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AN ISLANDS TRUST: LEADING EDGES IN LAND USE LAWS

K. DUN GIFFORD*

Introduction

A land use revolution is abroad in the land. It presents to citizens, legislators, and courts exquisitely difficult questions. One federal court summarized the developing conflict in these words:

> This court, like other federal and state courts throughout the country, finds itself caught up in the environmental revolution. Difficult and novel legal and factual questions are posed which require the resolution of conflicting economic, environmental, and human values. . . . [B]asic value judgments will be made by legislatures and voters which courts can review.[1]

Many of the conflicts rise out of the development of innovative approaches to the task of setting aside unique areas in their natural state. Often these conflicts are anything but quiet.

"Martha's Vineyard and the Island of Nantucket are . . . areas where explosive growth has led to clashes between those who wish . . . to protect the existing environment and those who favor development."[2] The fiercest clash, still underway, was precipitated by Senator Edward M. Kennedy (D.-Mass.) in September 1971, when he began his efforts to win acceptance of legislation to "preserve and conserve the unique characteristics of a unique area of the United States," the Nantucket Sound Islands.[3]

The legislative initiative he ultimately chose was also unique: the proposed Nantucket Sound Islands Trust.[4] It would establish three trust commissions, heavily weighted with Island residents

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*A.B., 1960, LL.B., 1966, Harvard University. The author has served as a principal spokesman for the Nantucket Sound Islands trust bill and has advised Senator Kennedy on aspects of its preparation and drafting.

1 Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972).

2 PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE 13-14 (1973) [hereinafter cited as THE TAKING ISSUE].

3 118 CONG. REC. 12,033 (1972).

4 S. 3485, 92d Cong., 2d Sess. (1972); S. 1929, 93d Cong., 1st Sess. (1973).

but each containing a federal and a state representative, to manage the tasks assigned to the trust. Advance approval of all major trust actions by these locally-controlled commissions would be a requirement of the bill as it has been amended by Senator Kennedy in response to suggestions from the people of the Islands. The land within the trust area would be divided into three classifications reflecting the existing natural values of the land areas, and controls would be imposed on their future development through an interlocking system of regulation and acquisition. In a major innovation, the bill requires adoption of compensable land use regulations as a mechanism to provide compensation, from the federal fisc, to landowners for any diminution in the value of their land caused by the controls.

Senator Kennedy has distinguished the Islands trust bill from other recent major federal land use legislation. The Islands trust bill is a preservation and conservation measure relying upon "the authority to purchase or otherwise obtain easements and other restrictions on those lands threatened by the type of development which would destroy the unique island values."[5] The Coastal Zone Management Act[6] and the National Land Use Policy and Planning Assistance Act of 1973[7] are designed to stimulate states "in developing and improving their capacity for land use planning and management."[8] These are planning measures, while the trust bill is a conservation measure. Massachusetts Governor Francis Sargent has drawn the same distinction between Senator Kennedy's bill and the regional planning legislation for Martha's Vineyard which he introduced in the Massachusetts Legislature on August 8, 1973: "[T]his is a planning and regulatory bill. It is not primarily a preservation bill. . . . If you are to guarantee the ultimate preservation of land, you must be willing to purchase it outright."[9]

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5 119 CONG. REC. S10,014 (daily ed. May 31, 1973).

6 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

7 S. 268, 93d Cong., 1st Sess. (1973). This bill was passed by the Senate and was pending in the House at the time of this writing. 119 CONG. REC. D726 (daily ed. June 21, 1973).

8 SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT, S. REP. No. 93-197, 93d Cong., 1st Sess. 38 (1973).

9 Statement by Governor F. W. Sargent, released by his office on Aug. 23, 1973.

Many commentators have recognized that the ongoing debate over the Islands trust bill has helped to shape it, particularly by strengthening and clarifying its innovative provisions.[10] In virtually every statement he has made on the subject, Senator Kennedy has specifically invited citizen participation in the process of refining the bill. From the beginning, he called for "massive citizen comment," expressing a hope that "citizen participation will be active and extensive."[11] Comments and suggestions from public officials and citizens numbered in the thousands,[12] and many were incorporated into successive versions of the bill. That the process is not yet complete was made manifest by Senator Kennedy's announcement on January 21, 1974, that he will circulate further suggested revisions for additional comment before introducing them in the Senate.[13] This process of active public participation in drafting a complex piece of federal legislation is unusual, but it should strengthen local acceptance and broaden public understanding of its provisions.

Senator Kennedy has stated that "the island trust concept will provide a model for legislation to preserve threatened areas elsewhere in the country."[14] This belief found similar expression in a *New York Times* editorial: "Only through the kind of cooperative federal, state and local action — public and private — envisioned in the broad outlines of the 'trust' idea can the nation's island heritage be saved from the man-made disaster that now threatens."[15] As if to confirm the prototypical aspect of the Islands trust, Senator Abraham Ribicoff (D.-Conn.) introduced a bill to establish the Housatonic River Valley Trust, which develops the trust idea in the context of a river valley.[16]

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10 *See, e.g.*, A. SIMON, NO ISLAND IS AN ISLAND (1973); TIME, July 31, 1972, at 64; *id.*, July 30, 1973, at 42; Finkler, *Can a Trust Turn the Tide on the Islands*, 38 PLANNING, Nov. 1972, at 269 (magazine of the American Society of Planning Officials); Turrentine, *Endangered Island*, 3 CATALYST FOR ENVIRONMENTAL QUALITY, Fall 1973, at 10; Lukas, *The Developers Are Coming*, SATURDAY REVIEW, Nov. 1972, at 58.

11 117 CONG. REC. 33,904 (1971).

12 118 CONG. REC. S11,951 (daily ed. July 27, 1972).

13 Vineyard Gazette, Jan. 25, 1974, at 1, col. 3.

14 119 CONG. REC. S10,017 (daily ed. May 31, 1973).

15 N.Y. Times, July 26, 1972, at 36, col. 2.

16 S. 3633, 92d Cong., 2d Sess. (1972). The island trust concept has also found favor in Canada. A report to the legislature of British Columbia recommended

Senator Henry Jackson (D.-Wash.) has introduced the National Islands Conservation and Recreation Act,[17] which he describes as "a proposal of much wider scope than the Trust Act."[18] Indeed it is; if enacted, it would require another 2-year study of all the nation's islands by the Secretary of the Interior and subsequent recommendations for which "largely undeveloped" islands[19] should be purchased outright by the federal government[20] and which islands should be purchased by the states, with federal financial assistance, by means of various less-than-fee techniques.[21] But Senator Jackson's bill does not directly address the problem of conservation and preservation in areas that are already partially developed. It is into this thornbush that the Islands trust bill plunges, recognizing the urgent need for new techniques described in a recent major analysis of national parkland policies.[22] In areas on the metropolitan fringe where development pressures are already evident, new techniques to protect resources are necessary if governmental costs are to be held down and local economies kept intact. The trust bill's innovations represent a leading edge in laws to deal with this serious national problem. While changes in the trust bill brought about through citizen participation have been major, its central concepts now appear set, hopefully to be replicated elsewhere.

The consideration of the trust bill begins with a brief description of the Nantucket Sound Islands. Next comes a discussion of the conceptual antecedents and the history of the proposed legislation. This is presented in some detail in the belief that such a case study in the development of land use concepts and of citizen participation in the legislative process, albeit not yet completed,

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establishment of a trust covering the Gulf Islands in the Strait of Georgia. VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA, Sept. 24, 1973, at 2-4.

17 S. 2622, 93d Cong., 1st Sess. (1973); S. 2621, 93d Cong., 1st Sess. (1973). For the texts of the bills see 119 CONG. REC. S19,607-10 (daily ed. Oct. 30, 1973).

18 119 CONG. REC. S19,609 (daily ed. Oct. 30, 1973).

19 S. 2622, 93d Cong., 1st Sess. § 4(d)(2) (1973).

20 *Id.* § 4(b). These islands would be "added to or created as units of the national park, wildlife refuge, and forest system." *Id.*

21 *Id.* § 5(b). These islands would become part of new "State Islands Conservation and Recreation Programs." *Id.* § 5.

22 THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 44 (1972).

can be of value to academics and legislators. The article concludes by discussing some of the more novel legal and practical issues raised by the trust bill.

I. The Nantucket Sound Islands

A. *Physical Description*

The Nantucket Sound Islands form a gentle arc off the south and east coastline of Cape Cod in southeastern Massachusetts. The numerous islands can be divided into three groups: the Nantucket group, comprising 30,790 acres with one island (Nantucket) accounting for all but 400 acres; the Martha's Vineyard group, comprising 67,200 acres with one island (Martha's Vineyard) accounting for all but 4,200 acres; and the Elizabeth Islands group, comprising 8,270 acres with one island (Naushon) accounting for 4,700 acres. In the aggregate, the Nantucket Sound Islands cover 106,260 acres, or 166 square miles.[23]

The Islands were formed 50,000 years ago during the Pleistocene Epoch, when the Laurentide Glacier pushed southward from Labrador and reached to the southern coastline of New England.[24] The Islands are what remains from the terminal moraines which marked the southernmost advance of this glacial ice. The northern halves of Martha's Vineyard and Nantucket, and all of the Elizabeths, are gently rolling and hilly, indicating the moraine. The southern halves are flat, sandy outwash plains. One noted geologist said in an 1890 study: "In the hills of . . . Nantucket [and] Martha's Vineyard . . . we have one of the most remarkable true terminal moraines anywhere to be found in the world."[25] Round, deep kettlebottom ponds mark the moraine; long, narrow runoff ponds mark the outwash plain.

U.S. Census Bureau data show the 1970 resident population of Nantucket to be 3,774 and that of the remainder of the Nan-

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23 Bureau of Outdoor Recreation, U.S. Dep't of the Interior, Islands of America 75 (1970) [hereinafter cited as Islands of America].

24 B. Chamberlain, These Fragile Outposts: A Geological Look at Cape Cod, Martha's Vineyard, and Nantucket 29-46 (1964).

25 *Id.* at 71 (quoting G. Frederick Wright). *See also* J. Teal & M. Teal, Life and Death of the Salt Marsh (1969); D. Sterling, The Outer Lands (1967).

tucket Sound Islands to be 6,117.[26] During the summer months these resident figures are swollen by summer visitors. The population of Nantucket swells to a summer seasonal daily average of 16,000, with peak weekends over 20,000. Martha's Vineyard swells to 40,000, with peak weekend population rising to over 50,000.[27]

Access to Martha's Vineyard and Nantucket is by boat and aircraft. The Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, a public authority created by Massachusetts statute,[28] is the only year-round water carrier; a commuter airline, Air New England, provides year-round air service. Since 1960 the number of seasonal passengers arriving by water has more than tripled.[29]

The Islands have until recently escaped the development pressures which have been so strong elsewhere along the Atlantic coastline. In a 1970 survey Martha's Vineyard was stated to be 15 percent developed and Nantucket 3 percent developed, while development on the Elizabeth Islands was negligible.[30] But as Massachusetts Governer Sargent has noted in regard to Martha's Vineyard: "There is not one inch of available land on the island that is not being eyed by developers today."[31] The continuing rush to the water by increasingly affluent Americans is now leaving its mark on these islands, as it has all along the Atlantic seaboard. "In 1971 there were 197 housing starts in Dukes County [predominantly Martha's Vineyard]. . . . In the first half of 1972 there were 144 starts, a figure 95 percent higher than that for the first half of 1971."[32] Housing starts on Martha's Vineyard continue to rise steeply; one single subdivision plan filed on the Vineyard in November 1973 would in and of itself add more new houses (867 houses on 507 acres) than are now located in two of

26 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, MASSACHUSETTS 23-17 (1973).

27 THE URBAN DESIGN GROUP, MASTER PLAN FOR NANTUCKET ISLAND (1970) [hereinafter cited as URBAN DESIGN GROUP STUDY]; DUKES COUNTY PLANNING & ECONOMIC DEV. COMM'N, SUMMARY OF THE COMPREHENSIVE PLAN FOR DUKES COUNTY (1971) (prepared by Metcalf & Eddy, Inc.) [hereinafter cited as METCALF & EDDY STUDY].

28 MASS. GEN. LAWS ANN. ch. 159 App., §§ 2-1 to -20 (1970).

29 METCALF & EDDY STUDY, *supra* note 27, at 26.

30 ISLANDS OF AMERICA, *supra* note 23, at 75.

31 Vineyard Gazette, Jan. 12, 1973, at 6, col. 3.

32 Finkler, *supra* note 10, at 269.

that island's towns.[33] Subdivision plans known to the Nantucket Planning Board would add nearly 1,500 new homes to that island's stock of less than 3,000 homes. Moreover, the quantity and quality of the fresh water supply is of increasing concern to local officials on both major islands.[34]

B. *Political and Economic Description*

The Nantucket Islands group (Nantucket, Muskeget, and Tuckernuck) makes up Nantucket County, the boundaries of which are coterminous with the town of Nantucket. The Martha's Vineyard Islands group and the Elizabeth Islands group together make up Dukes County, which encompasses seven separate towns. The Elizabeth Islands group (Naushon, Nashawena, Pasque, Cuttyhunk, and many smaller islands) makes up the town of Gosnold. The Martha's Vineyard Islands group is divided among the towns of Tisbury, Oak Bluffs, Edgartown, West Tisbury, Chilmark, and Gay Head, the first three of which contain 84 percent of the registered voters of Martha's Vineyard. All of the towns in Dukes and Nantucket counties are governed by the town meeting form of government.

The voters of the Nantucket Sound Islands are overwhelmingly Republican in both national and Massachusetts elections. They have supported the Republican candidates for President, Governor, U.S. Senator, and U.S. Representative in every election but one since World War II.[35]

A current survey of the economy of Martha's Vineyard is illustrative in highlighting its seasonal nature. According to the survey, the resort industry accounts for 51 percent of the island's economic base, which totaled $33 million in 1973. Construction accounts for another 41 percent, divided between second-home construction at 26 percent and construction services and supplies at 15 percent. The remaining 8 percent is spread among agriculture, fishing, and general services. Median family income in Dukes County is

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33 Vineyard Gazette, Nov. 2, 1973, at 1, col. 3.

34 118 CONG. REC. S11,950-51 (daily ed. July 27, 1972); 119 CONG. REC. S10,013 (daily ed. May 31, 1973) (remarks of Senator Kennedy).

35 *See* the biennial editions of SECRETARY OF THE COMMONWEALTH, ELECTION STATISTICS, COMMONWEALTH OF MASSACHUSETTS for the years 1946 through 1972. The 1964 presidential election was the sole exception.

the lowest of any county in Massachusetts. The survey concludes that

> The state of the bulk of Dukes County's economy is dependent on . . . the attractiveness of Dukes County as a resort community. . . . It appears prudent to work toward economic growth and expansion in directions other than the resort orientation. . . . Any economic expansion in Dukes County must be undertaken with considerable care so as not to damage the natural resources on which the life style and economy are dependent.[36]

Economic statistics for Nantucket are very similar to those for Martha's Vineyard.

C. *Studies and Surveys*

The Nantucket Sound Islands have been the subject of repeated studies and surveys down through the years, mainly as an element of broad-scale and comprehensive studies of U.S. coastal areas.[37] The most recent and important study, *Islands of America*, was completed in 1970 by the Bureau of Outdoor Recreation of the U.S. Department of the Interior.[38] Surveying over 26,000 U.S. islands, it assembled extensive resource and ownership data on each. It also recommended establishment of a new National System of Island Trusts, to join the other discrete systems which make up the arsenal of federal resource protection measures — National Seashores, National Parks, National Lakeshores, and the like. Specifically cited as "possibilities for Trust status" were the Nantucket Sound Islands.[39] Further study to determine their suit-

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36 DUKES COUNTY PLANNING & ECONOMIC DEV. COMM'N, SURVEY OF THE ECONOMY OF MARTHA'S VINEYARD (1973), quoted in Vineyard Gazette, Dec. 28, 1973, at 1, col. 1.

37 *E.g.*, U.S. CORPS OF ENGINEERS, DEP'T OF THE ARMY, NATIONAL SHORELINE STUDY (1971); FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL ESTUARY STUDY (1970); U.S. COMMISSION ON MARINE SCIENCE, ENGINEERING & RESOURCES, OUR NATION AND THE SEA (1969); U.S. COMMISSION ON MARINE SCIENCE, ENGINEERING & RESOURCES, MARINE RESOURCES AND LEGAL-POLITICAL ARRANGEMENTS FOR THEIR DEVELOPMENT (1969); PRESIDENT'S COUNCIL ON RECREATION & NATURAL BEAUTY, FROM SEA TO SHINING SEA (1968); OUTDOOR RECREATION RESOURCES REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA (1962); NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, OUR VANISHING SHORELINE (1955).

38 ISLANDS OF AMERICA, *supra* note 27.

39 *Id.* at 45.

ability "for National Seashore, Trust or other protective status" was recommended.[40]

All of the studies document the unique and fragile nature of the Nantucket Sound Islands and argue that without prompt, aggressive, and successful protective actions these islands will fall victim to second-home development pressures and irrevocably lose those qualities which make them worthy of consideration for federal protective status in the first place.[41] These pressures were documented in specific detail in two exhaustive § 701 studies,[42] one of Nantucket and one of Dukes County.

The first, conducted by the Urban Design Group, of Newport, Rhode Island, for the Planning Board of the town of Nantucket, was completed in July 1970. It states:

> [T]he availability of Nantucket's present historic and scenic assets is a direct consequence *of lack of demand* and therefore low levels of consumption of these resources over the past century. However, a "peaking" of demand has been evidenced during the past decade and . . . [it] can be expected to [continue] . . . in the next decade.[43]

The study recommended the adoption of zoning as a first protective step, and the Nantucket town meeting did so in March 1972.

The study for the Dukes County Planning and Economic Development Commission, conducted by Metcalf & Eddy of Boston and released serially during the years 1969 to 1971, was even more

40 *Id.* at 9.

41 U.S. CORPS OF ENGINEERS, DEP'T OF THE ARMY, STUDY AND REPORT ON CLOSING BREACH IN BARRIER BEACH, MADAKET HARBOR (1973); U.S. CORPS OF ENGINEERS, DEP'T OF THE ARMY, BEACH EROSION CONTROL STUDY ON GAY HEAD CLIFFS (1973); VINEYARD OPEN LAND FOUNDATION, LOOKING AT THE VINEYARD, A VISUAL STUDY FOR A CHANGING ISLAND (1973); NANTUCKET SOUND ISLANDS EVALUATION TASK FORCE, NATIONAL PARK SERVICE, AN ECOLOGICAL EVALUATION OF THE ISLANDS OF NANTUCKET SOUND (1972); VINEYARD CONSERVATION SOCIETY, IMPORTANT WILDLIFE HABITATS ON MARTHA'S VINEYARD (1972); DUKES COUNTY PLANNING & ECONOMIC DEV. COMM'N, ALTERNATIVE ARRANGEMENTS FOR THE REGIONALIZATION OF SELECTED MUNICIPAL SERVICES IN MARTHA'S VINEYARD (1972); COOPERATIVE EXTENSION SERVICE, UNIVERSITY OF MASSACHUSETTS, PUBLICATION NO. 4., SELECTED RESOURCES OF THE ISLAND OF NANTUCKET (1966); MASSACHUSETTS WATER RESOURCES COMM'N, GEOPHYSICAL INVESTIGATIONS, NANTUCKET ISLAND, MASSACHUSETTS (1966).

42 The studies were funded through the federal comprehensive planning grant program, Housing Act of 1954 § 701, 40 U.S.C. § 461 (1970).

43 URBAN DESIGN GROUP STUDY, *supra* note 27, at A-11.

blunt: "[B]y 1990 the County, particularly the Vineyard, could have destroyed its rural environment at economic disadvantage to itself and the developers will move on to the next unspoiled area."[44] The study recommended a broad range of steps to prevent this destruction, including an addition of 22,100 acres of open space to the existing 7,200 acres, establishment of a new community for 5,000 to 7,500 persons with a "containment green belt" of 2,100 acres, and classifiication of the Islands into four categories (Town and Village, Suburban, Exurban, and Rural) with residential density limitations set for each category.[45] None of these recomendations has yet been implemented.

II. Legislative Background

A. *S. 2605 (1971): The Study That Never Was*

The Metcalf & Eddy study of Dukes County stated in 1971 that if the state government did not swiftly create a special new agency to protect Martha's Vineyard or if the federal government did not act to place Martha's Vineyard under island trust status, then by 1975 Martha's Vineyard "undoubtedly will have contracted environmental terminal cancer."[46] As a direct result of this and other reports, many Island people, resident and seasonal alike, appealed directly and urgently to Senator Edward M. Kennedy for action.[47]

Four years earlier Senator Kennedy had set staff members, one of whom was the author, to work researching alternative methods for protecting the Nantucket Sound Islands. The research was deferred when it became apparent that the Department of the Interior's major islands survey, then underway, would preempt any attempt to legislate protective measures while it was in progress. By summer 1971 it had become equally apparent that the Department of the Interior would not act on its own report published a year earlier, and the Senator reactivated his research work. But the need for thorough study had grown increasingly

44 Metcalf & Eddy Study, *supra* note 27, at 55.
45 *Id.* at 55-59.
46 *Id.* at 55.
47 117 Cong. Rec. 33,904 (1971).

urgent, and September 29, 1971, Senator Kennedy introduced S. 2605, "[a] bill to authorize the Secretary of the Interior to conduct a study with respect to certain islands in the State of Massachusetts . . . ." The Secretary was to report to Congress in six months on "whether any or all (or any part thereof) of the [Nantucket Sound Islands] should be made a part of the Cape Cod National Seashore . . . . "[48] Senator Kennedy made it plain that he sought consideration of more than simply the Cape Cod Seashore approach.[49] He added his hope that "citizen participation will be active and extensive in making known the feelings and desires of the island people."[50]

On this latter point he need not have worried. The Islands' weekly newspapers gave Senator Kennedy's legislative action front-page coverage[51] and followed up by printing both editorial comments and scores of letters to the editors on the subject. The *New York Times* editorially commended Senator Kennedy for his initiative.[52]

Debates, discussions, and meetings were held throughout the fall of 1971, reaching a crescendo in a public meeting conducted by Republican Representative Hastings Keith in a hangar at the Martha's Vineyard airport on January 17, 1972. At that meeting the hostility of most Island public officials toward any intrusion into Island affairs by the federal or state government was very evident. As one of the Island newspapers concluded, "opposition was widespread," and Island officials "were firm in their contention that they do not wish to relinquish any of [their] local controls."[53]

Shortly after introducing S. 2605, Senator Kennedy had also asked the student-run Legislative Research Bureau and Professor Charles Haar of Harvard Law School to analyze the objectives and legal aspects of various Islands protection measures. On

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48 S. 2605, 92d Cong., 1st Sess. (1971), in 117 CONG. REC. 33,903 (1971). The bill authorized $1.5 million for the study. *Id.* § 2.

49 117 CONG. REC. 33,903 (1971) (remarks of Senator Kennedy).

50 117 CONG. REC. 33,904 (1971).

51 Vineyard Gazette, Oct. 1, 1971, at 1; Nantucket Inquirer & Mirror, Oct. 14, 1971, at 1.

52 N.Y. Times, Oct. 11, 1971, at 34, col. 1.

53 Nantucket Inquirer & Mirror, Oct. 20, 1971, at 1.

November 12, 1971, the resulting memorandum was printed in the *Congressional Record* at the Senator's request. The memorandum stated five objectives essential to any measure intended to protect the unique characteristics of the Nantucket Sound Islands:

1. take into account and not disturb areas already under some form of protection;
2. allow for expansion of residential and commercial areas in developed "centers of gravity," but only in accordance with a comprehensive plan;
3. preserve in a forever wild or natural state certain unique areas such as dunes and wetlands;
4. restrict but not prevent development in those areas either not needed for residential and commercial expansion or forever wild, while continuing present ownership patterns and maintaining the integrity of local control;
5. ensure public access to beaches and inland recreation areas.

After discussing alternative methods of growth control, the memorandum recommended federal legislation constructed around the island trust concept.[54]

As the prospects for swift passage of S. 2605 began to dwindle, one last hope for a federal study came on January 22, 1972, when National Park Service Director George Hartzog, Jr., suggested that the Park Service had the resources to conduct a study such as that called for in S. 2605 without specific enabling legislation. Senators Kennedy and Brooke, Representative Keith, and Massachusetts Governor Sargent sent a joint letter to Mr. Hartzog formally requesting Park Service assistance in developing data and recommendations on the alternate methods of assisting Islanders in preserving the character of the Nantucket Sound Islands. Two months later, Park Service Associate Director Stanley Hulett responded by letter that the Park Service "plans to begin a study of the Atlantic Coastal natural region . . . [including] Nantucket and Martha's Vineyard, and their satellite islands." In the interim, Mr. Hulett concluded, "local initiatives to include land use plan-

54 117 CONG. REC. 40,886 (1971).

ning and zoning might be implemented."[55] By making no commitment to study the Nantucket Sound Islands in any specificity, Mr. Hulett had effectively rebuffed the four Massachusetts officials. Thus ended the ill-fated attempt to obtain one final, narrowly focused, legitimating federal study.

B. *S. 3485 (1972)*: *A Concrete Proposal*

Senator Kennedy introduced the Nantucket Sound Islands Trust bill, S. 3485, on April 11, 1972.[56] Despite the lapse of more than six months since the introduction of S. 2605 and despite all the discussion and publicity over Senator Kennedy's stated intentions to legislate protective measures for the Nantucket Sound Islands, the actual fact of S. 3485 stunned the Islands. The *Boston Globe* described the trust bill as "a legislative bomb . . . dropped on the islands."[57] The political leadership and the real estate interests, predictably, reacted most violently. Comments ranged from "inhumane, arrogant and high handed" to "turning [the Island] into an Indian Reservation."[58] Advertisements appeared in the newspapers attacking the bill and its sponsor.[59]

The stated purpose of S. 3485 was "to preserve and conserve" the unique values of the Nantucket Sound Islands "for the enjoyment of present and future generations."[60] The bill would have established a trust commission with 21 members, all but three of whom were to be Islanders. The bill divided the land into four categories. In the "forever wild" category, there was to be no further development, and present owners of existing improvements or members of their families were to be permitted a right of use and occupancy for up to 25 years.[61] In the "scenic preservation" category, there was to be no further development beyond the "present intensity of use," but neither a time limit on use and occupancy nor restrictions on the right of transfer were to

55 118 CONG. REC. 12,038 (1972) (letter from Stanley Hulett to Senator Kennedy, Mar. 23, 1972).

56 S. 3485, 92d Cong., 2d Sess. (1972), in 118 CONG. REC. 12,033 (1972).

57 Boston Globe, Apr. 23, 1972, at A-6, col. 1.

58 The Grapevine, Apr. 19, 1972, at 2, col. 1; Nantucket Inquirer & Mirror, Apr. 27, 1972, at 2, col. 3.

59 *E.g.*, Vineyard Gazette, May 19, 1972, at 7.

60 S. 3485, 92 Cong., 2d Sess. § 1 (1972).

61 *Id.* § 5(b)(1). The 25-year limitation has since been deleted.

be imposed.[62] In the "county planned"[63] and "town planned"[64] categories (since combined into one), land use controls would have remained the province of the counties and the towns, respectively, so long as the ordinances controlling the uses were approved by the commission and the Secretary of the Interior as consistent with the purposes of the bill.

The Secretary of the Interior was to be granted authority to purchase fee and less-than-fee interests to give effect to the classifications, but only after the publication of regulations establishing standards for such purchases.[65] The owner protection, exchange, donation, and similar provisions which are standard in federal conservation legislation were made a part of the bill,[66] and $25 million was authorized to carry out the acquisitions.[67]

Section 10 of the bill designated all "beach lands" as forever wild, defining beach lands as the "wet and dry sand area lying between the mean low water line and the visible line of upland vegetation."[68] Nearly all beach lands, so defined, fall under the provisions of the Massachusetts Wetlands Protection Act,[69] which severely restricts their development potential; they also fall within the Secretary's § 7(a) acquisition authority.

Two provisions of the bill were designed to stimulate private, voluntary actions to retard opening up new areas to subdivision development. The first suspended the Secretary's acquisition authority both over lands currently owned by nonprofit preservation and conservation organizations and also over lands which within 24 months of the bill's enactment "are, to his satisfaction . . . irrevocably committed to be sold, donated, demised or otherwise transferred to such" nonprofit organizations.[70] Under the second provision the commissions and the Secretary could develop regulations for the "use and development" of an individual parcel of land and then notify the owner of these regulations. If the

62 *Id.* § 5(b)(2).
63 *Id.* § 5(b)(3).
64 *Id.* § 5(b)(4).
65 *Id.* § 7(a).
66 *Id.* §§ 7, 8.
67 *Id.* § 17.
68 *Id.* § 10(b).
69 MASS. GEN. LAWS ANN. ch. 130, § 105 (Supp. 1972).
70 S. 3485, 92d Cong., 2d Sess. § 13(a)(ii) (1972).

owner agreed to abide by the regulations, the acquisition authority would be suspended for that parcel as long as the owner adhered to the regulations.[71] It was anticipated that the commissions and the Secretary would consult and negotiate with the owner in drawing up these regulations.

Private owners and nonprofit organizations would want to utilize these two provisions to retain private ownership. The government's incentive would be to preserve land with no expenditure of public funds. If no agreement could be reached, then the bill's other mechanisms would apply.

During May, June, and July of 1972, Senator Kennedy and his representatives held numerous meetings with public officials who wished to discuss the bill and with groups of citizens. But many public officials on Martha's Vineyard refused to meet with Senator Kennedy or even to answer his invitations to participate in refining the bill. One Board of Selectmen explained its refusal in a letter to Senator Kennedy: your invitation "is indeed a cunning maneuver . . . we also know a few tricks of the trapper — a mouse doesn't have but a nibble before he is dead."[72] But other Vineyard officials, along with a majority of Nantucket officials,[73] did meet with Senator Kennedy's representatives and agreed to suggest changes to clarify the bill and increase local control.

On Nantucket and Martha's Vineyard, ad hoc citizens groups were formed both in favor of and in opposition to the trust bill. The groups favoring the legislation, the Committee to Preserve Nantucket and the Vineyarders to Amend the Bill, prepared and personally delivered to Senator Kennedy extensive suggestions for amending the bill. Senator Kennedy also circulated to the Islanders his own sugestions for amendments. One significant barometer of public sentiment came on May 23, 1972, when the Tisbury town meeting by a vote of 422 to 35 refused to approve an article in the warrant, inserted by the town Selectmen, empowering them to oppose the trust bill.[74] On the same night the town meeting in West Tisbury voted 44 to 16 to author-

71 *Id.* § 7(e).

72 New Bedford Standard Times, May 10, 1972, at 29.

73 Nantucket Inquirer & Mirror, May 25, 1972, at 1.

74 New Bedford Standard Times, May 24, 1972, at 17; Vineyard Gazette, May 26, 1972, at 1.

ize its Selectmen "to pursue negotiations" with Senator Kennedy.[75]

From these meetings emerged a major amendment to S. 3485, Senate Amendment No. 1372, which Senator Kennedy introduced in July 1972.[76] The amendment responded to Islanders' desires for more local control and for a reduction in the opportunities for independent action by the Secretary of the Interior. Instead of one trust commission, there would now be two, one for Nantucket County and one for Dukes County. Throughout the bill were new requirements that the Secretary, the Governor of Massachusetts, and the commissions work cooperatively; the element of partnership was much more apparent than in the original version. The provisions for forever wild lands and beach lands were made less draconian. A third mechanism to foster private, voluntary land stewardship was added, which would suspend the bill's acquisition authority over lands made subject to various protective arrangements authorized by Massachusetts statutes. An undivided one-half interest in lands acquired by the Secretary was to be transferred to the appropriate commission and taxed as if held privately to prevent erosion of the local property tax base. Acquisition procedures were clarified by incorporation of the Relocation Assistance and Real Property Acquisition Policies Act of 1970.[77] Finally, it was to become declared national policy that no bridge or other vehicular connection ever be constructed to the Islands.

Senator Kennedy acknowledged the role which the extensive suggestions made by citizens and officials had played in formulating these revisions: "When I introduced the bill in April, I termed it a 'working document' . . . this amendment [is] based in large part upon the work" of the groups who responded to invitations to help reshape the bill.[78] By that point, in mid-summer of 1972, both public officials and private citizens on Nantucket had involved themselves in the participatory process. But on Martha's Vineyard the participatory burden was carried by private citizens

75 Vineyard Gazette, May 26, 1972, at 1.

76 118 CONG. REC. S11,950-65 (daily ed. July 27, 1972).

77 42 U.S.C. §§ 4601-55 (1970).

78 118 CONG. REC. S11,951 (daily ed. July 27, 1972).

alone, since most public officials continued refusing even to discuss the bill's provisions.

C. *S. 1929 (1973) and the Beginning of State Involvement*

In January 1973 Senator Kennedy journeyed to the Islands to meet with the residents in open public meetings and discuss with them further changes in the bill. More than 800 residents present at the meeting on Nantucket indicated by a show of hands their overwhelming support.[79] On Martha's Vineyard, public sentiment was divided,[80] reflecting the results of a referendum placed on the November 1972 ballot by the bill's opponents. The referendum indicated that Vineyard voters opposed "federal land use regulations" by 60 to 40 percent.[81] This referendum was given effect in a resolution adopted by the Massachusetts legislature and sent to the U.S. Congress recommending defeat of federal land use regulations for Martha's Vineyard.[82]

On March 21, 1973, Senator Kennedy circulated a further revision of the trust bill to Island officials and interested citizens, soliciting and receiving extensive comments. Two months later, after incorporating the comments into the bill, he introduced S. 1929.[83] Representatives Gerry Studds and Edward Boland simultaneously introduced H.R. 8318, an identical measure. This third version further enhanced the role of the commissions, now three

79 Nantucket Inquirer & Mirror, Jan. 18, 1973, at 1, col. 5; New Bedford Standard Times, Jan. 13, 1973, at 5.

80 Vineyard Gazette, Jan. 19, 1973, at 1-B, col. 6; New Bedford Standard Times, Jan. 13, 1973, at 5.

81 Vineyard Gazette, Nov. 10, 1972, at 1, col. 1. An earlier opinion poll on Martha's Vineyard had produced similar results. Dukes County Planning & Economic Dev. Comm'n, Results of Public Opinion Questionnaire Conducted in May, 1972, Aug. 2, 1972, while a poll of nonvoting taxpayers, mostly summer people, indicated strong support for the bill. Committee of 14 Vineyarders, Letter Poll, Fall 1972. Businessmen on Nantucket were similarly supportive, Nantucket Chamber of Commerce, survey conducted Aug. 2, 1973, in sharp contrast to those on the Vineyard. Finally, the editorial position of newspapers read on the Islands, with the sole exception of The Grapevine, one of the Vineyard's two local weeklies, has been favorable. Boston Globe, Oct. 9, 1972, at 44, col. 1; N.Y. Times, July 26, 1972, at 36, col. 2; Nantucket Inquirer & Mirror, Apr. 20, 1972, at 2, col. 2; Vineyard Gazette, May 26, 1972, at 1, col. 4; The Grapevine, Aug. 2, 1972, at 2, col. 1; *id.*, Aug. 9, 1973, at 2, col. 2.

82 JOURNAL OF THE MASSACHUSETTS HOUSE, Mar. 19, 1972; Vineyard Gazette, Mar. 23, 1972, at 1, col. 1.

83 119 CONG. REC. S10,013-22 (daily ed. May 31, 1973).

in number (one for each island group), vis-a-vis the Secretary and refined much of the drafting of key provisions, particularly as they applied to scenic preservation lands.

Throughout the winter and spring of 1973, the Dukes County Planning and Economic Development Commission sponsored a series of eight meetings, with M.I.T. Professor and Vineyard summer resident Kevin Lynch as moderator, which brought together 11 proponents and opponents of federal legislation in a structured fashion to seek out the common ground among them. The work product was a consensus paper, published on June 7, 1973, which set out nine principles which any protective legislation should embody.[84]

The Subcommittee on Parks and Recreation of the Senate Committee on Interior and Insular Affairs held a formal hearing on S. 1929 on July 16, 1973, with a morning session on Nantucket and an afternoon session on Martha's Vineyard. The testimony received in Nantucket was largely supportive of the bill; that on Martha's Vineyard was mixed. The President of the Martha's Vineyard Chamber of Commerce (a realtor, hotel operator, and leader of the Vineyard's opposition to the trust bill) charged that Senator Kennedy's bill "smack[s] of Mussolini's method of seizing power," but this view was balanced by an Island historian's "passionate plea for the bill's enactment as 'the only measure that can meet the challenge.' "[85] Senator Brooke, through a representative, announced his opposition to the measure.[86]

Meanwhile, efforts to develop state legislation were underway. In November 1972 Martha's Vineyard officials had invited Governor Sargent to visit the Vineyard to discuss Island problems, the most pressing of which was "too much growth." The Commissioners of the State Department of Natural Resources had earlier stated that Governor Sargent would create a team of state officials to draw up state legislation "to do what the Kennedy bill does," and this view was actively put forward on the Vineyard by the trust bill's opponents. The Governor's assistant on environ-

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84 Dukes County Planning & Economic Dev. Comm'n, A Report to the People of Martha's Vineyard on the Development of the Island, June 7, 1973.

85 Boston Globe, July 17, 1973, at 3, col. 6.

86 Statement by Senator Brooke, issued by his office on July 16, 1973.

mental matters, however, denied any "intention on the Governor's part to make a land use proposal to counter the Kennedy bill."[87]

In order to resolve this political dilemma, Governor Sargent went to Martha's Vineyard in January and told local officials that while he was neither an opponent nor a proponent of the trust bill, he was aware of the serious development threat to the Islands.[88] He promised to work with local officials on the development of state legislation to expand local powers and authority to deal with the threat. This promise bore fruit on March 21, when a spokesman for the Governor presented to the Selectmen's Association a draft of a bill to establish a regional control mechanism for regulating development. The spokesman, Lewis Crampton, expressed his hope for a rapid reaction from the Selectmen since the proposal was viewed as a pilot plan for controlling development elsewhere in Massachusetts and the Governor was anxious to file it in the legislature.[89] After revisions and redrafting, Governor Sargent presented it as a late-filed bill on August 8, 1973.[90]

The state bill would establish a regional Martha's Vineyard Commission with 13 members, which would, after a year's moratorium on construction, designate certain "areas of critical planning concern" and declare certain projects to be "developments of regional impact." Towns, with commission approval, or the commission on its own motion in the event town action is inadequate, could adopt regulations for critical areas and developments of regional impact different from "the otherwise relevant local development ordinances and rules in their scope and magnitude."[91] Spokesmen for Governor Sargent have made it plain that this language is intended to "allow the towns to utilize their existing [zoning] powers, but to stretch them so that six-acre, eight-acre, ten-acre zoning is allowable." It has even been stated

87 Vineyard Gazette, Oct. 27, 1972, at 1, col. 4 (remarks of Henry Lee, the governor's assistant for environmental matters).

88 *Id.*, Jan. 12, 1973, at 6, col. 2.

89 *Id.*, Mar. 23, 1973, at 1, col. 1.

90 House No. 7280, Massachusetts General Court (Aug. 8, 1973).

91 House No. 7479, § 3, Massachusetts General Court (Sept. 13, 1973). The Committee on Natural Resources and Agriculture amended No. 7280 and renumbered it 7479, which was reported favorably on Sept. 13, 1973.

that complete prohibition of development in some areas is conceivable,[92] although the legality of achieving this result without compensation is highly questionable.[93] The state bill, in short, seeks to control growth only through expanded regulatory powers and only on Martha's Vineyard. In these respects it falls far short of the trust bill in its potential for preserving the Nantucket Sound Islands.

The Committee on Natural Resources and Agriculture of the state legislature held public hearings on the state bill in Boston and on Martha's Vineyard, but on October 31 the bill was killed for the session when agreement on a number of key provisions could not be reached.[94] Among the unresolved issues were the extent to which the zoning enabling act could be stretched[95] and the mechanism for seeking town approval before the bill could become effective in that town. The attempt of some Vineyard officials to derail Senator Kennedy's efforts had failed.

D. *The Next Steps*

On September 1, 1973, the *Boston Globe* carried an article by Edward J. Logue, a Vineyard summer resident and President of the New York State Urban Development Corporation. He took just about everyone to task for permitting the situation on Martha's Vineyard to become polarized and addressed a suggestion to Senators Kennedy and Brooke and Governor Sargent: "The essential requirement is simply that they get together — in a kind of summit meeting — and come to a common agreement on what they are willing, together, to support in the way of State and Federal legislation."[96]

All three individuals responded to this plea swiftly by exchanges of letters, and on October 4, members of their staff and others met to outline areas of agreement and disagreement among all

92 Vineyard Gazette, Aug. 28, 1973, at 4, col. 5 (quoting Lewis Crampton, Commissioner of the Department of Community Affairs).

93 *See* note 168 *infra.*

94 Boston Globe, Nov. 1, 1973, at 5, col. 1; Vineyard Gazette, Nov. 2, 1973, at 1, col. 7.

95 The real estate lobby was particularly concerned that the highly restrictive regulations envisioned by the bill's authors would be copied by other Massachusetts communities.

96 Boston Globe, Sept. 1, 1973, at 11, col. 2.

the parties. During the next two months these discussions and meetings continued, culminating in general agreement on principles for a combined federal-state legislative program to assist the Island governments in preservation and conservation of the Islands.[97] Neither the federal nor the state bill will be presented to the respective legislature, however, until after substantial opportunity for Island people to react to them. Working drafts of both bills vest additional management and decisionmaking authority in the locally-controlled commissions, with retention of the central concepts of land categories and acquisition authority.[98]

E. *Progenitors of the Trust Bill*

The most direct ancestor of the trust bill is a draft islands trust bill appended to the Interior Department's *Islands of America* report.[99] That bill generated the concept of a commission whose membership would include federal, state, county, and local officials whose functions would include preparation of a comprehensive plan to safeguard island resources and values.[100] One central difference between the proposals lies in the Interior Department's restricting the use of the commission's regulatory or acquisition authority until it has been demonstrated that the local governments will not follow the comprehensive plan or that they lack the powers to do so under state and local law.[101] Senator Kennedy adopted a bolder approach, vesting full responsibility for carrying out the resource protection mandate directly in the commission.

Two of the three provisions to stimulate private stewardship

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97 Vineyard Gazette, Dec. 21, 1973, at 1.

98 The most recent statement of proposed revisions, released March 4, 1974, is significant for two reasons. It is the first occasion on which Senators Kennedy and Brooke have joined forces on this issue and it proposes a state role to complement, rather than substitute for, the federal role. For instance, the Martha's Vineyard Commission, for purposes of the federal bill, would be the same commission as that created by the state. Also, in a significant bow to local control, the Secretary would be prohibited from acquiring any land or interests therein without prior approval of the commission. Memorandum to Residents of Nantucket Sound Islands from Senators Brooke and Kennedy and Representative Studds, Mar. 7, 1974 (text printed in Nantucket Inquirer & Mirror, Mar. 7, 1974, and in Vineyard Gazette, Mar. 8, 1974).

99 ISLANDS OF AMERICA, *supra* note 23, at 90.

100 *Id.* at 90, §§ 4, 5.

101 *Id.* at 91, § 6.

of land areas find direct antecedents in existing federal legislation. The suspension of acquisition authority over lands for a specified time to permit their donation to nonprofit organizations is derived from the 1972 legislation establishing the Cumberland Island National Seashore in Georgia.[102] The provision which permits a landowner and a commission to agree upon appropriate regulations, thereby suspending the commission's acquisition authority, derives from 1970 legislation establishing the Sleeping Bear Dunes National Lakeshore in Michigan.[103] The third provision, added by the July 27, 1972, amendment, is sui generis and derives from suggestions received by Senator Kennedy. That provision suspends acquisition powers over lands protected by the Massachusetts Conservation and Historic Preservation Easement Act.[104]

The division of Island lands into categories controlling density of development has been attacked by critics of the trust bill as federal zoning and therefore, since the federal government possesses no power to zone on private lands, as unconstitutional. In the 1970 Sleeping Bear Dunes National Lakeshore Act,[105] Congress required that public and private land be divided into three quite distinct categories. In category I, public use and development areas, the Secretary of the Interior was authorized to acquire fee or less-than-fee title to all or any part of the land.[106] In category II, environmental conservation areas, the Secretary could acquire a fee title only in those parcels he so designated within 150 days of the bill's enactment. Thereafter, he could only acquire a less-than-fee title "to insure the continued conservation and preservation of the environmental quality of the lakeshore" if the owners of the parcels would not agree to abide by use and development regulations established by the Secretary for their parcels.[107] In category III, private use and development areas, the Secretary was restricted in a manner similar to category II, except that his

102 16 U.S.C. § 459i-3(d)(1) (Supp. II, 1972).

103 *Id.* § 460x-2(f) (1970).

104 MASS. GEN. LAWS ANN. ch. 9, § 26 (Supp. 1972).

105 16 U.S.C. § 460x-1 to -14 (1970).

106 *Id.* § 460x-2(b).

107 *Id.* § 460x-2(f).

acquisition of less-than-fee interests was limited to the purpose of "protect[ing] lands designated for acquisition."[108]

Similarly, legislative precedent for federal regulation of private land exists. This is illustrated in a natural evolution which commenced with the 1961 Cape Cod National Seashore Act.[109] There the Secretary's power to acquire property by eminent domain was "suspended with respect to all improved property" within the Seashore so long as the property was subject to "a duly adopted, valid zoning bylaw approved by the Secretary."[110] The legislation directed the Secretary to "issue regulations specifying standards for approval by him of zoning bylaws."[111] The 1965 Whiskeytown-Shasta-Trinity (California) National Recreation Area Act elaborated the Cape Cod formula by specifying that the Secretary's regulations should

> have the object of (1) prohibiting new commercial or industrial uses . . . ; (2) promoting the protection and development of properties . . . by means of use, acreage, frontage, setback, density, height, or other requirements; and (3) providing that the . . . Secretary shall receive notice of any variance granted under, or any exception made to, the application of the zoning ordinance.[112]

The next step in the evolution appeared in the 1970 King Range (California) Conservation Area Act, which required the Secretary to prepare a "comprehensive, balanced and coordinated plan of land use, development and management of the Area" pursuant to a detailed set of guidelines and "to issue such regulations and to do such other things as the Secretary deems necessary and desirable to carry out" the Act.[113] Nowhere in the Act is the word zoning mentioned, and private owners of improved property are exempt from the Secretary's eminent domain powers so long as he finds the uses of the property consistent with the Act's pur-

108 *Id.* § 460x-2(e).

109 *Id.* § 459b.

110 *Id.* § 459b-3(b).

111 *Id.* § 459b-4(a).

112 *Id.* § 460q-1(e).

113 *Id.* § 460y-1(b).

poses. A final step appeared in the 1972 Sawtooth (Idaho) National Recreation Area Act:

> [T]he Secretary shall make and publish regulations setting standards for the use, subdivision and development of privately owned property within the boundaries of the recreation area. Such regulations . . . shall have the object of assuring . . . the highest and best private use [and] . . . shall be as detailed and specific as is reasonably required.[114]

In the Cape Cod formula, the Secretary set standards for zoning ordinances, which the towns then adopted. A gradual evolution led to the Sawtooth formula, in which the Secretary himself drew up the regulations. As we shall see, the trust bill goes one step further by utilizing compensable land use regulations.

III. Legal and Practical Issues Raised by the Trust Bill

A. *The Basis of Federal Powers and Interests*

The threshold legal issue raised by the Islands trust bill is the extent and basis of federal powers in the land use field. A corollary issue, assuming the legitimacy of the federal powers, is whether the situation of the Nantucket Sound Islands rises to the level at which these powers should be deployed.

Nowhere in article I, § 8 of the U.S. Constitution, which enumerates the powers of the national government, is there any mention of a federal role in park lands; neither is there any mention of a federal power of eminent domain. Yet the federal government is indisputably in the land use business; it now owns fully one-third of the nation's land, acquires and disposes of land regularly, and often uses the power of eminent domain in its acquisition.[115] Despite the lack of explicit constitutional authority, there is a large body of Supreme Court case law upholding a federal power of eminent domain to establish parks. Most of the early cases considered somewhat special circumstances and did not reach the root constitutional issue. A statute permitting establishment of Rock Creek Park in the District of Columbia, for example,

114 *Id.* § 460aa-3(a) (Supp. II, 1972).

115 Public Land Law Review Comm'n, One Third of the Nation's Land 19 (1970).

was upheld on the grounds of federal municipal jurisdiction over the District.[116] Another federal statute, establishing the park at the Gettysburg battlefield, was upheld on the basis of the war powers and the power "granted Congress by the Constitution for the purpose of protecting and preserving the whole country."[117]

In 1916 Congress enacted the enabling legislation of the National Park Service and declared that the purpose of the Park Service is to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . . "[118] This legislation collected all existing park laws into one locus for administrative purposes. Subsequent additions to the national park systems were mostly by gifts from private philanthropy or reclassifications of land already under federal ownership. Consequently, the constitutional authority of the federal government to maintain a park system was rarely raised until the 1930's, when other forms of park acquisition came into widespread use. By then many courts were surprised that the issue could still even be considered an open one. One court, in upholding federal condemnation of land for a park said: "[T]he right of the Government to maintain a system of national parks has never been challenged . . . . "[119] In a case involving Yosemite National Park, a lower court declared that the federal government "could tax to raise money to buy parks under the 'general welfare' clause. Parks and recreation facilities clearly provide for the general welfare."[120] The Supreme Court reversed the decision on other grounds, but said in passing that "[n]o question is raised as to the authority to acquire land or provide for national parks."[121]

Just how far the general welfare clause reached was clearly decided in 1936. The Supreme Court until then had not felt it necessary to decide between the view of Alexander Hamilton that the general welfare clause was a primary and separate power

116 Shoemaker v. United States, 147 U.S. 282 (1893).

117 United States v. Gettysburg Elec. Ry., 160 U.S. 668, 682 (1896).

118 16 U.S.C. § 1 (1970).

119 United States v. Dieckmann, 101 F.2d 421, 424 (7th Cir. 1939). *See also* Via v. State Comm'n on Conservation & Dev., 9 F. Supp. 556 (W.D. Va. 1935), *aff'd per curiam*, 296 U.S. 549 (1935).

120 Yosemite Park & Curry Co. v. Collins, 20 F. Supp. 1009, 1013 (N.D. Cal. 1937), *rev'd on other grounds*, 304 U.S. 518 (1938).

121 304 U.S. 518, 530 (1938).

and that of James Madison that it was a secondary power ancillary to the enumerated powers. But in *United States* v. *Butler*,[122] the Court unanimously accepted the Hamiltonian view and declared that when the Constitution said "[t]he Congress shall have the Power to lay and collect Taxes . . . to . . . provide for the . . . general Welfare,"[123] it meant that this power "is not limited by the direct grants of legislative power found in the Constitution."[124] It was thus proper for Congress to raise taxes (an enumerated power) and to appropriate them, under the general welfare clause, for a nonenumerated national purpose. The Social Security cases enunciated an evolutionary concept of the general welfare: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times."[125]

That the employment of eminent domain for park acquisition is valid under the public use doctrine was earlier established in the leading case of *Rindge Co. v. County of Los Angeles*.[126] There the Supreme Court upheld a county eminent domain taking for a scenic coastal highway and in so doing broadened the doctrine of public use: "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. . . . [A]ir, exercise and recreation are important to the general health and welfare."[127] The Court cited the Rock Creek Park case (*Shoemaker*) as authority for the proposition that parks are legitimate public purposes.[128] Since then both *Shoemaker* and *Rindge* have been repeatedly cited in cases challenging the use of eminent domain for park purposes. In upholding federal condemnation of lands for the Cape Hatteras National Seashore, one lower federal court, citing both cases, typically concluded that "it is nevertheless well settled that the condemnation of prop-

122 297 U.S. 1 (1936).
123 U.S. CONST. art. I, § 8.
124 297 U.S. at 66.
125 Helvering v. Davis, 301 U.S. 619, 641 (1937).
126 Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).
127 *Id.* at 707-08.
128 *Id.* at 708.

erty for park purposes is a taking for a public use and is constitutional."[129]

The Supreme Court has thus woven a tight fabric which now clothes federal park activities. It seems not to have seriously troubled a single court over the years that the Constitution is silent on federal park activities, as it is on eminent domain. It is now a solid part of our legal heritage that the federal government has ample powers to acquire and maintain parks, independent of the states; that this power has as its necessary corollary the power of eminent domain; and that the font of the power is the general welfare clause.[130]

Moreover, the scope of judicial review to be afforded a legislative determination of public use or purpose has been severely restricted since *United States ex rel. TVA v. Welch* was decided in 1946.[131] Should the trust bill become law, Congress in passing it will undoubtedly have relied upon the studies and surveys, cited elsewhere in this article,[132] which acknowledge the uniqueness of the Islands, the impact of the subdivision development pressures, the inadequacy of existing state and local powers to protect these values, and the consequent need for a federal role in protection efforts. Indeed, a number of the federal government's own studies have specifically recommended a federal role on the Islands.[133] Surely these studies provide grounds for congressional action more than adequate to withstand judicial review.

A final word on the adequacy of local and state laws is in order. It is clear that existing laws are not capable of protecting the Islands' unique qualities It is also clear that potential laws within the arsenal of weapons currently available to localities in Massachusetts — primarily zoning — are similarly inadequate. There is, however, no obvious and compelling reason, legal or practical, why the state could not legislatively provide for virtually everything the trust bill seeks to provide. But it has not done so, and

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129 United States v. Southerly Portion of Bodie Island, N.C., 114 F. Supp. 427, 428 (E.D.N.C. 1953), *rev'd on other grounds sub nom.* United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957).

130 *See* PUBLIC LAND LAW REVIEW COMM'N, *supra* note 115.

131 United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946).

132 *See* notes 22, 23, 27, 37, and 41 *supra.*

133 *See* notes 23 and 37 *supra.*

the views of Governor Sargent appear to be in accord with the notion of limited federal intervention.[134] Undoubtedly it is the high price tag for land acquisition which deters Massachusetts from singlehandedly atacking the problem;[135] very likely there are other considerations as well. But this should not matter. The fact that a state *could* protect lands within its borders is no argument against federal involvement where the state fails to do so. And to the extent that a federal park or preserve may arguably require unique qualities and use patterns which transcend in scope those required for a state park or preserve, the Nantucket Sound Islands can hardly be found lacking.

B. *Property Taxation*

Section 7(c)(1) of S. 1929 is a federal grant of authority to Massachusetts and its political subdivisions to tax "any real property or interest therein" in the trust area, held by the Secretary or the commissions, "as other real property is taxed." It has long been settled that property owned by the federal government is wholly immune from state or local taxation,[136] unless Congress specifically consents by statute to its taxation.[137] By granting to Massachusetts the right to tax properties held by the Secretary or the commissions, the bill confronts directly the local revenue loss which would occur if substantial land areas were owned outright by the Secretary and the commissions or if substantial decreases in land values occurred through purchases of development rights.[138]

It remains to be seen how the application of strict development

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134 Statement of Governor Sargent, released by his office on Aug. 23, 1973.

135 "If you are to guarantee the ultimate preservation of land, you must be willing to purchase it outright. Yet the reality today is that the state does not have that kind of money." Statement by Governor Sargent, Aug. 23, 1973.

136 *E.g.*, Clallam County v. United States, 263 U.S. 341 (1923).

137 *E.g.*, Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961) (especially dissent of Justice Whittaker); S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946); Des Moines Nat'l Bank v. Fairweather, 263 U.S. 103, 106 (1923); 84 C.J.S. *Taxation* § 198 (1954).

138 The report of the Public Land Law Review Commission, *supra* note 115, devoted an entire chapter to the history and equities of federal "in lieu" payments. Legislation was introduced this year to reform the entire payment system by placing federal lands in the same status as private lands. S. 2912, 93d Cong., 2d Sess. (1974). A recent example of specific waiver of tax immunity appears in the New Communities Act of 1968, 42 U.S.C. § 3910 (1970).

limitations will affect the permissible scope of property assessment under this provision. While relatively permanent land use regulations which depress land values should logically be taken into account in property assessment for tax purposes, the fact that the federal government is in effect the taxpayer may act as an incentive for local assessors to value land as high as possible. Checking this tendency is the requirement that federal land be taxed "to the same extent, according to its value, as other real property."[139] Local private taxpayers will surely not stand for assessments significantly in excess of restricted use value, and the standards established for these politically more vocal property owners will provide a benchmark against which to measure the fairness of assessments on similarly situated federal holdings. The net effect should be significant retardation of growth in the local property tax base as compared with current trends, but this will of course be offset by a corresponding reduction in future public service requirements (roads, sewers, water, schools, etc.) due to the slowing of development. Most importantly, the relative extent of public versus private ownership of lands will not affect the local tax take.

C. *Appropriations*

The trust bill authorizes an appropriation from the federal treasury of $25 million for the first three years of operation of the trust. Of this amount up to $20 million is earmarked for acquisition of land and interests in land and up to $5 million for development, both in April 1972 prices.[140] It is also contemplated that the Secretary of the Interior, in fulfilling his responsibility to administer and protect the trust, will make contributions to commission overhead, studies, and tax payments.[141]

Critics have questioned whether this $20 million for acquisition is sufficient.[142] The amount was calculated from the experience of other similar federal activities, from an awareness of land values on the Islands, and from a prediction of the impact of the pro-

139 S. 1929, 93d Cong., 1st Sess. § 7(c)(1) (1973).
140 *Id.* § 20.
141 *Id.* § 11(b).
142 *E.g.*, FINKLER, *supra* note 10, at 270.

visions to encourage voluntary private preservation actions. In addition, Senator Kennedy's limitation of the acquisition funds to the first three years is a tacit acknowledgment than additional funds will be needed. It is general practice in conservation legislation either to leave the authorization open-ended or to place no time limit on it. For example, the original authorization for the Cape Cod Seashore in 1961 was $16 million; this was subsequently raised to $33.5 million.[143] The original figure for the Point Reyes Seashore was $14 million in 1962; it is now $57.5 million.[144]

The principal reason for these price escalations is the long delay between enactment of a park activity and its execution. Ideally,

> [a]uthorization and acquisition . . . should be simultaneous by consistent Congressional use of a legislative taking. This . . . [is] strongly recommend[ed] as the best means of halting speculation and further development. Delays between authorization and acquisition lead to exorbitant land prices and, sometimes, to land uses inimical to the future park. This problem is most acute in and near metropolitan areas and can best be avoided by taking title to all land upon authorization. Payment, bearing interest, can then follow.[145]

An example of congressional use of this legislative taking technique involves Piscataway Park in Maryland, across the river from Mount Vernon. A House-passed bill[146] provides:

> Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title and interest in, and the right to immediate possession of, all real property [designated for acquisition]. The United States will pay just compensation to the owners of any property taken pursuant to this [Act] and the full faith and credit of the United States is hereby pledged to the payment[147]

of the compensation. The members of the House were aware of the drastic nature of the legislative taking procedure, but were

143 16 U.S.C. § 459b-8 (1970).
144 THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 42 (1972).
145 *Id.* at 41.
146 H.R. 4861 passed the House 334 to 4 on February 4, 1974. 120 CONG. REC. H435 (daily ed. Feb. 4, 1974).
147 H.R. 4861, 93d Cong., 2d Sess. § 2(c) (1974).

told that the park was authorized in 1961 and that "footdragging" had made it "more costly to the taxpayer than seemed to be necessary. By requiring the immediate transfer of title, the Congress will assure the prompt settlement of the issue."[148]

The trust bill would without doubt cost less if it employed the legislative taking technique. But until the commissions are formed after enactment of the bill, it will remain uncertain what lands will be designated for fee or less-than-fee acquisition and what the compensable land use regulations will require in the way of compensation. Consequently the authorization of appropriations which the trust bill now contains is the more logical approach.

D. *Resident Home Sites*

A novel provision appeared in the third version of the trust bill, S. 1929, to deal with what Senator Kennedy called the "rapidly rising land costs which are still fueled by speculative fever."[149] Not only have land prices on the Islands risen steeply in the face of development pressures, but it is reasonable to predict that the trust bill, by restricting the supply of buildable land, will make the remaining available building sites even more expensive. The trust bill's response to this anticipated problem for Island working people is a resident home site plan. Under its terms a commission can draw up a plan to provide residents of the Islands building lots for less than their fair market value. The commission can only do so if petitioned by a town meeting vote, and only with the advice of the Secretaries of Interior and of Housing and Urban Development. The plan would establish a "fair purchase value," at a lower figure than the fair market value, and the difference — the "writedown" analogous to that in the federal urban renewal program[150] — would be borne by the federal government out of appropriated funds. Should a resident home site be put up for sale by an owner who had availed himself of the plan, then the commission would have a right of first refusal for presumed recycling purposes.[151]

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148 120 CONG. REC. H434 (remarks of Representative Harold Johnson, D-Cal.)

149 119 CONG. REC. S10,016 (daily ed. May 31, 1973).

150 42 U.S.C. § 1450 (1970).

151 S. 1929, 93d Cong., 1st Sess. § 18(d) (1973). It is unclear whether the Secretary would be authorized to purchase the home site at a price calculated to recapture the original writedown.

The most obvious difficulty posed by this provision is that of eligibility. The trust bill offers no definition of "qualified residents," placing the responsibility for developing eligibility criteria upon the commissions and the Secretaries. Similarly, it offers no guidance on the amount of the writedown, even in percentage terms, leaving this to be worked out as part of the plan. It is entirely possible that the problems inherent in this provision are incapable of resolution and that it will never be utilized. But at least the federal government has offered the money and opened the door for Islanders themselves to begin working out the equities of a situation in which upward pressures on land prices is exacerbated by federal preservation measures.

E. *Access Limitations*

Section 1(g) of S. 1929 states that "because expanded access to the islands would seriously impair them and be in contravention to the purposes of this Act, it shall be national policy that no . . . direct vehicular access be constructed from the mainland to the islands."[152] Section 12(a) states that "the Commissions, together with the Governor, and the Secretary, shall make an immediate survey of public and private water and air access" to the Islands, and "make such recommendations . . . as they deem consistent with . . . this Act . . . [including] specific measures to limit the number of motor vehicles and passengers such carriers might otherwise transport" to the Islands.

The threshold question is one of policy: *should* there be limitations on access to an area where federal funds are to be spent? Certainly, if the purpose of preserving a unique resource for the benefit of all Americans is to be served, nonresidents of the Islands who so choose should be permitted to visit and enjoy that resource; any attempt to completely exclude outsiders would therefore be highly improper. But if preservation is to have any meaning for these threatened islands and if a significant investment of federal

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152 This provision responds directly to a 1972 bill, filed in the Massachusetts legislature, which would have authorized construction of a string of bridges and causeways connecting the Islands to the mainland. Senate No. 936, Massachusetts General Court (1972). Legislative precedent for § 1(g) appears in the Cumberland Island Seashore legislation: "nor shall any road or causeway connecting Cumberland Island to the mainland be constructed." 16 U.S.C. § 459i-5(b) (Supp. II, 1972).

money is to be prudently husbanded, some limitations on access are a virtual necessity.

The next question is whether access *can* be limited without violating any constitutional guarantees. The Department of the Interior has already instituted programs restricting both the number of visitors to, and the length of stay at, National Parks and National Seashores, and is considering extending them because of the irreparable damage heavy visitor use causes to the parklands.[153] Restrictions placed upon off-road vehicles in National Wilderness Areas have been upheld, even when imposed upon plaintiffs owning land within Wilderness Area boundaries.[154] The limitations have been seen neither as takings nor as sufficient grounds for judicial granting of easements by necessity.

The U.S. Supreme Court has imposed strict standards in cases where restrictions interfere with the right to travel.[155] But in cases where access to public services was sought, application of these standards has been limited to situations of "migration with the intent to settle and abide."[156] It seems reasonable to suppose that this limitation will also apply to any assertion of an unlimited right of access to geographic areas which have been purposely set aside for preservation.

Recent state court cases have voided municipal ordinances which establish differential beach use fees for residents and nonresidents,[157] but these appear to be distinguishable. They represent unilateral and self-serving attempts by local residents to treat outsiders on a different basis, and courts have frequently noted the lack of state legislative authorization for the challenged ordinances. However, any attempt to limit access to the Islands pursuant to recommendations of the study would presumably involve

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153 For an extended discussion, see THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE (1972).

154 *E.g.*, McMichael v. United States, 335 F.2d 283 (9th Cir. 1965); United States v. Perko, 133 F. Supp. 564 (D. Minn. 1955).

155 Shapiro v. Thompson, 394 U.S. 618 (1969); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989 (1969).

156 Cole v. Housing Authority, 435 F.2d 807, 811 (1st Cir. 1970).

157 *E.g.*, Borough of Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972); Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972); *Public Rights and the Nation's Shoreline*, 2 ENVIRONMENTAL L. REP. 10,184 (1972).

new legislation containing adequate authorization. More importantly, the trust bill itself would constitute a determination, by a more inclusive level of government than the locality, of a public purpose in preserving unique natural resources for the benefit of all Americans, not just local residents. In short, legislatively authorized restrictions which are reasonably related to the preservation of a unique resource and which do not totally exclude nonresidents should be immune to constitutional attack.

F. *Beaches*

That beaches — as fragile, scenic, and particularly limited resources — should be protected from private development has never been seriously challenged in the debates surrounding the trust bill. What has occasioned controversy is the rights, if any, which members of the public should have in beaches otherwise under private ownership. The history of the trust bill's treatment of beaches evinces a gradual clarification and curtailment of those potential rights.

The initial version, S. 3485, simply classified the wet and dry sand area between the low water line and the visible line of upland vegetation as forever wild.[158] The acquisition provisions of § 7(a) were thus brought to bear upon beaches, as were the provisions of § 5(b)(1) relating to the prohibition against further development of any kind. The bill was silent on the issue of beach *use*, but said that "[a]ccess to such lands shall be free and open, subject only to regulations issued by the Commission and approved by the Secretary."[159] In response to extensive modifications proposed by Island residents,[160] the July 27, 1972, amendment to the trust bill excluded beaches falling within town planned lands from the forever wild category, limited use of motor vehicles on beach lands to areas designated by the commission and the Secretary, and mandated the acquisition of enough beach lands to bring the total number of public bathing beaches up to a minimum of seven in Dukes County and four in Nantucket County. The amendment also provided for acquisition

158 S. 3485, 92d Cong., 2d Sess. § 10 (1972).
159 *Id.* § 5(b)(1).
160 118 CONG. REC. S11,958 (daily ed. July 27, 1972).

of a right of passage easement extending shoreward for 40 feet from the high water line.[161] S. 1929, in turn, eliminated the 40 foot easement and substituted in its stead "a nonvehicular right of passage . . . at the high water line of sufficient width for a person to pass and repass," in all beaches but those seaward of town planned lands. It also added a provision protecting the "rights of owners of residential improvements on beach lands as of April 11, 1972," by disallowing the right of passage where it would interfere with such rights.[162] Thus, from "free and open" access, the prospective public right to most beaches has been whittled down to a pedestrian right of passage.

Whether this right of passage constitutes a taking for which just compensation will be required is initially a matter of state law. While there is no general public right of passage, or easement of way, over private beaches in Massachusetts, passage for limited purposes is permitted. As stated in 1907[163] and followed since,[164] littoral owners hold the full fee title to lands from the high water mark down to the low water mark or 100 rods, whichever is closer, subject only to a public easement in this foreshore area "for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows."[165] While the cited cases all involve unsuccessful attempts to establish bathing and recreational rights, and while there are few cases dealing with general easements of way — or passage regardless of purpose[166] — this language seems broad enough to require compensation for the pedestrian right of passage. A lengthy 1851 opinion established the public's right to regulate private use of the foreshore — in that case, by limiting the length of wharves[167] — but assertion of a positive easement in the public to pass over or otherwise use private property is easily distinguishable from such

161 Amend. No. 1372, S. 3485, 92d Cong., 2d Sess. § 8(c)(1) (1972).

162 S. 1929, 93d Cong., 1st Sess. §§ 10(c)(1), (2) (1973).

163 Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907).

164 Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 200 N.E.2d 282 (1964); Michaelson v. Silver Beach Improvement Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273 (1961).

165 Butler v. Attorney General, 195 Mass. 79, 84, 80 N.E. 688, 689 (1907).

166 Puffer v. City of Beverly, 345 Mass. 396, 187 N.E.2d 840 (1963).

167 Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851).

zoning-like use of the police power. Finally, two recent decisions permitted prescriptive establishment of easements in the foreshore for bathing and recreation, but for individuals only.[168] Specifically foreclosed was the possibility, raised by recent decisions elsewhere,[169] of public acquisition of prescriptive easements.[170]

If Massachusetts case law seems unaccommodating, statutory relief may be in sight. A bill pending in the Massachusetts legislature would declare a reserved interest in the public to an "on-foot free right-of-passage along the shore."[171] The bill passed the Senate in 1973 and was referred by the House to the Supreme Judicial Court for an advisory opinion on its constitutionality.[172] Far bolder is the proposed National Open Beaches Act, in which

> Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution.[173]

Thus the issue could conceivably shift from state statutory and constitutional to federal constitutional grounds solely. If it did, the question of public rights in private shoreline on the Nantucket Sound Islands might well be resolved in a manner more akin to the original intent of the trust bill than to its final language.

G. *The Taking Issue*

Perhaps the most complex legal issue raised by the trust bill derives from the fifth amendment declaration that "private prop-

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168 Labounty v. Vickers, 352 Mass. 337, 225 N.E.2d 333 (1967); Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 200 N.E.2d 282 (1964).

169 City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. Dist. Ct. App. 1972); Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).

170 " '[P]ersons of the local community' and the 'general public' are too broad a group to acquire by prescription an easement to use private beaches for bathing and for recreational purposes." Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 761, 200 N.E.2d 282, 283 (1964).

171 Senate No. 804, Massachusetts General Court (1973).

172 JOURNAL OF MASSACHUSETTS HOUSE, Nov. 19, 1973; Vineyard Gazette, Nov. 23, 1973, at 1, col. 5.

173 S. 2621, 93d Cong., 1st Sess. § 3 (1973). This Act would also authorize the Department of Justice to establish a program for obtaining easements by condemnation. *Id.* § 5(a)(3).

erty [shall not] be taken for public use without just compensation." The definitive judicial interpretation of this clause, as it applies to land use regulation, was expressed by Justice Holmes in 1922 in *Pennsylvania Coal Co. v. Mahon*: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[174] This rather cryptic line of demarcation between noncompensable regulation and a confiscatory taking has since "passed into black letter law,"[175] leaving generations of scholars and practitioners to puzzle over its meaning.[176]

It is now clear, however, that prevention of substantially all new development in an area of heavy development potential is likely to require at least some measure of compensation.[177] Yet the outright acquisition of the land in question — requiring, as it does, both full and immediate compensation — can represent an inordinate financial burden on the purchaser. This is a burden which American governments have more often than not been unwilling to assume. Recently, various proposals to minimize this financial burden and thus promote more extensive, effective growth control have attempted to combine regulation and compensation. By utilizing the police power up to its legal limits and paying only for diminutions in property value occasioned by further increments of needed control beyond those limits, compensable regulations would meet the taking issue in a flexible manner and with minimal cost to the public.[178] It is along lines

174 260 U.S. 393, 415 (1922).

175 THE TAKING ISSUE, *supra* note 2, at 138.

176 *E.g.*, Netherton, *Implementation of the Land Use Policy: Police Power Vs. Eminent Domain*, 3 LAND & WATER L. REV. 1 (1971); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63. For a discussion of these issues under Massachusetts law, see 4 METROPOLITAN AREA PLANNING COUNCIL, OPEN SPACE AND RECREATION PROGRAM FOR METROPOLITAN BOSTON (1969).

177 "Land use controls which can be sustained as noncompensable regulations under the police power are inadequate to accomplish the broader objectives of open space preservation." Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 184 (1961).

178 *See* URBAN RENEWAL ADMINISTRATION, DEP'T OF HOUSING & URBAN DEV., OPEN SPACE FOR URBAN AMERICA (1965); Lafkowitz, *Comments on the Compensable Regulations Proposals*, 29 J. AM. INST. PLANNERS 97 (1963); Krasnowiecki & Strong, *Compensable Regulations for Open Space*, 29 J. AM. INST. PLANNERS 87 (1963); Krasnowiecki & Paul, *supra* note 177.

similar to these that the trust bill attempts to assure preservation of the Nantucket Sound Islands.

Under S. 1929 the land area of the Islands would be divided into three categories: town planned, forever wild, and scenic preservation.[179] Regarding the first of these categories, the trust itself poses no taking issue since "[l]ands and waters so classified shall remain under the jurisdiction of the town in which located for purposes of planning and zoning ordinances and other land use regulations."[180] Land use regulations and variances are to be "commented upon by the Commissions and the Secretary as to consistency with the purposes" of the bill,[181] but the comments have no legal impact and are intended only "to help achieve consistency and to provide information."[182]

Under the forever wild classification no new construction would be allowed. Any existing improvement would remain in the ownership of the family (defined broadly) owning it on the date of classification. Repairs and, after approval by the appropriate commission and local agencies, "replacements or extensions which shall not alter the basic character of the lands" would be permitted.[183] This basic proscription of major new construction would frequently result in a taking, at least to the extent that land values after its application fall below present land values under zoning and other permissible police power restrictions. The method of determining the compensation due and the options open to a landowner will be considered shortly.

Lands considered forever wild would also be subject to a procedure which, in Senator Kennedy's words, "protect[s] a family's stewardship of a particular area, while presenting the Commission with the long-range opportunity of restoring the forever wild status [to] some areas which are now built upon but which perhaps should not be . . . ."[184] If the owner of an improvement

179 S. 1929, 93d Cong., 1st Sess. § 5 (1973). The most recently proposed amendments would change the classifications to "Town Lands," "Open Lands," and "Resource Management Lands." The boundary lines would be determined by "public discussion" and could be changed by the commissions.

180 *Id.* § 5(b)(3).

181 *Id.*

182 119 CONG. REC. S10,015 (daily ed. May 31, 1973).

183 S. 1929, 93d Cong., 1st Sess. § 5(b) (1) (1973).

184 119 CONG. REC. S10,015 (daily ed. May 31, 1973).

wished to "sell or otherwise convey" to someone outside his family, the commission and the Secretary would have a 60-day first refusal option on the fee. If that option were not exercised, the sale to the third party would go forward in the ordinary course of business.[185] Selective acquisition and demolition are the envisioned actions under this procedure. Because of the particularly significant characteristics of the properties so selected, because the full fee would be obtained, and because it would be obtained at a time when the owner wanted to sell anyway, the taking issue should present no difficulties here other than the specific amount of the sale price.

The third category, scenic preservation, would deal with lands located generally between built-up village centers and the dunes, marshes, and hilltops. It is here that development pressures are the most severe.[186] One study calculates that scenic preservation covers 26,413 of the 41,890 developable acres on Martha's Vineyard and that the trust bill would permit 2,640 dwelling units on these lands while local zoning would permit 17,376 units.[187]

The bill accomplishes this reduction in holding capacity by requiring each commission to draw up regulations governing development beyond "the present intensity of use," based upon the following four guidelines:

1. The overall number of dwelling units shall not exceed 65 per square mile (just more than one for each 10 acres).
2. The area upon which this limit is to be calculated shall not include wetlands or bodies of water.
3. The location of the dwelling units is not to be determined on the basis of uniform lot sizes, such as by dividing scenic preservation land into 10-acre grids, but instead should be determined "with flexibility to encourage sound land use planning."
4. Dwelling units must be located in such a way as to account

185 S. 1929, 93d Cong., 1st Sess. (1973). The bill leaves unresolved the question whether "or otherwise convey" would include a long-term lease intended to avoid the commission's first refusal option.

186 119 CONG. REC. S10,015 (daily ed. May 31, 1973).

187 Dukes County Planning & Economic Dev. Comm'n, analysis released July 11, 1973.

for a stated variety of factors ensuring protection of the unique values of the Islands.

After regulations consistent with these four guidelines have been drawn up by each commission and public hearings have been held on them, they become effective upon approval by the Governor and the Secretary. Thereafter, construction on scenic preservation lands can begin after receipt from a commission of a permit indicating compliance with the regulations.[188] This treatment of scenic preservation regulations is a direct response by Senator Kennedy to local officials on Martha's Vineyard, who repeatedly entreated him to establish only general guidelines and leave specific regulations effecting those guidelines to each commission.

The mechanism for determining and paying compensation under these regulations — as well as those regarding beaches and forever wild lands — is to be developed by the Secretary after consulting with the commissions and the Governor and after holding public hearings. Specifically to be issued are compensable land use regulations which "establish the manner in which the fair market value of land or waters affected by the classifications . . . shall be calculated where such classifications have caused a decrease in such value . . . . "[189] Regarding this provision, Senator Kennedy has indicated his intent that "[W]henever an action of the Federal government in the nature of the land-use control regulation can be construed as a taking, of either the fee or of a less-than-fee interest, there must be provided full and fair compensation at fair market value."[190]

While the bill is silent on specifics, leaving the Secretary and other parties significant room for discretion, the very use of the term "compensable land use regulation" points toward a system under which the determination of just compensation will be based on an appraisal of two different property values: the value of a particular parcel *before* the imposition of the trust bill's controls and the value of the parcel *after* the imposition of the controls.

188 S. 1929, 93d Cong., 1st Sess. § 5(b)(2) (1973).

189 *Id.* § 8(g)(i)

190 119 Cong. Rec. S10,015 (daily ed. May 31, 1973).

The former will be made in the context of limitations imposed by existing local land use ordinances (such as zoning, subdivision controls, health regulations, and historic district regulations) and existing state laws (such as the wetland restrictions). These limitations will already have set parameters on the development potential of the parcel. The trust bill may, as to this parcel, further limit the development potential. If it does, the difference in value between that under the preexisting limitations and that under the trust bill's limitations will be the measure of compensation paid to an owner.

An important aspect of the valuation question is addressed by the Uniform Real Property Acquisition Policy Act: "Any decrease or increase in the fair market value of real property prior to the date of valuation caused by . . . the likelihood that the property would be acquired . . . other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property."[191] This provision discourages speculation in land earmarked for acquisition with federal funds or in land with a potential for acquisition. In effect, valuation is made at a moment in time just before the Island trust bill was first introduced in the Senate on April 11, 1972, with increases in that value attributable to normal market forces and inflation. This protects nonspeculators, because it can be argued that the pendency of the trust bill has depressed values in land areas earmarked for the imposition of its controls. While it is not clear that the actions of the town governments in adopting or amending their local land use ordinances in the interval between April 11, 1972, and the date valuation is made should be included in the calculation, the statute speaks in terms of disregarding only those fluctuations caused by the pendency of the federal legislation. Consequently, local or state actions affecting the developmental potential of a parcel and taken before the final date of valuation should be included.

An owner of land in scenic preservation land areas has, as a result, three alternatives after enactment of the trust bill,[192] and

191 42 U.S.C. § 4651(3) (1970).

192 All but the first of these three alternatives are also available to owners of forever wild land.

it may be helpful to illustrate these options with a simplified hypothetical example. Let us assume that Mr. Pease owns 30 acres of scenic preservation land, which he inherited from his father and on which he and his family now live. The zoning of the parcel requires minimum lot sizes of three acres, by reason of an amendment to the town zoning bylaw made in 1973. Mr. Pease's town has not adopted either the subdivision control law or the historic district ordinance and has promulgated no regulations under the state sanitary code. One corner of Mr. Pease's parcel is a coastal marsh, fronting on a small tidal pond.

Under this set of facts, it is safe to assume that the development potential of Mr. Pease's parcel is eight building lots: the 30 total acres, divided by the minimum 3-acre zoning, produces 10 lots; one, however, is already built upon, and one is coastal marsh upon which construction is probably prohibited by state law. As it turns out, Mr. Pease is not a subdivision developer, but he and his wife want the flexibility to give each of their sons a lot on which to build a house if they remain on the island. Furthermore, they want to preserve their view of the tidal pond and the ocean beyond.

Under the alternative in § 8(a) of S. 1929, the commission and Mr. Pease could agree that retention of his current dwelling, plus the construction of two additional dwellings at an indefinite time in the future, constituted satisfactory "minimum regulations on use and development" of the property "compatible with the purpose for which the Trust was established." If such an agreement were struck and, presumably, reduced to writing, then the power of acquisition over Mr. Pease's property would be suspended so long as the agreement remained in effect. If he particularly desired that neither the public nor anyone else own any interest in his property, this might satisfy Mr. Pease, and the preservation purpose of the bill would have been accomplished at no cost to the public.

Under the alternative in § 13 of S. 1929, Mr. Pease could decide that he wanted to donate his land to a private nonprofit conservation organization and take an income tax deduction for the value of the gift. Like the first alternative, this one would keep ownership of any property interest from the commission or the

Secretary and advance private voluntary conservation efforts at no direct federal cost. If he decided upon this alternative, he might either make the gift outright or demonstrate up to two years after enactment of the bill that he had made an irrevocable commitment to do so at some time *in futuro*. In either case, presumably he would retain his own dwelling and access to it, and he might also seek to retain one or more additional building lots. He need not make a gift of the fee; he could make a gift of a "conservation restriction" under the terms of a Massachusetts statute.[193] This statute provides for the creation, with prior approval of specified state and local officials, of judicially enforceable perpetual restrictions which either forbid or severely limit nearly every development use of the land. This, too, would provide an income tax deduction to Mr. Pease equal to the value of the restriction.

The third alternative would be to utilize the compensable land use regulations by transferring ownership of a less-than-fee interest to the commission and the Secretary in return for compensation. The regulations developed by the commission pursuant to the guidelines in § 5(b)(2) of the bill might permit the construction of two new dwellings in addition to the dwelling Mr. Pease now occupies; in this case the valuation would be made on the difference in the development value between the eight buildable lots permitted before the trust bill and the two buildable lots permitted after the trust bill. In one very recent case, the National Park Service paid 34 percent of the value of the fee title for the acquisition of a scenic easement,[194] and while this is not a controlling precedent, it indicates that an owner's retention of a property interest and the sale of a portion of the development rights is considerably less expensive than a purchase of the full fee title.

One final manifestation of the taking issue involves the owner who finds ownership of restricted land, whether or not partially acquired by the public, to be unduly burdensome. The Uniform Real Property Acquisition Policy Act requires federal agency heads to "offer to acquire the entire property" if "the acquisition

193 MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (Supp. 1972).

194 120 CONG. REC. H431 (daily ed. Feb. 4, 1974) (remarks of Representative Skubitz, R.-Kan.).

of only a part of a property would leave its owner with an uneconomic remnant . . . . "[195] While this language is directed at the problem of acquiring the fee of part of a parcel and leaving an unuseable sliver, also in fee, it appears broad enough to cover acquisition of a less-than-fee title to a parcel, which may leave the remaining less-than-fee portion an uneconomic remnant. To meet this problem the trust bill provides that, upon application by the owner, the Secretary must purchase outright any lands classified forever wild or scenic preservation if he finds "that the continued ownership of those lands would result in hardship to such owner."[196]

In sum, then, the taking issue is met through a complex interlock of regulation and compensation, with ample provision for flexibility on the part of both local regulators and local property owners. This appears to be a reasonable resolution of one dilemma which has faced Senator Kennedy and the bill's proponents from the outset: reliance upon regulations finding their wellspring in the police power cannot preserve the Islands, but the federal powers and funds essential for preservation raise the specter of loss of local control. Compensable land use regulations are a compromise, but one which can satisfactorily accomplish the stated goals of the trust bill without removing to the nation's capital the responsibility for their execution.

Conclusion

That the Nantucket Sound Islands are threatened with a rush of new development which would unalterably transform them into extensions of the megalopolitan sprawl is undenied. That some new laws are needed for their protection, to supplement the inadequate tools now available to the Islands to control and retard this inexorable growth, is similarly undenied. But it is still unclear how much sharing of the responsibility for determining the future of the Islands is acceptable to the local officials on Martha's Vineyard who still oppose any federal or state assistance.

195 42 U.S.C. § 4651(9) (1970).
196 S. 1929, 93d Cong., 1st Sess. § 7(a)(3) (1973).

What is clear is that the trust bill incorporates innovations of great importance to the storehouse of legal weapons available to help preserve lands faced with development pressures. In its evolution the trust bill has become more closely attuned to the special problems of the Nantucket Sound Islands, and the annealing process has been of inestimable assistance in honing the bill's leading edges. This annealing process has been the result of extensive citizen involvement in the bill's evolution, and the bill could well set a precedent for other legislative efforts to preserve and protect fragile natural areas under intense second-home development pressures. The new techniques in the trust bill have survived successive amendments. This bodes well for the bill's replicability.

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STATUTORY COMMENT

COASTAL CONTROLS IN CALIFORNIA: WAVE OF THE FUTURE?

Introduction

During the 1960's and early 1970's, Californians increasingly perceived a serious manmade threat to the natural characteristics of the California coastal zone. Though the spectacular Santa Barbara[1] and San Francisco[2] oil spills riveted attention on the dangers posed by oil development on the coast, probably far more important was a growing undefined apprehension about coastal development. Many citizens feared that without some way to stop the quickening pace of development the coastline might one day be fenced off by an 1100-mile wall of condominiums.[3] Since 80 percent of the almost 20 million Californians live within a leisurely drive of the coast,[4] most of them are affected by coastal development.

As of 1972 a collection of 15 counties, 45 cities, 42 state agencies, and over 70 federal agencies had legal responsibilities in the California coastal areas.[5] Not only did each governmental unit respond to different internal policies, but the laws applicable to the various units were bewilderingly complex and often contradictory.[6] This is readily understandable when one considers that the policy objectives of this governmental menagerie ranged from protection of Pacific fur seals to construction of nuclear power plants to expansion of local tax bases.

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1 L. Dye, Blowout at Platform A (1971); Los Angeles Times, Jan. 31, 1969, § 1, at 1, col. 5.

2 Los Angeles Times, Feb. 19, 1971, § 1, at 1, col. 5.

3 J. Bodovitz, The Coastal Zone: Problems, Priorities, and People, June 13-14, 1973, at 5 (text of address given by Executive Director of the California Coastal Zone Conservation Commission before the Conference on Organizing and Managing the Coastal Zone, U.S. Naval Academy, Annapolis, Md.) [hereinafter cited as Bodovitz]; *cf.* A. Toffler, Future Shock 12, 18 (1970).

4 Adams, *Proposition 20 — A Citizen's Campaign*, 24 Syracuse L. Rev. 1019, 1027 (1973).

5 *See* Douglas, *Coastal Zone Management — A New Approach in California*, 1 Coastal Zone Management J. 1, 2 (1973).

6 The Water's Edge: Critical Problems of the Coastal Zone 15 (B. Ketchum ed. 1972).

This situation was dramatically altered on November 7, 1972, with the enactment of a citizen-sponsored initiative called "Proposition 20,"[7] the California Coastal Zone Conservation Act of 1972.[8] Passed by a popular vote slightly greater than 55 percent,[9] the coastal initiative was written by conservationists and is one of the most far-reaching land use statutes in America.[10] The coastal initiative attempts to accomplish three basic objectives. It establishes a policy of coastal protection and environmental concern, creates a group of commissions to exercise interim controls on development through an elaborate permit system, and commands this new regulatory entity to study the needs of the coastal zone[11] and recommend a plan for the long-term management of the coast to the 1976 session of the state legislature. By its terms the coastal initiative is repealed 91 days after adjournment of the 1976 regular session.[12] This Note will analyze the provisions of the coastal initiative, examine the results of its operation during the first 16 months, and consider its legal implications.

I. Legislative Policy

The experience with local coastal controls has been disappointing.[13] The California Coastal Zone Conservation Act of 1972

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7 For a description of the background of the initiative effort, see Adams, *supra* note 4.

8 Cal. Pub. Res. Code §§ 27000-650 (West Supp. 1974) [hereinafter referred to as the coastal initiative].

9 Douglas, *supra* note 5, at 2.

10 *See, e.g.*, Del. Code Ann. tit. 7, §§ 7001-13 (Supp. 1972); Fla. Stat. Ann. §§ 161.011-.211, .25-.45 (1972); Hawaii Rev. Stat. §§ 205-1 to -37 (Supp. 1973); Me. Rev. Stat. Ann. tit. 12, §§ 4811-14 (Supp. 1973); Mich. Comp. Laws §§ 281.631-.645 (Supp. 1973); Minn. Stat. Ann. § 105.485 (Cum. Supp. 1974); Ore. Rev. Stat. §§ 191.110-.180 (1971); R.I. Gen. Laws Ann. §§ 46-23-1 to -12 (Supp. 1972); Vt. Stat. Ann. tit. 10, §§ 6001-89 (Supp. 1973); Wash. Rev. Code Ann. §§ 90.58.010-.930 (1972).

11 The coastal zone is defined as:

> that land and water area . . . from the border of . . . Oregon to the border of . . . Mexico, extending seaward to the outer limit of the state jurisdiction, including all islands within the jurisdiction of the state, and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego counties the inland boundary . . . shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance.

Cal. Pub. Res. Code § 27100 (West Supp. 1974).

12 *Id.* § 27650.

13 The prestigious Stratton Commission described this problem:

was passed by the voters less than two weeks after the Coastal Zone Management Act[14] was signed into law.[15] Both laws reflect similar concerns with the preservation of the coastal environment as a resource for future enjoyment. The underlying environmental problems in California had become severe through the inattention or mismanagement of the responsible private and public decisionmakers. Many agreed with the assessment of the leader of the Coastal Alliance, the citizen group which coordinated the fight for Proposition 20, that the coast "had become the construction industry's golden goose."[16]

The reasons for the deteriorating coastal environment go deeper than the actions of any one industry. The governmental structure of the coastal areas was too fragmented.[17] A basic premise of local zoning regulations is that local communities make the land use decisions affecting that community's health, safety, and welfare. In many geologic regions that assumption will correspond with physical processes, since environmental effects, such as air or noise pollution or increased density, often depend on proximity. A community seeking less noise pollution can simply refuse to zone or grant variances for large industrial plants.

In the ocean-based environment of coastal regions this situation is reversed. Because longshore or littoral currents move along the length of the coast,[18] sewage or other effluent dumped into the ocean will affect swimmers down the coast for several miles, but may not affect swimmers in the dumping community. A breakwater built into the ocean perpendicular to the shore may obliterate another city's beach by blocking the sand nourish-

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> Rapidly intensifying use of coastal areas already has outrun the capabilities of local governments to plan their orderly development and to resolve conflicts. The division of responsibilities among the several levels of government is unclear, and the knowledge and procedures for formulating sound decisions are lacking.

U.S. COMMISSION ON MARINE SCIENCE, ENGINEERING & RESOURCES, OUR NATION AND THE SEA — A PLAN FOR NATIONAL ACTION 49 (1969).

14 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

15 8 WEEKLY COMP. PRES. DOC. 1583 (1972).

16 Adams, *supra* note 4, at 1025.

17 *See* note 13 *supra*.

18 *See, e.g.*, W. MARX, THE FRAIL OCEAN 23-40 (1966); Bascom, *Beaches*, in SCIENTIFIC AMERICAN, OCEANOGRAPHY 131-41 (1971).

ment from the littoral drift.[19] Community *A*'s decisions affect community *B*'s health, safety, and welfare; and *A* may be motivated in the first place by adverse effects to its environment originating from community *C*. Under these circumstances any pretense that local land and water use control can protect the coastal environment is but a cruel joke.

Local jurisdictions in California and other states are also hampered by insufficient resources, staff personnel, and perspective; and there is often no unbiased overview of problems.[20] Local officials who consider development proposals in a jurisdiction largely dependent upon property tax revenues are caught in an inherent conflict-of-interest. California's solution for these problems of coastline management was to adopt a strong system of statewide control of land and water use decisions.

The introductory declaration of findings establishes the orientation of the coastal initiative.[21] The coastal zone is declared to be a valuable natural resource belonging to all people and it is recognized "as a delicately balanced ecosystem." Since permanent protection of the resources in the coastal zone is of paramount concern to all citizens, society must preserve the ecological balance. Moreover, the initiative declares a policy to "preserve, protect, and, where possible, to *restore* the coastal zone,"[22] an ambitious program in keeping with recent legislative policy on both the state[23] and federal[24] levels. In line with this policy, the last finding specifies four actions needed to protect the coastal zone:

> (a) To study the coastal zone to determine the ecological planning principles and assumptions needed to ensure conservation of coastal zone resources.

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19 *See* note 18 *supra*.

20 S. Rep. No. 753, 92d Cong., 2d Sess. 5 (1972).

21 Cal. Pub. Res. Code § 27001 (West Supp. 1974).

22 *Id.* (emphasis added).

23 *See* California Environmental Quality Act of 1970, Cal. Pub. Res. Code §§ 21000-151 (West Supp. 1974), which declared that it was California's policy to "[d]evelop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Id.* § 21001(a).

24 The Coastal Zone Management Act § 303(a), 16 U.S.C. § 1452(a) (Supp. II, 1972), states that it is congressional policy to "preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."

(b) To prepare, based upon such study and in full consultation with all affected governmental agencies, private interests, and the general public, a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone, to be known as the California Coastal Zone Conservation Plan.
(c) To ensure that any development which occurs in the permit area during the study and planning period will be consistent with the objectives of this division.
(d) To create the California Coastal Zone Conservation Commission, and six regional coastal zone conservation commissions, to implement the provisions of this division.[25]

II. Commission Structure

The California Coastal Zone Conservation Commission (CCZCC) and its six regional commissions, which are charged by the initiative to carry out its purposes, are similar in structure to those which California uses to set and police its water quality standards under the Porter-Cologne Water Quality Control Act.[26] Though the coastal initiative's structure is not unprecedented, many of its powers, duties, membership requirements, and responsibilities are unique.

The state commission is composed of 12 members.[27] Each of the six regional commissions chooses one representative.[28] The remaining six members must be representatives of the public who may not be regional commission members.[29] Each regional commission consists of 12, 14, or 16 members[30] and is divided equally between governmental representatives[31] (from the municipal, county, and regional levels) and public members. Each representative of local government is selected by his particular government agency,[32] and his membership on the regional commission

25 Cal. Pub. Res. Code §§ 27001(a)-(d) (West Supp. 1974).
26 Cal. Water Code §§ 13000-908 (West Supp. 1974).
27 Cal. Pub. Res. Code § 27200 (West Supp. 1974).
28 *Id.* § 27200(a).
29 *Id.* § 27200(b).
30 *Id.* § 27201.
31 The Association of Bay Area Governments, the Association of Monterrey Bay Area Governments, the Southern California Association of Governments, and the San Diego Comprehensive Planning Organization are all required to be represented on regional boards. *Id.*
32 *Id.* § 27202.

automatically ends if he ceases to hold office in the agency that selected him.[33] In such a case a replacement is chosen in the same manner used to pick the disqualified member.[34]

The public members of the state and regional commissions are chosen in equal numbers by the Governor, whose choices are subject to Senate confirmation,[35] the Speaker of the Assembly, and the Senate Rules Committee.[36] Unlike the criteria for other agencies whose members frequently represent designated interest groups,[37] the criteria for public members do not require any specific occupations. Instead, the coastal initiative stipulates that each public member shall be "exceptionally well qualified" to interpret environmental trends and information and to analyze resource issues in light of the policies of the coastal initiative,[38] and it requires that "expertise in conservation, recreation, ecological and physical sciences, planning, and education shall be represented."[39] The state commission and each regional commission is headed by an elected chairman and has an executive director as full-time administrative officer.[40]

The coastal initiative has two provisions governing the membership and organization of the commissions which reflect the initiative's drafting by citizens rather than legislators. All meetings of the commissions must be open to the public and held at least once a month in a location "convenient to the public."[41] In general, "no decision on permit applications or on the adoption of the coastal plan or any part thereof shall be made without a prior public hearing."[42] Provisions requiring detailed public notice of each matter to be considered at a public hearing abound

33 *Id.* § 27222.

34 This provision has proved extremely important because several outspokenly prodevelopment city councilmen have been unseated in local elections by "no" or "slow" growth candidates. In one case, the effect has been to radically change the balance of power on a regional board. *See* The Coastline Letter, No. 7, at 4 (1973).

35 CAL. PUB. RES. CODE § 27221 (West Supp. 1974).

36 *Id.* § 27202(d).

37 *Cf.* CAL. WATER CODE §§ 13201(a)(1)-(6) (West Supp. 1974).

38 CAL. PUB. RES. CODE § 27220 (West Supp. 1974).

39 *Id.*

40 *Id.* § 27243.

41 *Id.* § 27224. Some regional commissions meet weekly to keep up with their responsibilities. *See, e.g.*, Los Angeles Times, July 23, 1973, § 2, at 1, col. 5.

42 CAL. PUB. RES. CODE § 27224 (West Supp. 1974).

in the coastal initiative[43] and the commission regulations.[44] In addition there are extremely stringent penalties[45] for violating the strong conflict-of-interest provisions in the initiative.[46]

III. The Plan

The long-term purpose for establishing the CCZCC and its regional commissions is to create a politically acceptable, enforceable plan to govern land and water use in the coastal zone. Though the specific plan is still being developed,[47] the coastal initiative stipulates the objectives which it must seek to attain:

> (a) The maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values.
> (b) The continued existence of optimum populations of all species of living organisms.
> (c) The orderly, balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.
> (d) Avoidance of irreversible and irretrievable commitments of coastal zone resources.[48]

The initiative requires that the plan contain specific elements

43 *See, e.g., id.* §§ 27104(c), 27224, 27232, 27240(d), 27320(b), 27420(b), 27422, 27423(c).

44 *See, e.g.*, Regulations of the California Coastal Zone Conservation Commission §§ 13120, 13121, 13131, 13141-42, 13154, 13156(a), 13250(c)-(d), 13270-71, 13281, 13300-02, 13310, 13322(a)-(b), 13341(b), 13351-52, 13440, 13484, 13702, 13801, 13805, 13911 (Jan. 23, 1974) (to be codified in 14 Cal. Admin. Code) [hereinafter cited as CCZCC Regs].

45 The maximum is $10,000 and two years in prison. Cal. Pub. Res. Code § 27234 (West Supp. 1974).

46 No commissioner or staff employee, no former commissioner or staff employee during the first year after leaving the commission, and none of their business affiliates may appear in any capacity other than as a representative of the state or its political subdivisions in any proceeding, application, or official determination involving the state or regional commissions. No member or employee of a commission may participate in an official capacity when a financial interest is held by his or her spouse, child, or partner, or by an organization for which he or she has served within two years of his or her selection for a commission post, an organization with whom he or she is presently serving, or an organization with whom negotiations or understandings regarding future association have been undertaken. Cal. Pub. Res. Code §§ 27230-32 (West Supp. 1974).

47 At the present time the regional commissions are holding hearings on the initial plan elements. *See* The Coastline Letter, No. 14, at 4 (1973).

48 Cal. Pub. Res. Code § 27302 (West Supp. 1974).

concerning (1) land use, (2) transportation, (3) conservation, (4) public access, (5) recreation, (6) public services and facilities (including a power plant siting study), (7) ocean minerals and living resources, (8) population density, and (9) educational or scientific use.[49] These elements are to be a part of a larger product which must include at least the following: "[a] precise, comprehensive definition of the public interest in the coastal zone";[50] ecological *planning principles and assumptions* to be used in determining the suitability and extent of development; individual issue components, as described above; geographic reservations from and for specific uses; and recommendations for governmental policies and powers to implement the plan, including the organizational structure to assume permanent responsibility for implementing the plan.[51]

The procedure by which this plan is to be created commences with the promulgation by the CCZCC of objectives, guidelines, and criteria for the collection of data and preparation of local and regional recommendations.[52] Pursuant to these objectives and goals, the regional commissions will hold public hearings and prepare definitive conclusions and recommendations, including suggested areas to reserve for and from specific uses.[53] The regional commissions must complete their deliberations and transmit adopted proposals to the state commission by April 1, 1975.[54] The CCZCC must conclude its own studies, consider the recommendations of the regional commissions, and adopt the final plan for submission to the legislature by December 1, 1975.[55]

Many coastal plans and governmental studies have been written in California.[56] The recently completed Comprehensive Ocean Area Plan (COAP), for instance, is a massive compilation of data

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49 *Id.* § 27304(c).

50 *Id.* § 27304(a).

51 *Id.* § 27304.

52 The state commission unveiled its proposals in June 1973, almost two months before the statutory deadline. Douglas, *supra* note 5, at 24.

53 CAL. PUB. RES. CODE § 27320(b) (West Supp. 1974).

54 *Id.*

55 *Id.* § 27320(c).

56 *See, e.g.*, F. DOOLITTLE, LAND USE PLANNING AND REGULATION ON THE CALIFORNIA COAST: THE STATE ROLE (1972).

and a detailed inventory of specific coastal resources.[57] Unfortunately these reports have rarely had an impact either on the coast or on the process of coastal change.

Those groups which sponsored the coastal initiative hoped it would do more than add to the literature in the field. They wanted a new regulatory scheme to alter the expectations of both private developers and governmental administrators[58] and change the process of determining coastal land use and development. People were to carefully consider previously ignored or slighted factors such as biological productivity, scenic view, beach access, and wildlife preservation.[59] A new governmental agency, responsive to these same factors, was to be established with broad jurisdiction and wide powers.

The coastal initiative does not establish the configuration of permanent governmental controls for the coast, but leaves the recommendation of a particular system to the commissions. The decisions embodied in the final plan and those adopted by the legislature will depend in large part upon the experience acquired with statewide control under the present interim permit process. It is the permit controls which in theory give the CCZCC the greatest control of any statewide land use agency.[60] Furthermore, it is the combination of temporary regulatory controls with the planning process which is the hallmark of the California system.

IV. Interim Permit Controls

The interim permit control system under the coastal initiative is extremely complex. While its procedures are labyrinthine, its substantive requirements are highly amorphous. Like the San Francisco Bay Conservation and Development Commission (BCDC), after which its permit controls were patterned,[61] the

57 *See* California Resources Agency, Comprehensive Ocean Area Plan (1972).

58 Cal. Pub. Res. Code §§ 27001, 27302, 27401 (West Supp. 1974), require inquiry into previously ignored or slighted questions.

59 *Id.*

60 *Cf.* Douglas, *supra* note 5, at 3. *See generally* note 10 *supra.*

61 Cal. Gov't Code § 66632 (West Supp. 1974). This has been the position taken by the California Attorney General in litigation concerning the coastal initiative. *See, e.g.,* Brief for the State of California as Amicus Curiae at 11, Schillinger v. Topodynamics, Inc., No. 98491 (Super. Ct., Santa Barbara County, Feb. 23, 1973).

coastal initiative has a dual permit system. Local jurisdictions retain such authority as they possessed prior to enactment of the coastal initiative[62] and a new system requiring additional permits is superimposed on the old structure.

A. *Breadth*

The basic permit requirement is simple and comprehensive. Any person seeking to develop property within the coastal permit area[63] must obtain a permit from the appropriate regional commission for all development begun after February 1, 1973.[64] This rule is sweeping in its application. The term "person" includes not only private individuals, groups, or corporations, but public utilities and federal, state, and local governmental agencies.[65] "Development" encompasses a broad spectrum of activities affecting both land and water including: the placing and erecting of any solid material or structure; discharging or disposing of dredged material, or gaseous, liquid, solid, or thermal waste; grading, removing, or extracting any materials; changing the density or intensity of land use; changing the density of use of, ecology of, and access to water; constructing, demolishing, or changing the size of any structure; and removing major vegetation or logging.[66] All these activities which take place within the permit area require a commission permit.

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62 The coastal initiative requires a prospective builder to obtain a permit from the commissions "and, if required by law, from any city, county, state, regional or local agency." CAL. PUB. RES. CODE § 27400 (West Supp. 1974). It is a precondition for the filing of a permit application with a regional commission that, with limited exceptions, an application shall have been made to and limited approval received from all relevant city, county, and other organizations, such as air or water quality boards. CCZCC Regs § 13210.

63 The permit area in general is defined as "the portion of the Coastal Zone lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward of the mean high tide line of the sea . . . . " CAL. PUB. RES. CODE § 27104 (West Supp. 1974). However, any nontidal body of water lying partly within the permit area shall be totally included, with a 1,000 foot strip of land around its shore. *Id.* § 27104(b).

64 *Id.* § 27400.

65 *Id.* § 27105.

66 *Id.* § 27103:

> [S]tructure includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

B. *Limited Exceptions, Exemptions, and Exclusions*

Three different types of projects need not comply with the initiative's permit requirements. The coastal initiative's three major exceptions are repairs and improvements under $7,500 in value to existing single-family residences,[67] maintenance dredging of existing navigation channels and the removal of such material beyond the seaward limits of California jurisdiction under a Corps of Engineers permit,[68] and any repairs or upkeep on existing structures or facilities.[69] Those persons with vested rights under local building permits issued "prior to the effective date" of the initiative are exempted from the permit requirements.[70]

Certain specific or discretionary exclusions from the permit requirement are also included. The area of BCDC jurisdiction is wholly excluded from the permit requirements.[71] A recent legislative amendment to the coastal initiative[72] added a discretionary exclusion. If a parcel of property is only partially located within the permit area the regional commission may adjust the boundaries of the permit area up to 50 yards seaward if this will exempt the tract in question. The coastal initiative also provides a procedure whereby certain "stabilized" urban or commercial areas may opt out of the system at the request of the relevant city or county, if the regional commission assents after a public hearing.[73] These exclusions are limited by a proviso that no tide-

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67 Even this exception is technically qualified, for the state commission may establish classes of improvements to single-family homes with a risk of "adverse environmental effect" for which a permit may be required. CAL. PUB. RES. CODE § 27405(a) (West Supp. 1974).

68 *Id.* § 27405(b).

69 Ch. 1014, § 6, [1973] Cal. Stat. ____, *adding* CAL. PUB. RES. CODE § 27405(c) (West Supp. 1974). This section may have amended § 27405(a) by implication. If so, excepted repairs on single-family residences may no longer be limited to $7,500. The limitation on the value of improvements excepted by § 27405(a) would presumably remain the same.

70 CAL. PUB. RES. CODE § 27404 (West Supp. 1974). For the construction of this language see text accompanying notes 218-22 *infra*.

71 CAL. PUB. RES. CODE § 27104(a) (West Supp. 1974). No exclusion for the BCDC jurisdiction appears in the definition of the coastal zone, for which the coastal zone plan will be prepared. *See* CAL. PUB. RES. CODE § 27100 (West Supp. 1974).

72 Ch. 1014, § 1, [1973] Cal. Stat. ____, *adding* CAL. PUB. RES. CODE § 27104(d) (West Supp. 1974).

73 A "stabilized" urban land area is defined as a residential area with a minimum of four dwelling units per acre or a commercial or industrial area where 80 percent of the lots are built up to the maximum density or intensity of use allowable under

lands, no submerged lands, and no land on the immediate shoreline may be excluded[74] from the statute.

C. *Permit Approval*

Under the initiative there are three types of permits and two procedural systems. An applicant may seek a regular, administrative,[75] or emergency[76] permit. Regular permits may be granted individually after a public hearing[77] or on a consent calendar.[78] The substantive criteria for the denial of permits are well defined, while the approval of permits is within the relevant commission's discretion. The core of the initiative's permit system is the restricted eligibility for a permit, created by the requirement for certain findings by the regional commission.[79] The coastal initiative prohibits the granting of any permit unless the regional commission has first found that "the development will not have any substantial adverse environmental or ecological effect" and that "the development is consistent with the findings and declarations set forth in section 27001 and with the objectives set forth in section 27302."[80] The applicant has the burden of proof on these and all other issues.[81]

Even if an applicant establishes that his development meets these requirements, he must overcome the coastal initiative's voting provisions. To secure a permit the initiative requires a majority vote of the authorized membership of the commission.[82] This provision weighs against the granting of closely contested permits, since a commissioner's absence is an automatic "no" vote. Two-thirds of the members of the regional or state commission

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zoning regulations in force on January 1, 1972. CAL. PUB. RES. CODE § 27104(c) (West Supp. 1974). This section of the statute has been used by several northern cities. Telephone interview with Peter M. Douglas, consultant to the Assembly Select Comm. on Coastal Zone Resources, Mar. 1, 1974.

74 *Id.*

75 *Id.* § 27422.

76 *Id.*

77 See part V(D)(1) *infra.*

78 See part V(C) *infra.*

79 CAL. PUB. RES. CODE § 27402 (West Supp. 1974).

80 *Id.* For the relevant language of §§ 27001 and 27302, see text at notes 25 and 48 *supra*, respectively.

81 *Id.* § 27402 (West Supp. 1974).

82 *Id.* § 27400.

must approve any development involving dredging, filling, or other altering of a bay, estuary, salt marsh, river mouth, or lagoon; reduction of beach or other public access to tidal lands, beaches, or the ocean; interference with the line of sight to the sea[83] from the state highway nearest the coast; or adverse effect on water quality, sport fishing, agricultural uses, or areas of open water free from visible structures.[84]

Permits which are approved may be conditioned to further the coastal initiative's objectives or to improve the public use of the coastal zone.[85] The statutory language requires reasonable terms and conditions to ensure four specific categories of results. First, conditions should "increase, to the maximum extent possible by appropriate dedication," access to publicly owned beaches, recreation areas, and natural reserves.[86] Second, conditions should seek to guarantee the reservation of "adequate and properly located public recreation areas and wildlife preserves."[87] Third, provisions to minimize adverse effects on coastal resources through "solid and liquid waste treatment, disposition, and management" are proper.[88] Finally, conditions should ensure that alteration of land forms and vegetation or the construction of structures "shall cause minimum adverse effect to scenic resources" and the smallest possible danger of "floods, landslides, erosion, siltation, or earthquake failure."[89]

83 For the term's precise definition see CAL. PUB. RES. CODE § 27106 (West Supp. 1974).

84 CAL. PUB. RES. CODE § 27400 (West Supp. 1974). See text at notes 247-49 *infra*.

85 *Id.* § 27403. The commissioners have employed their conditioning powers for widely differing purposes. A lifeguard headquarters on a Los Angeles County beach was required to be constructed with louvered windows, The Coastline Letter, No. 16, at 7 (1973); the new city hall of a beautiful beach city was required to have windows that opened instead of the air-conditioned design submitted, The Coastline Letter, No. 15, at 8 (1973); an apartment house was not permitted to use artificial landscaping, The Coastline Letter, No. 16, at 3 (1973); a developer accepted a condition that he provide low cost housing for elderly persons in some of his units for at least 10 years at a fixed low rental (in return for commission approval of higher-than-usual project density), The Coastline Letter, No. 17, at 1-2 (1973).

86 A standard condition for beachfront projects requires dedication of a maximum 25-foot lateral easement above the mean high tide line. *See* CAL. PUB. RES. CODE § 27403(a) (West Supp. 1974).

87 *Id.* § 27403(b).

88 *Id.* § 27403(c). The South Coast commission has imposed, with CCZCC approval, conditions of higher quality than those required by water and air quality agencies. *See, e.g.*, Los Angeles Times, Aug. 9, 1973, § 2, at 1, col. 2.

89 CAL. PUB. RES. CODE § 27403(d) (West Supp. 1974).

D. *Enforcement*

The commissions as a group are faced with a large volume of permit applications, a strenuous planning schedule, and an extremely limited staff; consequently the commissions cannot hope to effectively police the entire 1100-mile permit area for potential violators.[90] Enforcement of the coastal initiative's provisions is therefore encouraged by a combination of heavy penalties and the absence of any standing requirement for citizen enforcement. Violators of any provision of the coastal initiative are subject to a $10,000 fine,[91] and any development which continues in violation is subject to fines of $500 per day.[92] The initiative envisions citizen enforcement through the courts, allowing "any person" to sue for declaratory or equitable relief[93] or to enforce civil penalties.[94] The coastal initiative also provides that the prevailing party shall recover his costs, including reasonable attorney's fees.[95]

A final enforcement provision provides that actions under the initiative shall be "in addition to any other remedies available at law."[96] This leaves open the possibility of actions under the California Environmental Quality Act of 1970[97] or common law actions such as nuisance or public trust actions[98] to preserve rights in present or former tideland areas. Furthermore, the concerned citizen can always report a violation to a commission or to the California Attorney General, who has independent authority to take legal action.[99]

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90 *See* Douglas, *supra* note 5, at 20-21.

91 CAL. PUB. RES. CODE § 27500 (West Supp. 1974).

92 *Id.* § 27501.

93 *Id.* § 27425.

94 *Id.* § 27426.

95 See text accompanying notes 272-75 *infra.*

96 CAL. PUB. RES. CODE § 27427 (West Supp. 1974).

97 CAL. PUB. RES. CODE §§ 21000-151 (West Supp. 1974). For an analysis of the coastal initiative and the California Environmental Quality Act, see Winters, *Environmentally Sensitive Land Use Regulation in California,* 10 SAN DIEGO L. REV. 693 (1973).

98 *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 524-46 (1970).

99 The Attorney General is empowered to "maintain an action for equitable relief in the name of the people . . . against any person for the protection of the natural resources of the state from pollution, impairment, or destruction." CAL. GOV'T CODE § 12607 (West Supp. 1974). He is further authorized to intervene in any

V. The Permit Process

Since a determination that a developer has acquired vested rights exempts him from the permit procedure,[100] the nature of the requisite vesting is crucial. The test enunciated by the Supreme Court of California is whether the applicant performed substantial lawful construction on a project before February 1, 1973.[101] If an applicant feels he has acquired vested rights he applies to the regional commission for an exemption. Otherwise, he must seek some type of permit from the regional commission. But before he can do that, an appilcant must apply for all city and county permits required by law[102] and must have received at least "approval in concept" from each local entity involved.[103] Local governments must notify the regional commission in writing of each application filed and each permit issued for the coastal permit area, including a description of the contents of the local application, the conditions attached and the reasons therefor, and any information or comments deemed pertinent by local officials.[104]

Once an applicant has complied with the precondition of local "approval in concept" he may apply for a regional commission

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judicial or administrative action "in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally." *Id.* § 12606. Since natural resources are defined to include, *inter alia*, land, water, air, vegetation, wildlife, silence, or "any other [thing] . . . which . . . contributes to the . . . enjoyment of a substantial number of persons," *id.* § 12605, it is manifest that this power is broad enough to encompass any action involving coastal uses and the coastal initiative.

The statute which created this authority added a section to the Code of Civil Procedure requiring that the Attorney General be served with copies of any pleadings in any action which seeks more than monetary relief and which alleges facts or issues concerning adverse environmental effects which could affect the public generally. Cal. Civ. Pro. Code § 389.6 (West Supp. 1974).

100 *See* text at notes 70 *supra* and 218-22 *infra*.

101 San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

102 CCZCC Regs § 13210.

103 "Approval in concept" means that the applicant has received local approval for at least the general site and grading plans (including roads and shoreline access), required zoning changes or variances, dredging or filling, environmental impact reports, special or conditional use permits, planned unit residential developments, and types and intensity of uses. *Id.* § 13211. Such approval must be final and not subject to rejection in principle absent substantial alteration in the nature of the proposed development. *Id.* § 13210.

104 *Id.* §§ 13220, 13222.

permit. The application briefly describes the requirements of the coastal initiative and then asks general questions concerning the major statutory criteria on which the commission must make findings and base a decision.[105] The applicant is asked to describe his legal interest in each parcel of property involved in the project[106] and to explain whether the project is consistent with the required findings. A description of the land and water in the project's vicinity must be included to enable the regional commission to be "adequately informed as to both present uses and [likely] future public and private plans."[107] The entire application must be sworn under oath subject to the penalties for perjury.[108]

A. *Administrative Permits*

In addition to regular permits, two special types of permit and one expedited procedure are available to applicants. "Administrative" permits are available for work on existing structures when that work is not over $25,000 and for new development up to a maximum of $10,000.[109] Persons qualifying under this section must obtain a permit, but it is obtained via an expedited procedure.[110] The grant of an administrative permit is discretionary. The statute provides that the commission "shall provide, by regulation, for the issuance" of permits in the specified cate-

105 *E.g.*, questions from the standard permit application:
"Does the development involve dredging . . . ?"
"Would the development reduce the size of any beach or other area usable for public recreation?"
"Would the development substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast?"
"Would the development affect any area that could be used for public recreation or as a wildlife preserve?"

106 CCZCC Regs § 13240.

107 *Id.* § 13232.

108 *Id.* § 13241.

109 CAL. PUB. RES. CODE § 27422 (West Supp. 1974).

110 Upon receipt of the application the executive director accepts or returns the application as unqualified for an administrative permit. CCZCC Regs § 13430. He notifies and consults with interested agencies or other persons at his discretion, *id.* § 13411(b), and applies the same criteria for granting permits that govern applications before the regional commission, including the appropriateness of attaching terms and conditions, *id.* § 13420(a), and makes a decision whether or not to issue the permit. There are no waiting periods comparable to those for regular permits.

gories by the executive directors.[111] The commission regulations state that when an applicant is within the categories of the statute the particular executive director "may approve" the application.[112] If the application is denied, the executive director must promptly notify the applicant and explain the denial.[113] The applicant may then appeal to the regional commission by applying under the normal permit procedures.[114]

At least a week before each meeting the executive director must file with the regional commission a summary report[115] of all the administrative permits he has granted since the last report. Such a report is also sent to "all persons and organizations wishing to receive such notification."[116] The administrative permit is not effective until the close of the meeting at which it was reported.[117] Until then any two commissioners may deny it effectiveness, and it is then treated as an ordinary application.[118]

B. *Emergency Permits*

The second special permit deals with "a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property or essential public services."[119] Applications are made to the executive director by letter, telephone, or in person[120] and must include notice of the nature and location of the emergency and the work to be performed.[121] Time permitting, the executive director must verify the stated facts[122] and then consult with the chairman of the

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111 CAL. PUB. RES. CODE § 27422 (West Supp. 1974).

112 CCZCC Regs § 13420. The virtue of the administrative permit is its speed and inexpensiveness (counsel is not retained to appear at a hearing as with normal permits), not its certainty.

113 *Id.* § 13431.

114 *Id.* § 13432.

115 *Id.* § 13440.

116 *Id.*

117 CAL. PUB. RES. CODE § 27422 (West Supp. 1974).

118 *Id.*

119 CCZCC Regs § 13010. Governmental agencies and public utilities are entitled to act to protect life or property or to maintain service without any compliance with the procedures for emergency permits. However, such agencies and utilities are expected to comply to the maximum extent feasible with the established emergency permit procedures of the commissions. *Id.* § 13460.

120 *Id.* § 13470.

121 *Id.* § 13471.

122 *Id.* § 13480.

regional commission.[123] Emergency permits "may" be granted by the director,[124] but only if he finds that an emergency exists requiring more rapid action than possible under administrative or regular permits[125] and that the action proposed "would be consistent with the policies of the Coastal Zone Conservation Act."[126] The permittee must file a descriptive report of the work with the executive director[127] within five days of receiving the permit. The executive director must report to the regional commission the permits he issues with a description of the circumstances and work authorized.[128]

C. *Consent Calendar*

Under its regulations[129] the state commission has created an abbreviated procedure called the consent calendar. The procedure was not specified by the Coastal Zone Conservation Act. All applications which an executive director believes to be "*de minimis* with respect to the purposes and objectives" of the coastal initiative may be scheduled by the director for a public hearing[130] where "all included items shall be considered by the Regional Commission as if they cumulatively constituted a single permit application."[131] The procedures for consent calendar permits are supposed to be the same as for normal permit applications, with merely an abbreviated hearing process. In practice the system means that valuable staff time is spent reviewing applications which receive negligible scrutiny by the commissions. This raises severe questions concerning major circumvention of the provisions of the coastal initiative.[132]

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123 *Id.* § 13481.

124 *Id.* § 13482.

125 *Id.* § 13482(a).

126 *Id* § 13482(b). The restrictive nature of this requirement is evidenced by the comparatively small number of these permits being issued.

127 *Id.* § 13483.

128 *Id.* §§ 13280(d), 13484.

129 "The Commission shall prescribe the procedures for permit applications and their appeal." CAL. PUB. RES. CODE § 27420 (West Supp. 1974).

130 CCZCC Regs § 13350.

131 *Id.* § 13351.

132 Some regions have made extremely heavy use of the consent calendar device. *See* text at note 228 *infra*.

D. *Standard Permits*

Projects whose scope or impact on coastal resources is sufficiently large to preclude use of the consent calendar or administrative permit procedure and which cannot qualify for an emergency approval must comply with the procedures for obtaining a standard coastal development permit. Applications which are properly drawn,[133] meet the preconditions of local "approval in concept,"[134] and are accompanied by the requisite filing fee[135] are deemed filed with the regional commission.[136] Regional commissions must give written public notice of the nature of a proposed development and the time and place of a public hearing on the matter.[137] The hearing must be scheduled for a date at least 21 but no more than 90 days after the application was accepted for filing.[138]

For each application the executive director must prepare a summary, which "shall be brief and understandable, and shall fairly present the gist of the application, using the applicant's words wherever appropriate."[139] Staff comments on questions of

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133 All questions must be answered in sufficient detail and necessary maps attached before an application is complete. CCZCC Regs § 13274.

134 *See* note 103 *supra.*

135 These are authorized by CAL. PUB. RES. CODE § 27420(a), and CCZCC regulations now require $25 for administrative, $50 for consent, and $250 for public hearing permits. CCZCC Regs § 13260.

136 Improperly drawn applications are returned to the applicant as insufficient. *Id.* §§ 13273-74.

137 CAL. PUB. RES. CODE § 27420(b) (West Supp. 1974). Some regional commissions have reportedly ignored this provision:

> Four of the regional commissions report that they are following this rule and are publishing notices in local newspapers. However, San Diego Commissioners stopped doing so, they said, because they thought it was a waste of money, and the South Coast Commission — the Los Angeles-Orange County panel — has thus far failed to publish a single notice of hearings.

Adler & Bishop, *One View of the Coastline Commissions: They're Failing the Electorate,* Los Angeles Times, Apr. 18, 1973, § 2, at 7, col. 1 [hereinafter cited as Adler & Bishop].

138 CAL. PUB. RES. CODE § 27420(b) (West Supp. 1974). Several developers whose applications were not heard within the statutory period brought actions alleging the commissions had lost jurisdiction over their projects. The lower courts have denied these claims, noting that the proper action is one to compel the regional commission to hear the application. *See, e.g.,* Slanker v. South Coast Regional Comm'n, No. C 60435 (Los Angeles Super. Ct., Aug. 2, 1973); Los Angeles Times, Aug. 3, 1973, § 1, at 2, col. 5. Such a move would present tactical problems, so that developers whose applications are not heard within 90 days usually do nothing.

139 CCZCC Regs § 13280.

fact, applications of Coastal Zone Conservation Act policy, related previous applications, and other important facts are attached to the summary,[140] but distinguished from it. Also included, if formulated, may be an initial staff recommendation for commission action.[141] The summary, staff comments, and any maps or drawings furnished by the applicant or staff are circulated by mail to all regional commissioners, the applicant, and "all affected cities and counties . . . within a reasonable time to assure adequate notification prior to the scheduled public hearing."[142] The same material "shall be made available"[143] to all known affected owners of neighboring property and to all other individuals and organizations thought to have a particular interest in the application.[144]

The executive director must reproduce and distribute to the commissioners the text of all public comments on an application received at any time before the hearing or final vote is taken.[145] These reproductions must be made available to all other interested parties in the commission offices.[146]

The regulations of the state commission seek in a variety of other ways[147] to expand the opportunities for knowledgeable public participation. Requirements for notice and public hearings abound in the regulations; liberal recording procedures facilitate effective press coverage.[148]

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140 *Id.*

141 *Id.*

142 *Id.* § 13281.

143 *Id.*

144 *Id.* New commission regulations require the applicant to post a notice of the submission of a permit application on the site of the proposed development when he submits his application. *Id.* § 13250(d). The applicant must also furnish the regional commission a stamped envelope addressed to each property owner of record with property within 1000 feet of any boundary of the proposed development, so that the commission may notify those persons. *Id.* § 13250(c).

145 *Id.* § 13290. If an application has produced a large response the executive director may eliminate the text of individual messages and merely list the names and addresses of all those communicating with the commission and the substance of their views. *Id.* § 13291.

146 *Id.* § 13290.

147 *E.g.*, "The Commission . . . shall not vote upon substantive or policy matter of general importance . . . of which adequate descriptive notice has not been given as part of the required notice of the meeting." *Id.* § 13154.

148 Each commission meeting is electronically recorded. These tapes are open for public inspection and are retained at least one year. *Id.* § 13155. The commissions must also keep complete minutes of their meetings and make them available to the public. *Id.* §§ 13156(a), 13302(c).

1. The Public Hearing

At the public hearing the permit applicant makes a presentation of his project, if he "wishes to expand" on the application.[149] Faced with swollen dockets and marathon meetings,[150] the commissions tend to strictly curtail presentation time. After the applicant's presentation "any person wishing to speak to an application shall be heard," until the commission has allowed "a reasonable opportunity to present all questions and points of view."[151] Additional arguments and rebuttals to other speakers are submitted in writing for circulation to the commissioners.[152] The commissioners may ask follow-up questions of any applicant at the meeting following the public hearing on his proposal.[153] The commission need not conduct the hearing according to evidentiary rules and may consider any serious and relevant material.[154] In extraordinary cases a commission may even take a field trip to the site of the proposed activity.[155]

2. Role of the Executive Director

After an application's public hearing the executive director is required to undertake whatever research, consultations, or investigations may be needed to answer questions and prepare recommendations.[156] He may pose further inquiries to the applicant and report any recalcitrance to the commissioners.[157] Any new evidence is circulated to the applicant and all interested parties.[158]

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149 *Id.* § 13302(a)(2).

150 The South Coast commission's weekly meetings often exceed 12 hours in length. *See* Bodovitz, *supra* note 3, at 3; Los Angeles Times, July 23, 1973, § 2, at 1, col. 5.

151 CCZCC Regs § 13304(a).

152 *Id.* § 13304(c).

153 *Id.* § 13305.

154 Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil action. Unduly repetitious or irrelevant evidence shall be excluded.

Id. § 13301.

155 *Id.* § 13310.

156 *Id.* § 13330(a).

157 *Id.* § 13330(b).

158 *Id.* § 13330(a).

The application is then scheduled for further hearing and voting.[159] The executive director must furnish an analytical report, usually written, to the commissioners in an open meeting. This report usually describes unanswered questions and must include a recommendation for action.[160] After this presentation the applicant may "briefly and specifically" state his views on the recommendations or may postpone his statement and commission action until the next meeting to prepare a response.[161]

3. Developer Tactics

If it appears to an applicant that his application will be denied, he may employ either of two tactical devices. He may withdraw his application without commission concurrence.[162] This step requires him to start the entire process over or give up completely. The alternative to withdrawal is removal from active consideration. This ploy allows the surprised, nervous, or inspiration-struck[163] applicant to postpone commission action. The removed application can only be reconsidered after the developer requests a new hearing.[164] Each applicant may remove once without commission concurrence.[165] Additional removals may be obtained with the concurrence of the regional commission or its executive director.[166] The applicant must carefully balance his apprehensions of adverse commission action against his holding costs on land and interest and the negative community impression multiple removals may generate.

4. Approvals and Denials

Voting on permits must occur within 60 days after the public hearing.[167] This is normally done at the meeting following the

159 *See* text at notes 167-69 *infra.*
160 CCZCC Regs §§ 13330(c)(d).
161 *Id.* § 13342.
162 *Id.* § 13321(a). Withdrawal must also be in writing. *Id.* § 13321(b).
163 One southern California developer described his decision to reduce a proposed 10-story multiunit housing development to only three stories as the product of a revelation in the night, coincidentally experienced after a bruising public hearing.
164 CCZCC Regs § 13321(c). This hearing must be scheduled for a date at least 21 but no more than 90 days after the request.
165 *Id.* § 13321(d).
166 *Id.*
167 CAL. PUB. RES. CODE § 27420(c) (West Supp. 1974).

hearing.[168] But if the executive director's report has been distributed prior to the hearing and adequate public notice was given, then on the executive director's recommendation the permit may be voted on immediately after the public hearing.[169] To help commissioners decide how close a vote is likely to be, and therefore the impact of absent members, the commission may take straw votes when the chairman determines this will facilitate consideration of the application.[170] Final voting is by roll call, with the chairman voting last.[171] Commissioners absent from an application's public hearing may vote on it if they have had an opportunity to familiarize themselves with the hearing presentations and the materials submitted to the commission.[172]

When a regional commission votes to grant an application and no appeal is taken, the executive director must sign and mail the permit within 10 working days.[173] The permit is a standard form, which must include a statement of the reasons for approval, any clarifications by the regional commission, and various standard provisions.[174] The permit is also accompanied by an acknowledgment and notice of receipt, which the permittee must return to indicate knowing assent to the terms of the permit.[175]

The granting of and compliance with a permit ends the permittee's odyssey through the coastal zone commissions; noncompliance raises further problems. Violation of the terms of a permit is grounds for its revocation.[176] Unless negotiations can resolve the problem, the executive director must refer any actual or threatened violation to the Attorney General to seek penalties or obtain equitable relief.[177]

5. Appeals

Denial of a permit or appeal of a regional commission's approval triggers the initiative's appeal process. "An applicant, or any

168 CCZCC Regs § 13341(a).
169 *Id.* § 13341(b).
170 *Id.* § 13344.
171 *Id.* § 13345.
172 *Id.* § 13347.
173 *Id.* § 13520.
174 *Id.* § 13500.
175 *Id.* § 13510.
176 *Id.* § 13621.
177 *Id.*

person aggrieved by approval of a permit by the regional commission, may appeal to the [state] commission."[178] The regulations amplify the right to appeal by providing that any applicant whose project was denied or who objects to conditions imposed and any person "aggrieved"[179] by the grant of a permit may bring an appeal within 10 working days of action by a regional commission.[180]

The appellate jurisdiction of the CCZCC is entirely discretionary, for "[t]he Commission may decline to hear appeals which it determines raise no substantial issues."[181] Such a determination must be made by an affirmative vote of a majority of the commission members.[182] The executive director of the state commission describes the criteria used for this determination as these four questions:

> 1) Was there ample, factual basis for the regional commission decision?
> 2) Was there egregious procedural error which, if corrected, would lead to a different decision?[183]
> 3) Is there a statewide issue?
> 4) Is there a planning issue at stake?[184]

If the state board decides to hear the appeal, it must hold a *de novo* public hearing and decide the case "in the same manner and by the same vote" as required for the regional commission decision.[185] In other words, an applicant must be able to satisfy

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178 CAL. PUB. RES. CODE § 27423 (West Supp. 1974).

179 A person is "aggrieved" . . . only if he or she is dissatisfied with a determination of a Regional Commission, *and* he and his or she and her representative opposed the application on which the Regional Commission determination was made in person at the public hearing or by letter or other appropriate means suitable to inform the Commission of the nature of the opposition, or would have opposed the application but for good cause were unable to do so. Such a person need not be a resident of the county in which the development is proposed.

CCZCC Regs § 13903.

180 CCZCC Regs § 13900. If appellants do not notify all parties known to have an interest in the application, the appeal may be dismissed. *Id.* § 13911.

181 CAL. PUB. RES. CODE § 27423(c) (West Supp. 1974).

182 CCZCC Regs § 13920.

183 *E.g.*, applying the majority vote standard instead of the two-thirds requirement.

184 The Coastline Letter, No. 16, at 13 (1973).

185 CAL. PUB. RES. CODE § 27423(c) (West Supp. 1974).

the coastal initiative's mandatory findings and must receive at least a majority vote of the state commission's membership[186] — and perhaps two-thirds[187] — to survive an appeal. Failure of the commission to act within 60 days after the notice of appeal is filed affirms regional action.[188] The commission may also modify or reverse the regional commission's decision. Action by the state commission concludes the operation of the coastal permit system.[189] Any person aggrieved by action of the state or a regional commission has a right to judicial review by filing a writ of mandate within 60 days.[190]

VI. The Planning Process in Operation

Pursuant to its statutory mandate to set guidelines, criteria, and objectives for the planning process, the CCZCC has decided to fulfill its planning responsibilities by adopting distinct policy decisions on a number of important issues. The commission's list of individual issues, or "elements," covers essentially the same items[191] as the statutory plan components, but represents an approach different from prior California planning. The executive director of the state commission has explained the philosophy behind the new approach:

> [O]ne of the lessons from much of the land and water planning of recent years is that comprehensive plans with their long summaries and multiple appendices are rarely understood by the public and infrequently adopted by the

186 *Id.* § 27400. This is the greatest antidevelopment factor in the coastal initiative. The applicant must receive at least seven affirmative votes out of the authorized membership of 12 to sustain a permit. Hence, a 6 to 5 vote in favor of confirming a regional commission permit will reverse that permit and result in a denial.

187 *Id.* § 27401.

188 Cal. Pub. Res. Code § 27423(b) (West Supp. 1974).

189 However, any amendment of a permit or application necessitates starting the process anew, even after an appeal to the CCZCC. CCZCC Regs § 13610.

190 Cal. Pub. Res. Code § 27424 (West Supp. 1974).

191 *Compare* California Coastal Zone Conservation Comm'n, staff memorandum to regional executive directors and staffs on a detailed planning time table, June 25, 1973, at 4 (on file with *Harvard Journal on Legislation*) with Cal. Pub. Res. Code § 27304(c) (West Supp. 1974). The order in which the CCZCC placed the issues leaves the more difficult ones, such as power plant design and siting, intensity of development, and government organization and powers, to be decided last.

> decisionmakers. So necessity virtually dictates that effective planning be done one element at a time. This approach enables tentative decisions to be developed, subject to further review as additional elements are considered.[192]

The state commission staff is presently in the process of issuing policy statements on each "element" by defining the issue and the nature of the statewide interest in the problem. In order to modify the policies to satisfy regional needs, each regional commission is consulting with local governments and holding public hearings.[193]

A. *Fragmented Treatment of Interrelated Problems*

This elemental approach provides a sharper focus on each major issue concerning coastal land and water use, but also embodies a fragmented treatment of these interrelated subjects. For instance, the intensity of residential development in the beach areas is closely related to the coastal transportation system. If automobiles and parking lots are the primary components of a transportation system, then the constraints of highway view, adequate parking, and street capacity in beach areas will be important in formulating housing policies. If these facilities are inadequate, then housing policy may have to permit intense residential development in areas near beaches so that people will have access to the coast by living near it. Conversely, if a system of trams is available, it would be feasible to ban massive housing projects on the coast and insist on higher quality structures, aesthetic requirements, multiple off-street parking, and higher air and water quality standards. Though such development would be expensive and restricted to higher income persons, the existence of an efficient means of transportation and ease of access to the ocean for those living inland would alleviate the hardship of the building restrictions.

Early plan elements may therefore be crucial in the formulation of later, more controversial elements in ways which may not have been adequately considered in the initial formulation.[194] Ironic-

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192 Bodovitz, *supra* note 3, at 7-8.

193 CCZCC Minutes, meeting of Jan. 9, 1974, at 9.

194 *Cf.* Bodovitz, *supra* note 3, at 9. The CCZCC's adopted procedure now envisions doing the simple plan elements first, then the more difficult ones. This runs

ally, this isolated approach to land use problems was precisely what caused the environmental crisis. These problems can be minimized as long as they are kept in mind by the commissioners and public in the course of the planning process. Though it is too early to assess the results of this approach, it is worth noting that a similar process was successfully implemented, albeit on a much smaller scale, with BCDC.[195]

B. *Pursuit of Policy Decision*

A far more striking difference between the coastal initiative's planning process and previous governmental studies is the pursuit of policy decisions themselves, rather than the accumulation of data and assessment of alternatives. Though the initiative provides that the coastal plan "shall be based upon detailed studies of all the factors that significantly affect the coastal zone,"[196] it does not require the commission to undertake comprehensive studies. The coastal initiative seems to contemplate using the previous studies as planning data by requiring that all elements of the COAP[197] and any staff or funds allocated to it be transferred to the state commission at its first meeting.[198] This emphasis on policy decisions is embedded in the initiative, which requires the plan to contain "planning principles and assumptions to be used in determining the suitability and extent of . . . development,"[199] and similarly commands the inclusion of recommended "government policies."[200]

The most serious problem with formulating a plan through the use of broad, general policies is the danger that the adopted policies will be so vague or loaded with qualifications that they will not sufficiently regulate local decisions. Broad policies interpreted

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the risk of having solutions to easy or less important issues constrain the range of choice for the later, more explosive issues. "What they're liable to end up with is a statewide plan which everybody has some reason to oppose." Dr. Robert F. Rooney, former chairman, South Coast regional commission, quoted in The Coastline Letter, No. 13, at 4 (1973).

195 Bodovitz, *supra* note 3, at 8.

196 CAL. PUB. RES. CODE § 27301 (West Supp. 1974).

197 *See* CALIFORNIA RESOURCES AGENCY, COMPREHENSIVE OCEAN AREA PLAN (1972).

198 CAL. PUB. RES. CODE § 27242 (West Supp. 1974).

199 *Id.* § 27304(b).

200 *Id.* § 27304(e).

and applied locally (whether by cities or regions) may effectively produce the same conditions for continuing massive manmade degredation of the coast as existed before the initiative. Thick studies with intricate graphics may well be ineffective instruments for planning, but broad banners under which everyone can march may be worse than nothing at all. Nevertheless, the basic attempt to establish a set of policies for legislative enactment is a valuable approach for three reasons. First, it will focus debate directly on the issues confronting the state in coastal policy, so that public feeling may be more clearly ascertained by legislators. Second, whatever governmental structure is created to manage the coast permanently will do so without a further lengthy period of policy formulation. Third, clear policies will make any future agency more clearly subject to public accountability if it ignores the plan.

C. *Non-Self-Implementing Nature of the Plan*

Because the plan must be approved by the legislature in 1976 to have any effect, the commissions may be tempted to draft an overly general plan to secure wider legislative support. The history of attempts to enact coastal land controls demonstrates quite clearly the potent opposition which the coastal plan can expect in the legislature from utilities, oil companies, and land developers.[201] Adopting 12 or 13 sets of policies unfortunately multiplies the potential sets of disappointed "losers" over coastal policy. Faced with this prospect, the commissioners may be eager to produce as few opponents as possible by the planning policies. The broad policy statement necessary to win political support in the 1976 legislature must be counterbalanced by the prospect of a successfully enacted plan so general as to be useless. The coastal initiative's emphasis on public hearings is one response to this dilemma.

Extensive public involvement has been implicit in Proposition 20 since the beginning of the drive to collect the nearly 500,000 signatures needed to place the initiative on the ballot.[202] Active public participation in the planning process through frequent public hearings should strengthen this involvement and help guar-

201 *See generally* Adams, *supra* note 4.

202 CAL. CONST. art. IV, § 22(b); Douglas, *supra* note 5, at 3.

antee strong public support for the finished product. Such public support is necessary to create permanent statewide coastal controls over strong opposition.[203] The experience of BCDC[204] is a useful indication of the results of widespread public participation in the planning process.[205] When final legislative consideration began for BCDC, weak substitute legislation was proposed in Sacramento which would have eviscerated regional controls. At least partly because the public had been so extensively involved in the preparation of the permanent BCDC planning policies a massive outpouring of public support pushed the regional plan to enactment in Sacramento.[206]

D. *Statewide Planning*

The individual elements will not only be addressed as policy issues but will be considered on a statewide basis. The coastal initiative does not specify the division of responsibilities between state and region in the permanent plan. Careful analysis is needed to determine the suitability of the various potential systems, such as plenary state control, state review of regional operative responsibility, or local control within state mandated geographic use zones.[207] None of these alternatives, or any other combination of regional responsibility and state appellate scrutiny, is foreclosed by the initiative. Section 27304 calls for a determination of the "government agency or agencies" which will assume permanent control. A system of autonomous regional entities would fit within this definition, as long as the public interest in the coastal zone was defined[208] and such regional or local entities were provided with sufficient "governmental policies and powers" to implement coastal management controls.[209]

The thrust of the coastal initiative, however, and the under-

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203 Bodovitz, *supra* note 3, at 9-10.

204 CAL. GOV'T CODE § 66600-61 (West Supp. 1974).

205 Bodovitz, *supra* note 3, at 8.

206 *See* R. ODELL, THE SAVING OF SAN FRANCISCO BAY (1972); Note, *Saving San Francisco Bay: A Case Study in Environmental Legislation*, 23 STAN. L. REV. 349, 366 (1971).

207 *See* Note, *Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning*, 49 N. CAR. L. REV. 866 (1971).

208 CAL. PUB. RES. CODE § 27304(a) (West Supp. 1974).

209 *Id.* § 27304(e).

lying problems inherent in local control over coastal development argue for a greater degree of statewide control over the permanent agencies to be created. Since the governmental policies required by the initiative are to be recommended by a statewide commission and since the initiative created a statewide commission which assumed primary responsibility for preparing the plan, the initiative seems to envision for the final plan plenary state control or at a minimum active review by a state agency.

Furthermore, to qualify for federal funds[210] and cooperation[211] under the Coastal Zone Management Act the eventual management agency would have to embody some form of direct state supervisory role. The Coastal Zone Management Act requires the Secretary of Commerce to find, prior to approving a state plan, that it utilizes any combination of the following state control techniques:

> (A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;
> (B) Direct state land and water use planning and regulation; or
> (C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.[212]

The Coastal Zone Management Act requires a state coastal plan to provide for an even thornier situation. A mechanism must be established for a region to enforce its overall plan in a particular location even against the wishes of local officials.[213]

Finally, the local inadequacies which created the need for the coastal initiative indicate the need for strong statewide responsibilities. Certainly regional controls would be an improvement over strictly local responsibility. However, regional controls would reduce but not eliminate the conflict in coastal use policies.

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210 Coastal Zone Management Act §§ 305-06, 16 U.S.C. §§ 1454-55 (Supp. II, 1972).
211 *Id.* § 307(c), 16 U.S.C. § 1456(c).
212 *Id.* § 306(e)(1), 16 U.S.C. § 1455(e)(1).
213 *Id.* § 306(e)(2), 16 U.S.C. § 1455(c)(2).

This conflict may lead to mismanagement or destruction of precious coastal resources which are of statewide, not merely regional or local, significance. This need was enunciated by the Stratton Commission, which stated:

> An agency of the *State* is needed with sufficient planning and regulatory authority to manage coastal areas effectively and to resolve problems of competing uses . . . . [S]trong state organization is essential to surmount special local interests, to assist local agencies in solving common problems, and to effect strong interstate cooperation.[214]

The resolution of this debate over the proper combination of state and regional responsibilities is extremely important for the legislative acceptability and workability of the final plan. The eventual strength of local and regional support for statewide management will be decisive for the plan in the 1976 legislature and for the effective operation of statewide controls if they are adopted. State control is the most desirable solution for the problems of coastal zone management, but it should be accomplished without excluding strong regional participation in the regulatory system.

Public discussions of a state plan to date have concentrated on state or regional power to prohibit particular developments which are seen as destructive of local environments. The process of obtaining the necessary permits is extremely lengthy for many of the major high intensity uses of coastal resources, such as power plants. If the final decision on land or water use permissibility does not come until the end of the process, terrible inefficiencies may result. A power plant may be needed somewhere, yet permits may be denied in several specific locations, with each new effort requiring repetition of the long permit procedures and preparation of new impact statements. This involves costs in time and money which are eventually passed on to the consumer. Hence, one of two possible provisions should be included in the coastal plan. One alternative is for the state to override local opposition and order the location of a regional facility such as a power plant.

214 U.S. COMMISSION ON MARINE SCIENCE, ENGINEERING & RESOURCES, OUR NATION AND THE SEA — A PLAN FOR NATIONAL ACTION 56-57 (1969) (emphasis added).

A second, far less politically explosive approach would be to allow major developers to secure an advisory ruling from both state and regional commissions on the acceptability of a particular site.[215] The utility or industry could then seek out the necessary local and other governmental approvals with the knowledge that further review of this project by state or regional coastal commissioners would be limited to the specific problems of project design and environmental impact. Unlike siting decisions, these factors can be modified without repeating the entire permit procedure.

VII. PERMIT CONTROLS IN OPERATION

A. *Early Problems*

Almost all significant development along the entire 1100-mile California coast must comply with the permit requirements. As a result the commissions were deluged with permit applications when they commenced operations. The permit requirements went into effect less than three months after the coastal initiative's passage. There was insufficient time to adequately assemble a staff, to prepare permit forms and procedures, and to secure office space. While still disorganized the commissions were faced with an enormous backlog of applications and whisked many through with only brief scrutiny.[216]

215 Recent changes in the commission regulations provide that the executive director may waive the requirement of prior local approval where the impact on coastal resources is a major issue in the decisions of other agencies, where particular state or local agencies specifically request prior commission consideration, or where commission project changes would require repetition of consideration by other governmental agencies. CCZCC Regs §§ 13210(b)-(d). This provision can help solve the problem of repetitious permit processes caused by adverse siting decisions at the end of long regulatory procedures. But holding a full commission hearing on both siting *and* project design will lock an applicant into a particular design before review by the relevant specialized agencies. Any design changes, or later adverse decisions by water or air quality boards, utility commissions, or health agencies, would then necessitate a second commission hearing, negating the advantages of a preliminary commission review for site suitability.

216 In the initial four months of permit authority (February 1 to June 1, 1973), 2,567 permit applications were filed with the regional commissions. They were able to act on only 1,420 applications, granting 1,392, denying 28, and leaving 1,147 pending on June 1, 1973. During this same period, the regional commissions received a total of 352 exemption claims and acted on 259, leaving 93 pending on June 1. Of the exemptions considered, 60 were denied and 199 were approved.

The commissions were also flooded with claims for exemptions from the coastal initiative. Since these claims are given priority,[217] they obstructed the permit and planning processes by preventing the commissions from reaching these issues until late in their meetings. Exemption claims were exhaustively debated before the commissions because of confused legal criteria. The coastal initiative exempted from the permit requirements those projects for which building permits had been secured "prior to the effective date" of the initiative and for which the developer had acquired vested rights.[218] The California Constitution makes the effective date of an initiative the day following its passage;[219] for the coastal initiative it was November 8, 1972. The initiative itself, however, declared April 1, 1972, the cutoff date for securing vested rights.[220]

Even though amended by the legislature to read November 8, the initiative left open the question of the need for a commission permit where the developer had a building permit issued between November 8, 1972, and February 1, 1973, the beginning date for the permit process. Developers claimed to be immune from permit requirements if they performed substantial work before February 1, while the commissions and the California Attorney General[221] said that November 8 was the cutoff date. The California Supreme Court finally resolved the dispute in favor of the developers in late August of 1973,[222] but not until the commissions had wasted a great amount of time debating exemptions. This experience with exemption claims has so far been the biggest debacle of the entire system.

Because the coastal initiative failed to establish clear standards

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Letter from Deputy Attorney General Dennis A. Antenore to Chief Justice Donald R. Wright, California Supreme Court, June 8, 1973. These statistics indicate that the commissions are more willing to deny an exemption than a permit, because a denied exemption may be resubmitted as a regular permit application.

217 CCZCC Regs § 13703.

218 CAL. PUB. RES. CODE § 27404 (West Supp. 1974). Vested rights are acquired by having begun construction, performed substantial work, and incurred substantial liabilities. *Id.*

219 CAL. CONST. art. IV, § 24(a).

220 California Coastal Zone Conservation Act § 27404, [1972] Cal. Stat. A-186.

221 56 OP. CAL. ATT'Y GEN. 200 (1973).

222 San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

the commissions haggled over exemptions instead of using their full life to plan the long-term use of the coast and to process and review interim permits. Fortunately the long exemption fight is largely over and the commissions have been able to face more substantive issues.

Despite the enormous volume of permits, the average turnaround time in the South Coast region[223] has been quite respectable and within the statutory period.[224] Action was taken on permits in the following percentages:[225]

no action	5.0 percent
less than 30 days	30.8 percent
30-59 days	36.0 percent
60-81 days	21.6 percent
over 90 days	6.6 percent

Unfortunately these figures are misleading, since they include the faster administrative, consent, and emergency permits. On actual public hearings the turnaround times averaged much longer:[226]

no action	10.8 percent
less than 30 days	3.3 percent
30-59 days	23.2 percent
60-81 days	40.1 percent
over 90 days	22.5 percent

Thus, almost one-fourth of all permit applications requiring a public hearing took longer than the statutory maximum of 90 days. While some of these matters were voluntarily extended

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223 The South Coast regional commission consists of heavily populated Los Angeles and Orange Counties. No single regional commission is representative of all the regional commissions because of the widely disparate coastal conditions. The South Coast region is atypical because of its intense urbanization, but study of this region does offer valuable insights into the practical operation of the California system of regulating coastal development. This is true because the commission has handled over 40 percent of the permits processed in the system, CCZCC, Tabulation of Statewide Permit Decisions, Dec. 1, 1973, and has therefore been exposed to the greatest range of problems. In addition, more information is available about the actions of this regional commission than of any other.

224 For the statutory period see text at note 138 *supra*.

225 Scorecard on Coastal Commision [*sic*] Permits, computer analysis of all South Coast regional permit actions as of Jan. 11, 1974, at 95 (prepared by the Office of Sea Grant Programs, University of Southern California) (on file with *Harvard Journal on Legislation*) [hereinafter cited as Scorecard].

226 *Id.*

beyond the 90-day period, many were undoubtedly delayed because of the crush of matters before this regional commission.[227] Significant costs are thus imposed on developers.

To cope with the broad scope of the coastal initiative and the huge number of permit applications the commissions have employed the expedited procedures too freely. Of all South Coast regional actions 21.9 percent were administrative permits, 51.4 percent were approved on the consent calendar, 0.7 percent were emergency permits, and 25.9 percent were granted after a public hearing.[228] In other words, 74.1 percent of all permits came as the result of procedures *other than* a public hearing. This violates the purposes of the coastal initiative, since huge numbers of applicants are subjected to the cost and delay of the permit procedures yet only perfunctory consideration is given to their cumulative impact on coastal resources.

Reconsideration by one of the regional commissions may result in the reopening of a denied permit for further action.[229] These rehearings are often scheduled ahead of permit applications which have not yet had an opportunity to be heard, and they often result in the grant of a permit, in a manner which defeats the coastal initiative's notice and hearing requirements.[230] Local opponents have no way of knowing under this procedure when a project they have successfully opposed will reappear.

Popular assessments of the actual impact of the coastal commissions vary widely. One prominent Los Angeles attorney states "the commission is nothing more than a glorified zoning board," while environmental attorneys lament that "the act may have to be renamed the 'Coastal Zone Construction Act.' "[231] Those critics argued that the regional commissions failed to quickly assemble efficient staffs with planning experience, were unable to cope with large backlogs of permit applications, failed to give adequate

227 The figures for permits that required public hearings were also heavily influenced by the high number of very slow actions in the early months. Permits are now being handled more expeditiously, but no figures are available to show the current average turnaround time.

228 Scorecard, *supra* note 225, at 18-19.

229 *See* The Coastline Letter, No. 7, at 6 (1973); *id.*, No. 10, at 9.

230 CAL. PUB. RES. CODE § 27224 (West Supp. 1974).

231 Adler & Bishop, *supra* note 137.

notice of meetings, had "little understanding" of the initiative's "conservation purposes," and "deferred excessively" to local zoning authorities.

B. *Denials*

1. Multiunit Housing

Between February 1, 1973, and December 1, 1973, the regional commissions granted 4,736 coastal permits and denied only 145.[232] This 97 percent approval rate indicates both that the commissions have approved vast amounts of coastal development and that their power or inclination to halt construction activity along the coast is not nearly as great as opponents feared. The commissions have been forced to be selective about the matters being vigorously regulated because of the large number of applicants and the joint responsibility to plan as well as regulate. Under these conditions multiunit residential projects have been the focus of the most heated permit contests. Those projects are particularly important in environmental terms because they most often would destroy open space and foreclose planning options for that land.[233] In those places where multiunit development does not consume open land it is likely to supplant single-family residence sites.[234] This changes community population density and raises the environmental impact of development.

Permits for multiunit residential projects have encountered stiff opposition and have often been denied. These projects accounted for 78.9 percent of all permit denials issued by the South Coast commission[235] through January 1, 1974, and a further 52.9 percent of withdrawals.[236] While no permits were denied for industrial, utility, dredging, or demolition applications, 60 multiunit residential applications were denied by this regional commission and another nine were withdrawn in the face of opposition.[237] Denials represented slightly over 10 percent of all deci-

232 CCZCC, Tabulation of Statewide Permit Decisions, Dec. 1, 1973.

233 Scorecard, *supra* note 225, at 83-84. In the South Coast region, 59.2 percent of all multiunit projects were proposed for vacant or open space land.

234 In the South Coast region, 25.1 percent of all multiunit projects would utilize property previously devoted to single-family housing. *Id.*

235 *Id.* at 81.

236 *Id.*

237 *Id.*

sions on multiunit applications by the South Coast Commission.[238] In terms of numbers of actual housing units the facts are even more striking: this regional commission denied permits for approximately 27 percent[239] of all proposed housing units almost entirely by denying approval for these 60 multiunit projects. All but four units of these denials were for proposed multiunit projects.[240] Thus, overall percentage rates of permit approvals and denials may not provide an adequately sophisticated reflection of the commission's effects.

2. Commercial Projects

Commercial projects represented another major source of denials in the South Coast region, where they formed 13.2 percent of all permit rejections.[241] Here percentage numbers are particularly irrelevant. The denial of a permit for a shopping center may be more important for coastal conservation than the approval of a large number of single stores or restaurants. Indeed, the South Coast commission has rejected several shopping centers proposed for the permit area and seems to be evolving a policy against such development as an inappropriate use of precious coastal land resources.[242]

3. State Commission Reversals

The statistics on regional permit grants do not reflect the number of approvals which have been overturned by the state commission.[243] While comprehensive figures are unavailable on the cumulative nature of state denials, the effect is certainly large.

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238 *Id.*

239 *Id.* at 99-100.

240 Scorecard, *supra* note 225, at 81.

241 *Id.* at 81.

242 The Coastline Letter, No. 15, at 8 (1973); *id.*, No. 16, at 6. The staff recommended denial on a proposed 10-acre center because "piecemeal commercial developments are not desirable, and a new plaza will detract from older shopping centers." *Id.*, No. 14, at 8. Though this approaches a questionable foray into relations between competitive economic units, the underlying land use judgment has strong environmental justification and, if open hearings are an indication, public support. Such favoritism, even for economic reasons such as preventing decline of inner city commercial areas, has been sanctioned as a proper exercise of the police power. *See, e.g.*, Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969).

243 For an analysis of the state commission's decisions in its first six months, see The Coastline Letter, No. 12, at 1 (1973).

For instance, in the multiunit residence category the state commission overturned *in a single meeting* four South Coast permits,[244] encompassing a total of 1,124 units, almost one-third as many units as the regional commission denied in total.[245] Even brief examination of the important decisions of the CCZCC confirms that it "has taken a tough, conservationist stand,"[246] which must be considered in any assessment of the coastal initiative's results.

Easily the most controversial of the state commission's rulings involved the application of two major Los Angeles and San Diego utilities to drastically expand the capacity of the San Onofre nuclear power station. The San Diego regional commission approved the project 9 to 1, even though it required large excavations through the beach for enormous cooling water conduits. The application which the state commission examined had already been processed by the Atomic Energy Commission, the Environmental Protection Agency, the Army Corps of Engineers, the California Public Utilities Commission, state and regional water quality control boards, and the San Diego regional commission. Despite the unbroken string of approvals and the lengthening shadows of the energy crisis, the commission denied the permit by a vote of 6 to 5 *in favor* of the project.[247]

The case nicely illustrates the commission voting requirements. Despite approval by the regional body the state commission was required to hold a hearing and examine the application under the same procedures as regional commissions. In this case eight affirmative votes would have been required to sustain the regional permit, because a majority of the commission's authorized members had found the matter one proper for treatment under the two-thirds vote rule.[248] It would have interfered with the line of sight to the ocean from the coast highway, impaired lateral public beach access, and reduced the size of the beach. This action

244 The Coastline Letter, No. 14, at 4 (1973).

245 Scorecard, *supra* note 225, at 99-100.

246 Los Angeles Times, Aug. 13, 1973, § 1, at 3, col. 4.

247 *See* N.Y. Times, Dec. 7, 1973, § 2, at 42, col. 1; Los Angeles Times, Dec. 6, 1973, § 1, at 1, col. 6.

248 CAL. PUB. RES. CODE § 27401 (West Supp. 1974).

marked the first time a state agency refused to grant necessary permits for an AEC-licensed reactor.[249]

After the initial CCZCC permit denial, the utility officials became receptive to compromise.[250] Only a month later the commission took the permit back for a new vote. The CCZCC stipulated in a lawsuit brought by the utilities that it would vote without any consideration of nuclear safety. The utilities had alleged this to be a federally preempted question and had contended that the commission, though warned against considering safety by the California Attorney General's office, had based its decision partly on this issue.[251] The commission rejected moves to have the regional commission consider a new permit application and voted to grant the San Onofre permit with extensive conditions.

The state commission has taken major action in other areas to preserve planning options, stop harmful waste of coastal resources, or disapprove certain kinds of development. One of the most important decisions was a policy that agricultural lands in the coastal zone should not be converted to other uses, particularly residential, absent compelling circumstances.[252] This decision has tremendous importance for the large areas of underdeveloped land along the coast which is presently utilized for grazing or cropland.[253] The state coastal commission has also placed limits on new freeway construction in the permit area and has banned one $52 million project for a freeway section from San Diego to the Mexican border.[254] Projects which involve large amounts of land, particularly if it is now open space, are most likely to be opposed by the state commission. To prevent planning options from being foreclosed, the CCZCC has frequently reversed regional permits for such areas.[255]

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249 *See* note 247 *supra*.

250 Los Angeles Times, Dec. 7, 1973, § 1, at 3, col. 5.

251 CCZCC Minutes, meeting of Jan. 9, 1974, at 2-9.

252 Los Angeles Times, Aug. 2, 1973, § 1, at 1, col. 2.

253 *See* GRUEN, GRUEN & ASSOCIATES, SEDWAY/COOKE, APPROACHES TOWARDS A LAND USE ALLOCATION SYSTEM FOR CALIFORNIA'S COASTAL ZONE 212-30 (1971) (Appendix II, COMPREHENSIVE OCEAN AREA PLAN, *supra* note 57).

254 Los Angeles Times, Aug. 13, 1973, § 1, at 1, col. 5.

255 *See, e.g.*, CCZCC Minutes, meeting of Sept. 5-6, 1973, appeals 117 and 121; The Coastline Letter, No. 14, at 5 (1973).

Not all of the most important questions for coastal policy involved expensive or extensive projects. One of the CCZCC's most far-reaching decisions involved a mere pipeline into the ocean.[256] The pipeline was to be a sewage outfall to dispose of treated wastes from southern Orange County. The outfall was a small but necessary part of a waste treatment facility being built to accommodate 230,000 people in an area with a current population near 50,000. The major portion of the growth this facility might stimulate would have occurred outside the permit area, since the service area would have stretched 20 miles inland. The state commission reduced roughly 25 percent of the outfall's capacity and imposed water quality conditions on the effluent which exceeded those of the regional water quality control board. This decision to impose growth limits represents a recognition of the environmental impact on coastal but particularly marine resources which would inevitably follow the expansion of a utility.

C. *Conditional Approvals*

Not all major projects considered by the state commission have been rejected. The CCZCC has granted or let stand regional permits in about 50 percent of the appeals,[257] although it may often alter the conditions of the regional commission's approval. The Southern California Edison Company planned to refurbish an old power station on Terminal Island in the Los Angeles-Long Beach harbor to accommodate larger power demands. The commission granted a permit to perform the work, even though the plant's emissions would increase air pollution in the coastal zone. This step was taken because the plant, built in 1947, was under grandfather clauses in the air quality laws, and the discharges from the refurbished plant would be less than those from the old plant. The commission approval limited the total hours of operation per month and the permissible levels of both nitrogen-oxide emissions and thermal discharges.[258] The utility was also required to construct a $7.5 million cooling tower unless the company could "conclusively" demonstrate to the regional com-

256 Appeal 29-73, described in The Coastline Letter, No. 10, at 6 (1973).
257 Telephone interview with a CCZCC staff member, Mar. 1, 1974.
258 The Coastline Letter, No. 12, at 15 (1973).

mission that there would be no "substantial" environmental effect.[259]

According to officials of the utility, the conditions imposed by the CCZCC were more strict than those of the state Public Utilities Commission, Los Angeles County Air Pollution Control District, and the South Coast regional commission. The state executive director argued for the permit to the commission, urging that the increased air and thermal pollution in the harbor area would be outweighed by the reduction Edison could make in the use of "dirtier" plants elsewhere in the Los Angeles basin.[260] The commission was willing to look beyond the coastal zone to the broader environmental effects its authorization would generate.

Despite the often spectacular nature of some denials, the vast majority of permits are approved. But granting a permit does not necessarily mean a defeat for the environment, as some environmentalists seem to feel. It may often be a pyrrhic victory for the developer required to comply with expensive conditions. The impact of the commission system on approved projects must be considered to effectively assess the system's worth. This impact is reflected by the nature of the approved projects and the types of conditions imposed.[261] The South Coast commission, handling more than 40 percent of the system's permits, attached conditions to 8.7 percent of its permits[262] in the period ending January 1, 1974.

Increased beach access is a major objective for the coastal commissions and many permit conditions reflect this. One technique used is to require dedication to the public of a 3- to 25-foot lateral easement above the mean high tide line. This has been particularly useful in the exclusive Malibu area.[263] These easements protect the public's preexisting right to use the area between the high and low tide lines by providing a strip of dry sand for sunbathing or resting.[264] In many areas parking, not

259 Los Angeles Times, Aug. 9, 1973, § 2, at 1, col. 2.

260 CCZCC Minutes, meeting of Aug. 8, 1973.

261 For the statutory objectives of imposing conditions, see text at notes 85-89 *supra*.

262 Scorecard, *supra* note 225, at 21.

263 Sieroty, Proposition 20 — One Year Later, 1 California Today, Nov. 1973, at 2.

264 Los Angeles Times, Aug. 13, 1973, § 1, at 3, col. 3. *But cf.* The Coastline Letter, No. 8, at 7 (1973) (comments of Commissioner Hayes).

lateral access, is often the key to effective beach access. The commissions have often required two offstreet parking spaces for each unit of a development, so that precious street spaces will not be clogged with residents' vehicles.[265] Other important conditions have improved access by requiring dedication to the public of bicycle paths, walkways, and scenic view points throughout large developments. Conditions may also serve other policies such as improved water quality[266] and increased open space.

Many projects have been substantially modified after conferences with the commission staff; many more applications anticipate permit conditions in the original design.[267] By this process many projects have been sizeably trimmed in height before they are approved.[268] Often the result of staff and commission scrutiny will be a more aesthetically pleasing and generally superior design, achieved because prospective applicants and their architects devote more attention and funds to this aspect.[269]

D. *Enforcement*

One of the most severe practical problems of the new system has been to enforce the provisions of the coastal initiative. A regional commissioner described the situation in the early months of the commissions: "Many people have just gone ahead with their projects and made fools of those who are trying to abide by the law."[270] In later months the enforcement improved as the commissions acquired sufficient staff to survey coastal building

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265 Sieroty, *supra* note 263, at 2.

266 Douglas, *supra* note 5, at 14. *See also* The Coastline Letter, No. 10, at 6 (1973).

267 Douglas, *supra* note 5, at 14. This is sometimes done in response to explicit warnings from a regional commission. The San Diego Coast regional commission states:

> [D]evelopments such as private docks, gangways, and fences that could interfere with public access along a beach or shoreline will not normally be approved unless adequate provisions are made for public access.
>
> ....
>
> Public easements should be provided by a developer, whenever reasonable, between private developments and any shorelines of the permit area.

San Diego Coast Regional Commission, Interim Goals and Policies, approved in principle May 18, 1973, at 1.

268 *See, e.g.*, The Coastline Letter, No. 8, at 6 (1973).

269 Sieroty, *supra* note 263, at 2.

270 The Coastline Letter, No. 4, at 6 (1973) (Commissioner Arthur Holmes, San Clemente City Councilman).

activity. In one case a developer found to have violated the initiative and a restraining order was sentenced to five days in jail and a $500 fine.[271]

Enforcement remains a problem, however, particularly in view of the failure of the citizen-suit mechanism.[272] Instead of reading that "any person who brings an action to enjoin a violation and prevails may recover his costs," the language of the initiative states that "any person who prevails in a civil action brought to enjoin a violation of this division or to recover civil penalties shall be awarded his costs, including reasonable attorney's fees."[273] This language is open to the inference that defendants may be able to recover their attorney's fees if they "prevail." In fact one lower court has reached that result.[274] The possibility of such an outcome, where a private citizen or group might be billed for a developer's expensive counsel, has effectively eliminated private enforcement.

Amendment of the attorney fee provisions might encourage more citizen investigation and litigation. Recently the commissions have attempted to establish a cooperative system with local governments whereby no actual building permits would be issued until the developer produced a coastal commission permit for his development.[275]

E. *Impact on Development*

The overall impact of the Coastal Zone Conservation Act has not been to halt development along the coast. Many observers feel that development is still proceeding too fast and in a haphazard form. The South Coast regional commission was recently warned by a local official that the coast was still being built up at a heady pace. This same official commented on the effect controls were having on land values, stating that in the coastal zone "smart money believes we are going to have a better looking

271 Los Angeles Times, Sept. 21, 1973, § 1, at 1, col. 5.

272 Douglas, *supra* note 5, at 21.

273 CAL. PUB. RES. CODE § 27428 (West Supp. 1974).

274 South Coast Regional Comm'n v. Citron, No. C 62940 (Los Angeles Super. Ct., oral opinion, Mar. 11, 1974).

275 Douglas, *supra* note 5, at 21.

coast extending further inland in the future."[276] Other officials in the same area have called for building moratoriums pending review and reformulation of what are now seen as outmoded and overbroad local zoning laws.[277]

County property assessors believe that improved property in the permit area is rising in value faster than its usual rate. Unimproved property in developed areas is showing mixed tendencies, probably leading to higher prices. Only large open tracts in unsubdivided areas have fallen in value, though few transactions have been recorded as many owners hold their property to determine the future legal situation.[278] In response to this several counties have given affected property owners property tax relief by lowering assessed valuations, sometimes in annual stages, by 10 to 40 percent.[279]

F. *Changing Expectations*

Under the initiative there has been a change in coastal land use expectations. Citizen groups have sprung up to act as "Coast Watch" brigades and have actively participated in the permit process by appealing many regional decisions.[280] This has encouraged a new perception of public rights by a citizenry accustomed to helplessly witnessing assaults on the coastal environment. During one recent South Coast public hearing a commissioner asked an opponent to a development if he had ever owned property. The answer may not have been atypical of a spreading belief: "I own property in another sense. I have an estate in the environment — clean air, beaches and so on."[281] Developers, government, and the public have begun to recognize the public values in coastal lands.[282]

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276 The Coastline Letter, No. 16, at 12 (1973) (comments of Mr. Anton Calleia, Exec. Ass't to Los Angeles Mayor Thomas Bradley).

277 *See id.*, No. 7, at 1 (1973). Calvin Hamilton, Los Angeles City Planning Director, requested the South Coast regional commission to grant a building moratorium for the Venice area of Los Angeles if the city zoning laws could not be quickly modified to reduce permissible densities.

278 *Id.*, No. 16, at 12.

279 *Id.*

280 Los Angeles Times, Aug. 13, 1973, § 1, at 3, col. 1.

281 The Coastline Letter, No. 10, at 5 (1973).

282 For examples of changes in governmental policies in response to the initiative, see Los Angeles Times, Aug. 13, 1973, § 1, at 3, col. 5 (early ed.).

Conclusion

How the marriage of interim regulation and planning is consummated will determine the longrun effect of state coastal zone management.[283] The permit process has been in the public spotlight because of its shortrun importance for many coastal communities. But it is the planning mechanism which is critical for coastal control. The commissions and their permit controls may be continued, modified, or allowed to quietly expire in 1976. The future governmental structure and its powers to control coastal land and water use will be important components for the success of coastal management after 1976. But it is the policy document guiding the regulators which will most likely have the greatest influence on coastal management. If the excitement and immediate pressures of permit regulation divert the commissioners from designing the best possible plan, then the great coastal experiment will fail.

The permit system should be more selective in the level of development monitored. For example, those activities consistently found in the 51.4 percent[284] of the permits appearing on the consent calendar should be exempt. Because regulation imposes its own costs on a developer, particularly if the regulation is inefficient and time consuming, no project should have to satisfy the permit requirements unless the type of development or the project's location make it socially beneficial to impose those costs.

Long ago the Maine Supreme Judicial Court eloquently enunciated the need for environmental regulation: "The amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated."[285] The California Coastal Zone Conservation Act of 1972 is a strong effort to establish a fair system by which land and water use decisions, previously based solely on economic considerations, would be based on the public interest in a healthy and pleasing environment. The coastal initiative

283 *See generally* Los Angeles Times, Aug. 13, 1973, § 1, at 1, col. 5.

284 Scorecard, *supra* note 225, at 18-19.

285 Opinion of the Justices, 103 Me. 508, 511, 69 A. 627, 629 (1908).

seeks to establish a mechanism by which policies to benefit the public interest may be discussed and then implemented. It is an attempt by Californians to preserve a resource of inestimable value in the belief that future generations have a right to enjoy the coastal wonders. The alternative is a coast forever marred by human desecration.

*Richard Carroll Breeden**

* B.A., 1972, Stanford University; member of the Class of 1975 at Harvard Law School; consultant, Center for Policy Alternatives, Massachusetts Institute of Technology.

NOTE

A FEDERAL STRATEGY FOR NEIGHBORHOOD REHABILITATION AND PRESERVATION*

Introduction

During the past several years various federal programs have attempted to achieve the goal, first articulated in the Housing Act of 1949, of a "decent home and suitable living environment for every American family."[1] In contrast to the earlier "public housing" approach,[2] in which governmental agencies owned and operated housing for those unable to obtain suitable, privately owned living space, recent programs have attempted to increase the number of private units available to lower income groups.

These federal efforts are of two types. Programs such as rent supplements[3] or the rent allowances included in welfare payments are designed to increase the demand for decent housing by permitting the recipient to compete for such housing on the open market. Supply-oriented programs, on the other hand, create financial incentives for the private development of housing which can be afforded by low or moderate income families. These incentives may flow directly from the federal government, as when it supplies low interest mortgage money[4] or subsidizes and insures mortgages obtained in the conventional credit markets.[5] They also may be indirectly provided by reduced taxation of qualified projects.[6]

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*The original version of this Note was written under contract with the Department of Housing and Urban Development.

1 Act of July 15, 1949, ch. 338, § 2, 63 Stat. 413 (codified at 42 U.S.C. § 1441 (1970)).

2 This was established by the Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. ch. 8 (1970)).

3 12 U.S.C. § 1701s (1970).

4 *E.g.*, "the below market rate" program under the National Housing Act of 1934, § 221(d)(3), 12 U.S.C. § 1715*l* (1970).

5 *E.g.*, the program for rental and cooperative housing for low and moderate income families under the National Housing Act of 1934, § 236, 12 U.S.C. § 1715z-1 (1970).

6 *E.g.*, INT. REV. CODE OF 1954, § 167(k) (rapid depreciation of expenditures to rehabilitate low income rental housing).

The Housing and Urban Development Act of 1968[7] placed heavy emphasis on the supply approach, declaring a 10-year goal of "the construction or rehabilitation of twenty-six million housing units, six million of them for low and moderate income families."[8] This Note critically analyzes a key element of the 1968 Act, the so-called § 236 program of interest subsidies to moderate income rental housing,[9] particularly as it applies to housing rehabilitation.[10] It then proposes an interim program to rehabilitate housing but avoid many shortcomings of § 236.

The need for such an interim rehabilitation strategy is twofold. First, increasing concern about the cost and effectiveness of the federal subsidy effort has led the Administration to suspend all new commitments under such housing programs pending further study.[11] Both General Accounting Office and Department of Housing and Urban Development evaluations have found the land, construction, and architectural costs of § 236 projects higher than those of similar conventionally financed undertakings.[12] An interim program can be instituted while debate over long-run strategies continues. Moreover, a limited proposal avoids problems associated with complex strategies — delay, the dilution of resources, and the failure of program elements to interact as planned.

Second, the current recognition of the need to conserve energy and other resources and of the value of preserving neighborhoods with the potential for economic and social viability suggests that any new program should focus on preserving the existing housing stock. Of the 142,000 units completed under § 236 between 1968 and 1972, though, only about 15 percent were rehabilitations.[13] As the *New York Times* recently put it:

7 Act of Aug. 1, 1968, Pub. L. No. 90-448, 82 Stat. 476 (codified in various sections of 12, 42 U.S.C.).

8 *Id.* § 1601, 42 U.S.C. § 1441a (1970).

9 12 U.S.C. § 1715z-1 (1970).

10 For general analyses of the federal housing programs, see JOINT ECONOMIC COMM., 92D CONG., 2D SESS., THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS, A COMPENDIUM OF PAPERS, PT. 5, HOUSING SUBSIDIES (Jt. Comm. Print 1972); DEP'T OF HOUSING & URBAN DEV., HOUSING IN THE SEVENTIES, REPORT OF THE NATIONAL HOUSING POLICY REVIEW (prelim. ed. 1973) [hereinafter cited as REVIEW REPORT].

11 REVIEW REPORT, *supra* note 10, at iii, 4-3.

12 *Id.* at 4-3.

13 *Id.* at 4-56. As of February 28, 1973, 19,368 units had been rehabilitated. In-

> Probably nothing has been more wanton in waste and illogic that the notion that you tear down solid old buildings and replace them with shoddy new ones . . . . Not infrequently, [with rehabilitation] the savings are in money . . . but something is also saved of the substance and spirit of the community. . . . When nothing was in short supply except sensibility, it was easier to bulldoze than rehabilitate. This proposition has produced a surprisingly second rate landscape.[14]

I. THE SECTION 236 PROGRAM: A CRITICAL ANALYSIS

A. *The Nature of the Program*

Since its enactment in 1968, the § 236 program[15] has been the major federal subsidized housing program. Its objective is the construction or rehabilitation of multiunit rental housing for moderate income families by private developers, and it provides annual payments which reduce the interest on the permanent mortgage to an effective 1 percent. The interest cost savings are passed through to the tenants by limitations on developers' profits and owners' rents.[16] The mortgage is insured by the Federal Housing Administration for a period of 40 years.[17] This allows a lower annual debt repayment and hence a lower rent schedule. The 40-year period is lengthy by conventional standards.

Nonprofit developers, such as community groups, are eligible for 100 percent financing, while for-profit developers get 90 percent financing.[18] This 90 percent level may effectively reach 98 percent because of a liberal builder-sponsor noncash development fee included in project costs.[19] The program provides, at maxi-

terview with Paul Lydens, Deputy Ass't Comm'r, Federal Housing Administration, in Washington, D.C., May 19, 1973.

14 N.Y. Times, Feb. 5, 1974, at 34, col. 2 (city ed.).

15 National Housing Act of 1934, § 236, 12 U.S.C. § 1715z-1 (1970).

16 24 C.F.R. §§ 236.50, 236.55 (1973).

17 *See* HUD Circular HPMC-FHA 4442.3A, ¶ 5 (1971).

18 *Id.*

19 This credit is known as the Builder-Sponsor Profit and Risk Allowance (BSPRA). It is a noncash fee added to the finance and construction costs of a project, the total of which is 90 percent financed. Thus, the developer's cash requirement is reduced by the amount of the BSPRA. That is, the three cost components of a development — land, construction, and carrying and finance charges

mum, a subsidy equal to the difference between the market interest rate and an effective 1 percent for 40 years. The amount paid decreases if the occupying tenant's rent paying ability (as defined by 25 percent of his income) exceeds the "basic" rent. The latter amount equals annual project operating costs, limited developers' profit, and repayment of principal and interest at the 1 percent rate. The government planners hoped that tenant incomes would rise faster than the "basic" rent, as influenced by annual operating expenses, since the annual debt cost is fixed. This would thus reduce the subsidy commitment.

The program is designed for families with an income approximately 135 percent of that of public housing tenants. However, the lower income beneficiaries of the rent supplement program[20] are eligible to live in § 236 projects, and 20 to 40 percent of a development may theoretically consist of such individuals. Under the supplement program the government pays the difference between 25 percent of the occupant's income and the usual rent paid by § 236 residents.

B. *A Cost Analysis of § 236 Rehabilitation*

The § 236 rehabilitation program, called "Project Rehab," supplemented by accelerated depreciation deductions,[21] proved to be an expensive route to help lower income tenants. This section will confine itself to a quantitative evaluation of the costs of a § 236 rehabilitation project. The policy implications of the § 236 approach will be discussed as part of the justification of the program proposed later in the Note.[22]

The economics of a § 236 rehabilitation are startling. Assume a for-profit development with 100 two-bedroom units. The hypothetical development cost breakdown is as follows:[23]

— are nominally 90 percent financed, but the BSPRA inflates the last two by 10 percent, effectively financing them 100 percent. Only the cost of land is actually 90 percent financed.

20 12 U.S.C. § 1701s (1970).

21 INT. REV. CODE OF 1954, § 167(k).

22 See part III *infra*.

23 The relationship of the costs of the various components is based on the average project developed by the Continental Wingate Co., Boston.

Development Costs

Land & Old Buildings	$ 200,000
Construction	1,400,000
Carrying & Finance Charges	200,000
Total Cash Cost	$1,800,000
BSPRA[24]	160,000
Total Development Cost	$1,960,000

The operating costs are a function of the annual debt service, the allowable developer profit, the actual operating costs, and an allowance for vacant apartments. The total development costs, indicated in the preceding table, are $1,960,000. As this is a for-profit project, 90 percent of these costs are financed, so the principal amount of the mortgage would be $1,764,000. Assuming the usual insured mortgage, amortized over 40 years and at the subsidized annual interest of 1 percent, the level repayment is 3.03 percent of the principal,[25] or $53,449. The portion of the total development cost not covered by the mortgage, *i.e.*, the developer's equity, is $196,000. Since the § 236 program limits the developer's profit to 6 percent of his equity,[26] the profit here would be $11,760. The operating budget for the buildings, including utilities, maintenance, taxes, insurance, etc., might be about $115,000. The total of these costs — annual debt service, developer's profit, and actual operating costs — is $180,209. The vacancy allowance suggested by HUD is 5 percent of this amount[27] or $9,485. The total of all operating costs is $189,694:

Operating Costs

Annual Debt Service	$ 53,449
Allowable Developer Profit	11,760
Operating Budget	115,000
Subtotal	$180,209
Vacancy Allowance	9,485
Total Rental Income Allowed	$189,694

24 BSPRA, the Builder-Sponsor Profit and Risk Allowance, is a noncash credit to the developer which must be added to the actual cost to find the total development cost. *See also* note 19 *supra*.

25 HUD Circular HPMC-FHA 4442.3A, ¶ 5 (1971).

26 24 C.F.R. § 236.50(a) (1973).

27 HUD Circular HPMC-FHA 4442.3A, ¶ 6 (1971).

The total rent of $189,694 per year results in a monthly rent of $158 per unit.

The economic impact of the interest subsidy utilized in the hypothetical development can be demonstrated by keeping all development and operating costs constant and comparing the hypothetical development with a typical loan not insured and subsidized by HUD. For example, compare a 25-year loan of 90 percent of development cost at 8.5 percent annual interest with the § 236 40-year loan at 1 percent annual interest:

	Conventional Project[28]	§ 236 Project
Debt Service	$170,402	$ 53,449
Developer Profit[29]	11,760	11,760
Operating Budget	115,000	115,000
Subtotal	297,162	180,209
5% Vacancy Allowance	15,640	9,485
Total	312,802	189,694
Monthly Rent	$261	$158

1. Tenant Benefits

To illustrate the tenant income range served by the § 236 project, assume that $158 per month is one-twelfth of the annual rent and rent is one-fourth of the tenant's income. The annual income of the tenant would thus be $7,584. The conventional rent of $260 per month would require a tenant earning $12,480, if he also paid 25 percent of his income for rent.

Twenty to forty percent of the units are theoretically eligible for rent supplements. Under that program a tenant pays 25 percent of his yearly income for rent and can live in a particular development if his rent paying ability is at least 30 percent of that project's "market rent" (here, the § 236 basic rent).[30] Thus, assuming the minimal ability to pay, a tenant could pay as little

28 Many rehabilitation projects in decaying areas would not qualify for commercial loans.

29 For comparability of the analysis, the developer's profit is assumed equal for both projects. However, the market would dictate the profit in the conventional project, while under § 236 developers' profits are regulated so the subsidy will be passed on to the tenants.

30 12 U.S.C. § 1701s (1970); REVIEW REPORT, *supra* note 10, at 4-71.

as $48 per month. The difference, $110, would be paid by the government as a *double* subsidy.

2. Developer Benefits

While the developer's nominal equity ($196,000) is 10 percent of the total development cost, the noncash developer credit of $160,000 is included in the $1,960,000 total cost from which the 10 percent equity is computed.[31] Since the credit accrues to the developer, he can subtract that noncash amount from the nominal equity to arrive at a net cash equity requirement of $36,000. This $36,000 is approximately 2 percent of the development cost, leaving an effective 98 percent debt. The developer's 6 percent return on 10 percent nominal equity thus becomes a more impressive 30 percent return on his 2 percent equity. Yet the $11,760 annual return is not, in absolute amount, significant. The real benefit derives from the tax shelters the program provides.

The 1969 Tax Reform Act added § 167(k)[32] to the Internal Revenue Code, which provides for 60-month, straight-line depreciation of rehabilitation expenditures for certain low income housing. Tenant income must be at levels which would qualify under § 236[33] and the rehabilitation expenditure must be a minimum of $3,000 (over two years) and a maximum of $15,000 per dwelling unit.[34]

The rehabilitation costs that would qualify for the 5-year writeoff in this development are the $1.4 million construction costs and approximately one-half ($80,000) of the Builder-Sponsor Profit and Risk Allowance,[35] assuming builder and developer split the profit. Thus, $1,480,000 can be written off in equal installments over a 5-year period. In addition, during the first 12 months of ownership — the construction period — a large portion of the $200,000 carrying and finance charges can be deducted as a current expense.[36] The deductions are:

31 *See* table at note 24 *supra.*

32 Pub. L. No. 91-172, § 521(a), 83 Stat. 649.

33 26 C.F.R. § 1.167(k)-3(b)(2)(i) (1973) (the level indicated is identical to the maximum income for a subsidized tenant under § 236).

34 INT. REV. CODE OF 1954, § 167(k)(2).

35 See note 19 *supra.*

36 INT. REV. CODE OF 1954, § 163(a) (this is a general provision not limited to any specific type of interest payment).

Year	Amount	Deduction
1	$200,000	carrying & finance charge expenses
2	296,000	5-year writeoff
3	296,000	5-year writeoff
4	296,000	5-year writeoff
5	296,000	5-year writeoff
6	296,000	5-year writeoff

To an investor in the 50 percent tax bracket, these losses will mean $100,000 for the first year and $148,000 each year for the next five years in cash saved from taxes in those years. The developer usually sells the capitalized stream of these tax losses to high tax bracket investors in partnership offerings.[37] The developer is paid on an installment basis over 2 to 4 years to increase the investors' "return" and to provide security for adequate performance of the developer's general partner.

As a rule of thumb, the rehabilitation industry prices its developments for sale according to a percentage of the mortgage. The typical price for a rehabilitation development for one major producer[38] is 25 percent of the mortgage amount. Applying that figure to the $1,764,000 mortgage amount in this case leads to a $441,000 gross syndication price for the 100-unit project. To estimate his net profit, the developer must deduct the $36,000 cash equity along with builders', lawyers', and accountants' fees and general overhead. Nevertheless, a gross profit of roughly $4,000 per unit in the first year or two of operation is not insignificant.

C. *Evaluation of § 236*

Perhaps the greatest criticism of § 236 is its high cost in relation to the benefits conferred upon the tenants and upon the developer and upper bracket investors. While it is often difficult to "cost-out" a program, the author, using a present value analy-

37 Interview with Gerald Schuster, President, Continental Wingate Co., a Boston-based, national low-rent rehabilitation developer, in Boston, June 10, 1973.

38 *Id.*

sis with a 6 percent discount rate, concludes that this particular 100-unit project will cost the federal government between $2,598,-683 and $2,797,183.[39] This is more than $25,000 per unit.

The benefits to the tenant are much harder to assess, since many of the rehabilitation developments have short and uncertain life spans of 5 to 15 years.[40] It is also questionable whether the difference between the § 236 development *with* subsidy and that same development *without* subsidy should be the measuring rod for the tenant benefits, because development costs under § 236 financing are higher[41] and because the tenant might not choose to "buy" that much housing if he had the cash equivalent of the subsidy.[42] It is also probable that 10 to 15 years in the future the low income tenant will find a better home among newly subsidized housing — the present dwelling may well be run down and locked into escalating operating costs. The developer, on the other hand, has already received his benefits through tax provisions that assume the continued operation of the housing.

Many critics feel that § 236 has spurred inflation of housing development, professional, and construction costs to the point where the subsidy merely eats up the distorted costs of producing this housing.[43] As the costs rise, the subsidies often benefit moderate income tenants rather than the poor, because the latter are priced out of the housing. Most importantly, many feel that § 236 encourages maximum costs geared to the mortgage and the tax shelter and that far too many professionals get profitable involvement in an otherwise marginal situation.[44]

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39 Calculations on file with the *Harvard Journal on Legislation.* These calculations take into account: (1) the direct § 236 subsidy, (2) tax benefits, (3) possible discounting of the mortgage by the Government National Mortgage Association, (4) loss from the tax exemption of interest on state bonds used to help finance the project, and (5) possible rent subsidization under 12 U.S.C. § 1701s (1970).

40 Interview with Ken Hartnett, urban desk reporter, Boston Globe, in Boston, May 5, 1973.

41 REVIEW REPORT, *supra* note 10, at 4-57.

42 *Id.*

43 *Id.*

44 For a discussion of middlemen's profits, see 1 S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION 425 (1973) [hereinafter cited as SURREY].

II. Toward a Neighborhood Preservation and Rehabilitation Strategy

This proposal presents a federal housing strategy directed toward the ongoing provision of housing services rather than the one-time financing of new or substantially rehabilitated housing. In effect, the proposal is oriented toward *operating expenses* rather than *capital improvements.*

The potential for saving housing from decay and abandonment and for preserving viable urban communities is far greater with a realistically framed housing maintenance approach than with a costly production program that produces highly visible but often limited results. As one expert directly involved in the production of low-income urban housing sees it:

> Rehabilitated housing has made only minute contributions while the possibilities of using the enormous potential of existing housing resources has been almost totally ignored. The dilemma for public policy of enormous losses of sound as well as poor housing through abandonment in the nation's large cities while the expansion of publicly assisted housing fails to replace such losses in these localities has sharply focused attention on this anomaly.[45]

A program designed to implement this strategy must adhere to several essential guidelines. The federal government must provide a package of subsidies and funding criteria that will serve to define the governmental effort (federal, state, and local), financial and administrative, over a period of time necessary to assure proper impact. In so doing, it must set an upper limit on its funding commitment realistically geared to meet the goals of the program. While the nature of the state and local program commitment will be detailed in the proposal, the specifics of dollar amount and administrative support exceed the scope of this Note.

Program subsidies must also be channeled into stable urban communities. One of the major flaws of the § 236 approach has been the lack of community impact achieved. With very heavy program costs and also limited by constraints of private developer

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45 F. Kristoff, Federal Role in Rehabilitation (unpublished paper submitted to National Housing Policy Review, June 1973).

initiative, the § 236 vehicle produced as few as 1,000 to 1,500 units of rehabilitation housing over a 3-year period in major decaying urban areas such as St. Louis.[46] This small scale approach failed to inject new vitality into the decaying areas and also served to limit the commitment made by the involved parties, who perceived the limits of its effectiveness.

The suggested program would insure impact by defining areas into which subsidies would flow and by working in tandem with state and local governments to provide comprehensive preservation services to the impact neighborhood. Individual homeowners should have access to long-term, low cost funds for repair and rehabilitation, if necessary, and for refinancing current high-interest indebtedness incurred in making prior repairs. Funds should be available for maintenance and improvement of multifamily structures. Hopefully, the state and locality will provide property tax relief and a sustained level of neighborhood services essential to the continued viability of the area.

Essential to the sustained improvement of living conditions in the impact area is a set of incentives for the residents and local housing entrepreneurs that encourage maintenance and housing services. This proposal suggests a tax credit mechanism that, for the selected area, will replace the traditional homeowner mortgage interest and property tax deductions[47] and the accelerated depreciation provisions with regard to multifamily housing.[48] Both of these tax devices have produced disincentives to long-term maintenance in urban areas. The homeowner deductions are related to the taxpayer's marginal tax bracket. Residents in urban decay areas where this type of impact aid is required tend to have lower income and thus benefit less from the tax provisions. For multifamily housing the accelerated depreciation provisions create a declining incentive over time as the depreciation benefits from ownership decline rapidly and become almost nonexistent after 10 years of ownership.[49] A tax credit will avoid these

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46 Interview with Donald Lipton, St. Louis developer of § 236 rehabilitation housing, in St. Louis, Mar. 8, 1973.

47 INT. REV. CODE OF 1954, §§ 163 (interest deduction), 164 (property tax deduction).

48 *Id.* § 167.

49 *Id.* § 167(b)(2) (double declining balance method of depreciation). *See also*

pitfalls by operating on a rent formula that will yield benefits on a level rather than declining basis.

The final objective of the program is to close the gap between the cost of housing services and the resident's income. Without buttressing residents' income the housing services approach will fail. Ample evidence of the results of a failure to consider this gap can be seen in the case of low rent public housing,[50] in which the federal government had to commit annual operating subsidies,[51] not intended to be part of the federal subsidy scheme for public housing, to preserve its investment in capital grants to local housing authorities. These authorities had faced revenue deficits caused by the failure of tenant income to keep pace with operating costs, which led to a reduction in the level of maintenance services. The proposed program envisions a housing maintenance subsidy to residents living in the rehabilitation area primarily funded by the federal government, but with significant state and local aid.

While the details as to the level and kind of state and local commitment are beyond the scope of this Note, areas for state and local participation will be suggested. They are meant to provide a basis to evaluate the core proposal for federal action and to develop a policy framework for eliciting the maximum potential support from state and local governments.

III. A Proposed Rehabilitation Strategy

A. *A Federal Revolving Fund for 40-Year Low Interest Loans to States*

A core element of the plan is the federal provision of long-term, low interest funds to the states for making rehabilitation loans to individuals. The funds, raised by direct Treasury borrowing,

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Meir & Morris, *Tax Shelters and Real Estate: The Rehabilitation of Low Income Housing*, 17 Tax Coun. Q. 214 (1973).

50 42 U.S.C. ch. 8 (1970).

51 The "Brooke Amendment" provides for a continuing federal subsidy to local public housing projects by paying the difference between 25 percent of tenant income and project operating costs, including debt repayment (which was the initial U.S. financial commitment to public housing). Act of Dec. 24, 1969, Pub. L. No. 91-152, §§ 212(a), 213(a) (codified at 42 U.S.C. §§ 1402(1), 1410(b) (1970)).

should be loaned to the states for 40 years at a 2.5 percent annual interest rate. States should be required to match these funds with an additional 30 percent from their own money. The federal government might also lend its full faith and credit to the state matching borrowings to reduce the effective borrowing costs.

The rationale for this type of loan funding is that it is a much less expensive way to provide low interest long-term funding for housing than the § 236 method of raising capital in the private money market and then subsidizing it.[52] The cost savings of a program based upon direct federal borrowings arise from the superiority of the federal government's credit. If a 2.5 percent interest cost to the subsidy recipient is the goal, it is cheaper for the federal government to borrow and subsidize than to subsidize funds raised by states or private individuals. A congressional study estimated that a change from the § 236 subsidy to a direct loan approach would save from $2 to $4 billion over the next six years.[53]

A long standing objection to the direct loan approach has been based on the effect such large lump sum payments have on one year's federal budget. The § 236 mechanism had a favorable reception because of its smaller annual impact: only the annual interest payments are recorded. The distinction is illusory, since the initial cash outflow from direct loans will be repaid in subsequent years, while the § 236 grant must be paid in installments over the following 40 years.

The Joint Economic Committee has recommended that as a solution to this basically political problem "it should be stipulated that such loans shall be recorded in government accounts in a separate budgetary capital account, excluding them from regular budget outlays."[54] There is precedent for this debudgeting of federal agency lending activities. Effective May 12, 1973, the lending activities of the Rural Electrification Administration and the Rural Telephone Bank were excluded from budget totals by

52 The direct loan element is similar to the predecessor of the § 236 program known as the § 221(d)(3) below market interest rate program. 12 U.S.C. § 1715*l*(d)(3) (1970).

53 JOINT ECONOMIC COMM., 93D CONG., 1ST SESS., HOUSING SUBSIDIES AND HOUSING POLICIES 20 (Jt. Comm. Print 1973) [hereinafter cited as CONGRESSIONAL REPORT].

54 *Id.* at 8.

statute.[55] Similar statutory exclusion could overcome political objections to the direct funding proposal.

Another benefit inherent in the proposed funding mechanism is the avoidance of the more costly tax-exempt financing through state and local agencies.[56] Many state housing finance agencies participated in the § 236 program by receiving subsidy allocations and lending out tax-exempt funds, coupled with interest subsidies to developers. Over 20 percent of the § 236 production has been accomplished in this manner.[57] A direct interest subsidy is cheaper than an interest subsidy by tax-exempt financing because the direct subsidy avoids the loss of federal tax revenue from the high tax bracket investor who is the usual bond purchaser. For example, when a qualified state agency borrows through the tax-exempt route[58] at, say, 6 percent (assume the market rate would otherwise be 8 percent), the full 6 percent is tax free to the lender. If he is in the 50 percent tax bracket, he would have paid 3 percent in taxes. Thus the federal government loses the 3 percent as revenue to provide a 2 percent reduction in state borrowing cost.[59] If direct funding of loans to states is used, the individual lender to the federal government would receive a taxable 8 percent as interest (the rate to the federal government would actually be less than the regular market rate[60]). The federal government would lose 2 percent when it loaned the money directly to the states at 6 percent, but would get back 4 percent from the tax on the lender. Thus the Treasury would receive a net gain of 2 percent of the amount of the loan, compared to a loss of 3 percent with the tax-exempt method.

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55 7 U.S.C.A. §§ 934-36, 947(c), 948 (Supp. Oct. 1973); BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1975, SPECIAL ANALYSES 88 (1974).

56 INT. REV. CODE OF 1954, § 103 (tax-exempt interest on certain municipal bonds).

57 F. Truslow, State Housing Finance Agencies, Roles and Accomplishments (unpublished paper submitted to National Housing Policy Review, May 1973).

58 INT. REV. CODE OF 1954, § 103.

59 While the exemption benefits the 50 percent bracket investor to the extent of 3 percent on a 6 percent bond, the reduced interest paid by the state is only 1.5 percent. This discrepancy exists because the market for tax-exempt securities may become "saturated" or because, at the margin, the bonds must be attractive to investors below the 50 percent bracket. *See* SURREY, *supra* note 44, at 277; REVIEW REPORT, *supra* note 10, at 2-19.

60 *See* text at note 53 *supra*.

For the 40-year loan to the states to be fully retired with the interest rate specified, the state's annual payment (for 40 years) of principal and interest on the loan would be a constant sum equivalent to 3.75 percent of the principal amount of the loan. Under the § 236 scheme, with its 40-year mortgage and subsidized interest of 1 percent, the debt service, *i.e.*, annual repayment of principal and interest, is 3.03 percent of the principal. The repayment terms in the proposal are structured on a 40-year basis simply to permit the state to reinvest funds returned from housing loans with shorter maturities.

A more flexible approach may be instituted whereby the state would not have to remit any principal for the first 10 to 20 years, provided the state could show a significant payback of principal on its loans to private parties. The rate of state remittance could also be influenced by factors of appreciation in property values and general inflation, both of which would insure repayment of the principal to the federal government. The 10 to 15 year deferral of principal repayment would lower the annual debt service for that period to 2.5 percent, the amount of the interest. This lower debt service would allow the states to make more loans or to provide lower interest rates on the loans made.

The payments to the federal government of principal and interest should go into a revolving fund that would be loaned out again to the states. At full 3.75 percent debt service, every three years, in effect, an additional 10 percent funding would be available without further federal appropriations; this would simply reduce the amount of future federal lending and would serve to build up the coverage of the fund.

The states, in conjunction with localities, should have flexibility in designing loan programs to meet such diverse needs as homeownership acquisition and financing, refinancing, operating expense and heavy maintenance loans, emergency repair loans, down payment loans, and financing for acquisition and rehabilitation of multifamily housing. Interest rates and maturities would be designed to meet the needs of the loan applicant. The only two broad restraints on the states would be that no loan to private parties could have a maturity greater than 25 years and that the prescribed annual debt service payments to the federal

government must be made. Thus the state could charge interest rates greater than 2.5 percent on some loans and less than 2.5 percent on others, so long as the portfolio of loans produced the requisite annual payments to the federal government.

Maximum maturities of 25 years would both encourage a recycling of loan investment monies into the neighborhoods and create a more realistic housing investment strategy. A major problem in § 236 rehabilitation has been the 40-year loan for individual housing projects. Many of the rehabilitation projects financed on these liberal terms will have useful lives of only 5 to 15 years.[61] As insurer of the 40-year mortgage, the federal government will become financially responsible for absorbing a large portion of the original debt that will be secured by an asset which will become worthless long before the loan is amortized. A more realistic loan strategy would insure the continued availability of the preservation funds and prevent financial loss due to overcommitment.

For multifamily housing the terms of the loan should be geared to the prerehabilitation rent levels as much as possible and not to the individual tenant income levels; unlike § 236, subsidies will not decrease as income rises. Gross disparities between tenant rent paying ability and housing costs will be adjusted through the housing income maintenance element presented in a subsequent part of this Note.[62] This provision will help insure that the tenant receives upgraded housing services for his current rental dollar. Rehabilitation improvements should also be geared more toward repair of the housing service core, *e.g.*, plumbing, electrical, and heating aspects, than toward the substantial reconstruction[63] that characterized the § 236 rehabilitation program.[64] This emphasis will give the program a greater impact by spreading housing investment funds more broadly throughout the community rather than making substantial but scattered investments.

61 Interview with Ken Hartnett, urban desk reporter, Boston Globe, in Boston, May 5, 1973.

62 See part III(D) *infra*.

63 Housing in need of more substantial improvements should perhaps be demolished.

64 For § 236 rehabilitation in Detroit, the average per unit reconstruction costs were over $11,000. Data on file with Continental Wingate Co., Boston (consultant to Michigan State Housing Development Authority).

Finally, guidelines should be established to provide liberal financing terms to private and public organizations or individuals who perform the vital entrepreneurial function of assembling and repairing marginal housing units for multifamily rental. For example, low interest second-mortgage financing could be used to reduce the developer's equity and increase his return. In return for low cost financing and other program benefits, a multifamily housing operator should be subject to an annual rent certification to monitor costs to assure that the various housing service subsidies are not being appropriated for private profit by cost padding.

There could also be a limited form of subsidy recapture[65] tied to appreciation of single family housing upon sale. This recapture, however, should not be so large as to discourage the desired behavior. An amount of the subsidy that represents the difference between market interest rate and the loan rate would be remitted in any year to the extent of the difference between the recipient's housing costs and 25 percent of his income. Further, a certain percentage of the subsidy benefits paid over the years would be recouped upon sale; this second recapture element would be conditioned upon an appreciation value and would yield a specified percentage of such value not in excess of a certain percentage of subsidies paid. In neither case will the borrower be personally responsible for repaying the subsidy if the conditions giving rise to recapture do not occur.

B. *Federal Housing Maintenance Grants and Mortgage Portfolio Insurance*

In certain cases housing in the impact area, family owned and multifamily, will not require debt financing from the revolving fund. There simply may be a need for a one-time repair of the housing unit or for a flow of additional funds over a short period to enable periodic maintenance to preserve the housing stock. Federally funded grants on a 5-year basis should be provided to housing that requires increased maintenance expenditures to bring the level of services up to code standards. The funds could

65 For a description of recapture under the tax laws, see text at note 74 *infra*.

be placed in an escrow account and be paid out for maintenance costs on an annual basis. The owner's costs and income would be certified and controlled to deter abuse. Tenants living in absentee-owned units could avail themselves of this grant without involving the cumbersome receivership proceedings that would be required to place a lien on the landlord's property if the program were financed by debt. However, the program is structured to induce the owner to make repairs himself.

Another flexible tool for the preservation areas would be federal insurance of private loan funds established to provide market and below market rate mortgage funds to housing residents in areas that are traditionally avoided by bankers as high risk neighborhoods. These privately organized and financed programs should meet the needs of higher income residents who need repair financing but who do not want or cannot qualify to participate in the low cost revolving fund. The federal guarantee will serve to encourage the provision of private capital in these impact areas. These funds would be insured by the federal government with little detailed supervision; the insurance would be granted to the entire portfolio, rather than on a loan-by-loan basis. Self-insurance for an initial percentage of any loss could assure good faith and intelligent loan administration.

The Pittsburgh Neighborhood Housing Services Program is a prime example of local initiative to preserve neighborhoods through the provision of liberal credit. Spurred on by local industry and a savings and loan association, a nonprofit corporation was set up to make improvement loans at interest from 0 percent to market rates — according to homeowners' ability to pay. The rehabilitation expenditures were small, ranging from $1,000 to $6,000, with a lot of "sweat equity" involved. In four years (1969-1972), 529 loans aggregating over $2,000,000 were made; they served over 1,000 families.[66]

C. *Federal Tax Credit Incentives for Management and Maintenance*

A major problem with the § 236 rehabilitation program is the substantial program cost incurred in relation to the actual dollar

66 Kristoff, *supra* note 45.

amount of housing improvements.[67] A major portion of this cost is attributable to the government's desire to include the private sector in the housing process. The concept of private participation is a good one; however, the extent to which the private housing developer is involved and profits far exceeds the needs or objectives of the program.[68]

The § 236 mechanism for funding and allocation is also distorted by an approach that emphasizes the private selection of housing units most readily available for acquisition and encourages the developer to select projects on the basis of tax, rather than housing, considerations. The developer has an incentive to select buildings in total disrepair so that improvement costs — and corresponding tax losses — will be high. These benefits are largely bestowed in the early years of operation. The developer's often low tax bracket exacerbates this situation by forcing him to sell his interests to high bracket investors who pay the developer the capitalized value of the tax losses often in one lump sum before the project is even rehabilitated.[69] In addition to cutting down on incentives for long-term management, this situation creates much waste since the ultimate benefits to the developer are based upon enriching the high bracket investor-intermediary who can make use of the tax losses. The latter's "investment" often thus becomes the developer's incentive payment. The service approach to housing is not part of this scenario.

The tax laws not only produce a mismatch between multifamily housing preservation objectives and private actions, they also serve to discriminate against the individual homeowner in his endeavor to maintain and improve his housing. The homeowner may itemize and deduct the interest on his mortgage and the property taxes on his home.[70] Unfortunately, this is a regressive benefit. Homeowners in lower tax brackets benefit less than those in the higher brackets, since a deduction's value increases as the taxpayer's marginal tax bracket increases. A 70 percent taxpayer

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67 *See* text at note 43 *supra*.

68 CONGRESSIONAL REPORT, *supra* note 53, at 20. *See generally* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

69 *See* Meir & Morris, *supra* note 49, at 244.

70 INT. REV. CODE OF 1954, §§ 163, 164.

will avoid paying $70 of tax with a $100 deduction, while a 25 percent taxpayer will avoid paying only $25 of tax with the same deduction. Renters who have property tax and interest costs passed on to them through rent get no deduction at all.

The program seeks to eliminate these distortions by proposing incentives that are less costly, more direct, and more evenly distributed over time. Further, the program attempts to limit the waste of scattered housing investments and to increase the program's impact by selectively applying tax incentives to housing that is rehabilitated or maintained within the designated impact areas.

For administrative simplicity the tax mechanism remains one of the best ways of providing federal incentive funding. The objections to this form of subsidy are met by replacing housing cost deductions with a tax credit which, in effect, is a uniform dollar reduction by the federal government of the beneficiary's tax burden. Specifically, the Treasury, through the Internal Revenue Service, should provide benefits to residents in areas chosen by the states and cities, subject to local housing code administration inspections and standards. This type of cooperation is not without precedent. The legislation authorizing rapid depreciation for low income rehabilitation specifically calls for administering that tax incentive in a manner consistent with the goals of the Housing Act of 1968.[71]

With respect to multifamily housing, this program should provide an equal annual tax credit for different categories of private apartment owners based upon the particular preservation action. The tax credit should be a function of the preservation action and the tenant income range served; the credit should not be tied to the dollar amount of improvements made, but rather to the annual provision of housing services as required by code standards. The highest credit should go to an individual who consolidates ownership of economically marginal, abandoned, or absentee-owned buildings. Owner-occupiers should come next in priority and absentee owners last. The amount of the repairs should not be determinative of priority so long as the preservation action is approved by the proper local authorities. The credit must be

71 *See id.* § 167(k)(3)(B).

greater for units housing tenants whose income is low. However, there ought to be a substantial credit for every tenant. The tax regulations[72] dealing with rapid depreciation for rehabilitation housing provide that only those units rented to tenants at incomes below a certain level qualify for benefits. This all-or-nothing rule discourages the type of economic mix that is most beneficial to urban communities.

The tax credit should not be assignable to a third party, but, in any year in which it could not be used by the developer/owner, could be returned to the treasury and would be refunded in cash. The stricture against assignability of the credit is designed to prevent the developer/owner from selling a future stream of such credits for a present sum. This reduces the incentive for future abandonment of the project.

A tax credit would be much less costly than the current approach since it is really a direct transfer payment routed through the tax system. There would be no siphoning off of benefits by tax investors, brokers, and other professionals. Thus the amount given would be much less to achieve the same incentive.

Another advantage, not often recognized, is that by providing developers with benefits on an installment basis over the life of the housing project, the system gives the government continuing control over the owner, in contrast to vesting him with tax benefits before he earns them. The annual credit simply could be suspended any time the housing did not meet code standards.

The problem of conferring tax benefits on the developer as accelerated depreciation has led to a complicated provision of the Internal Revenue Code called recapture.[73] Recapture basically is a tax on the recipient of the depreciation losses, if within a

72 26 C.F.R. § 1.167(k)-3(b).

73 INT. REV. CODE OF 1954, § 1250.

74 The recapture tax is based on the difference between the tax deductions taken as a result of the accelerated depreciation provisions and the amount which would have been deducted had the project been depreciated on an equal installment basis over its estimated useful life. INT. REV. CODE OF 1954, § 1250(b)(1). Section 1250(b)(4) deals specifically with depreciation taken under § 167(k) rehabilitation projects. The tax will be at the ordinary income rate of the investor. The recapture provision does provide that a diminishing percentage of this "difference" will be taxed as the period of ownership lengthens. *Id.* § 1250(a)(1)(C)(ii). By the end of 16 years and 8 months there is no recapture for a qualified rehabilitation project. *Id.* § 1250(a)(1)(C)(iv).

certain period of time he disposes of the project.[74] Since the developer is often not the owner — and hence not the tax deduction beneficiary — because he has sold the project to investors who can use such losses, he is not directly affected by the provision, except insofar as he has guaranteed to the investor that such recapture will not come about.[75] Recapture is also triggered upon foreclosure, but HUD, as insurer of the mortgage, has been reluctant to foreclose.[76] This circumstance creates a situation in which the developer can mismanage the project and still get annual tax-benefits without the threat of their termination. The tax credit would end this abuse.

The homeowner would have the ability to waive the itemized deductions for property tax and interest, provided he too was in the preservation impact area and he brought his home up to the preservation code level. The amount of credit should have a stable minimum cash value and should be suspended if the housing is not kept up to code. As a further incentive to keep up the dwelling, the calculation of the proper credit to be given in lieu of deductions should be based upon a percentage of valuation, so that the credit could move upward as the value of the house and surrounding values moved up. The credit should not be much in excess of the amount the homeowner would have received for his deductions had he been in the 50 percent tax bracket.

D. *Federal/State Housing Income Maintenance Support*

A major premise of this housing proposal is that neither a demand-oriented cash assistance approach[77] nor a supply subsidy providing incentives to produce new or "improved" housing alone

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75 *See* Meir & Morris, *supra* note 49, at 261.

76 As of May 1, 1972, 4.8 percent of the 225,645 units insured under § 236 were in default and another 1.5 percent had been assigned to or acquired by HUD. REAL ESTATE RESEARCH CORP., SUMMARY FEDERAL HOUSING SUBSIDIES: THEIR NATURE AND EFFECTIVENESS AND WHAT WE SHOULD DO ABOUT THEM 30 (Nat'l Ass'n of Homebuilders ed. 1972). When HUD receives the loan by assignment and pays off the insured lender, it is reluctant to take title or to sell because the immediate budget impact of the capital loss is great. As of December 31, 1972, HUD had foreclosed only six § 236 projects and held 60 more by assignment. No foreclosed project had been sold. For the § 221(d)(3) below market interest program (similar to § 236), the average loss on acquisition and sale of a unit was approximately 45 percent of acquisition cost. REVIEW REPORT, *supra* note 10, at 4-69.

77 See text at note 3 *supra*.

can be effective in an urban preservation context without the other. Two interrelated problems plague the urban neighborhood — decaying housing stock and the lack of capital and income necessary to keep the stock viable. The problem and inherent frustrations can best be illustrated by the classic limitation on code enforcement programs. Civil and penal sanctions imposed on building owners do not encourage repairs and the threat of the owner's walking away from his building for lack of funds to make repairs is worse than the continued code violations. Yet merely supplying capital in the form of housing improvements will not provide a solution, since the housing capital cannot be preserved if there is no ongoing flow of income to support the housing services essential to preserving the stock.

On the other hand, solely providing residents with cash assistance as a demand-oriented strategy will not insure proper expenditure of the funds, nor will it insure that expenditure of the funds on housing services will generate a corresponding improvement in housing capital. If vacancies are low, a cash assistance program will tend to create a greater money demand for existing stock, driving rents up. Even with a need for production, pure cash assistance cannot assure a landlord or his potential lenders that the tenants with increased purchasing power will remain and spend the funds on his housing to provide support for improvements.

This proposal seeks to apply a union of the supply and demand approaches to housing preservation. On the supply side the revolving loan fund,[78] portfolio insurance,[79] maintenance grants,[80] and tax credit incentives[81] have been provided. This section introduces the essential demand component in the system — housing income maintenance. The federal government should require that no tenant in the target area pay more than 35 percent or less than 20 percent of his income for rent. As previously indicated,[82] the homeowner benefited by subsidies from the loan program would pay not less than 25 percent of his income for housing. A

78 See part III(A) *supra.*
79 See part III(B) *supra.*
80 See part III(B) *supra.*
81 See part III(C) *supra.*
82 See text following note 65 *supra.*

homeowner who made unsubsidized improvements[83] might be made eligible for housing maintenance grants.

While this Note does not specify the actual federal/state/local distribution of the burden of funding housing income maintenance, the proposal includes certain minimum state and local prerequisites. The housing income maintenance guarantee should be applicable to every resident living within the designated impact area at the time of designation. Because of the "no less than 20 percent and no more than 35 percent formula," many tenants will not receive actual benefits under this guarantee as they will be within the acceptable range. However, as their housing is improved and rents rise they may come within the recipient category, or they may eventually require assistance as housing service costs rise faster than tenant income.

The maintenance guarantee should not be available to tenants in buildings that are not brought up to housing code standards. However, with the availability of large scale low cost funds, the local administrators can more readily force the landlord to bring his housing up to code; his threat to walk away will have reduced credibility since other entities, public or private, can acquire the units with the help of program funding. Most importantly, the guarantee will encourage the building owner to make the requisite improvements, because there will be additional tenant buying power to support them.

E. *Property Tax Freeze and Abatement*

A major state and local contribution to the success of the program would be to freeze and, in some cases, abate local property taxes in the impact area. The nation's cities rely heavily on local property taxes to finance public services.[84] As is often the case, the poorer the locality, the greater the dependence on public services, the lower the property values, and hence, the higher the effective tax rate. The tax rates and assessment ratios[85] are often

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83 The eligibility of homeowners for maintenance grants in addition to low interest loan funds is debatable as they would be eligible for tax credits. See text following note 76 *supra*.

84 *See* Bureau of the Census, Dep't of Commerce, Government Finances, 1970-71, Series GF-71, no. 5, at 5 (1972).

85 That is, the percentage of market value at which property is assessed.

unrealistic in relation to true value and place an inordinately unfair burden on homeowners and renters.[86] There is even discrimination within city jurisdictions, sometimes a result of poor assessment rather than conscious action. A study revealed that real estate in the Roxbury section of Boston was bearing a disproportionate share of that city's tax load.[87] While the tax rate was uniform throughout the city and the assessment ratios were supposedly uniform, the effective tax rate (assessment ratio multiplied by tax rate) was much higher because the city assessors failed to revalue Roxbury property separately from other Boston property.[88] Other property had risen in value much more rapidly than in Roxbury, where the values were extrapolated. Roxbury's effective assessment ratio was far higher than that of other appreciated houses in Boston, so the effective tax rate was higher.

To rectify this a tax freeze and abatement should be instituted in the rehabilitation area.[89] An abatement reduces the operating costs of a development and thereby reduces rents paid by low income tenants. The abatement and subsequent freeze should be at an across-the-board rate of 10 to 15 percent of project rent for multifamily housing and 10 to 15 percent of imputed rent on single family homes. Imputed rent can be computed on the basis of an annual rate of return on market value appraisal of the house. Whatever formula is used, the result should not produce a severe disparity of tax load as compared with similar rental projects. The merit of a tax based on rental income is that improvements are not discouraged as they are under pure valuation taxing. In the latter case, any improvement, whether or not market value truly rises, is seen as an increase in value and results in increased taxation. In some cities these reductions could probably be worked out by effective tax administration (*e.g.*, the Boston case); in others, state and local legislation must be enacted.

Tying the tax abatement and freeze to a fixed level of rental income is essential to the success of the program and ought to be

86 Oldman & Aaron, *Assessment-Sales Ratios Under the Boston Property Tax*, 18 NAT'L TAX J. 36 (1965).

87 *Id.*

88 *Id.* at 43.

89 *See* Alpert, *Property Tax Abatement: An Incentive for Low Income Housing*, 11 HARV. J. LEGIS. 1 (1973).

seen as a condition precedent to federal funding. One of the major problems with past federal housing programs is that the true costs over time of developing a successful housing program were never recognized and consequently levels of federal and state commitment to propel a program to its objectives were never formulated.[90]

This provision is thus crucial in that it keys the state and local housing income maintenance commitment to the concrete property tax terms at the heart of the state/municipal service and redistribution functions. By preventing the taxing away of the federal housing subsidy — which loss might lead to the need for increased payments — the proviso should help create a realistic upper limit on the federal government's commitment.

F. *Pooling Federal Housing and Community Development Resources*

Legislation enacting this proposal should specifically combine with it the federal community development programs, *e.g.*, housing code enforcement[91] and Model Cities.[92] Such action is an important part of a strategy that seeks to preserve urban neighborhoods. There also must be a matching local commitment to maintain and improve local infrastructural capital facilities and services. Without a sufficient level of city services the impact funds for housing will not realize their potential benefits.

The requirements for matching state and local funding that are contained in the present federal community development grants[93] should be carried over to the proposed program. Specific legislative requirements for pooling of community development funds and the housing preservation subsidies is essential to the success of the program. Experience with the interaction between the § 236 rehabilitation program and existing community development programs has indicated that vague statutory preferences or administrative guidelines for placing housing in areas receiv-

90 *See* text at note 51 *supra*.
91 42 U.S.C. § 1468 (1970).
92 42 U.S.C. ch. 41 (1970).
93 *E.g.*, the Code Enforcement Program, 42 U.S.C. § 1468 (1970).

ing community development funding are insufficient to insure a sensible combination of such funding.[94]

G. *The State Role*

A crucial state role will be that of marshaling its administrative and financial resources to qualify its necessary localities for this federal funding. A logical agency to manage the loan portfolio is the state housing finance agency, now established in 31 states.[95] The record of these organizations has been impressive. In just four years, January 1, 1969 to March 1973, the 11 most active housing financing agencies, using tax-exempt financing, have financed 90,587 housing units with a total project cost of $2.64 billion.[96]

The states, in conjunction with their state housing authorities, should develop a strategy for selecting preservation impact areas in accordance with the federal mandate. The federal government would be passive and its controls and monitoring would be only through the state housing authority. Extensive guidelines and performance standards would provide the direction for the states to carry out the federal mandate.

Federal funding of the program should also be based upon additional state and local participation as described in this proposal.[97] All necessary state and local financial and administrative resources to assure effectiveness of the program should be committed before federal funding and tax credit benefits begin. The type and level of state and local financial participation are crucial bargaining points of federal grants, and the goal should be maximum leverage so that the federal effort is matched in substantial proportion both by capital grants and the provision of services. The states might also be required to insure a portion of the federal loan funds. This type of coinsurance would assure greater state attentiveness to the quality of the program being implemented.

94 For example, in Detroit, 85 percent of the rehabilitation units funded were in areas near, but outside of, the Model Cities areas. Unpublished data of the Michigan State Housing Development Authority, on file with the Continental Wingate Co., Boston.

95 Truslow, *supra* note 57.

96 *Id.*

97 *E.g.*, parts III(D) and III(E) *supra*.

H. *Additional State and Local Improvements to the Housing Delivery System*

While not part of the core proposal, the following suggested areas of state and local program contributions are important to the success of a broad based housing preservation strategy. The extent of their adoption could form a basis on which to evaluate competing state and local requests for preservation funding.

1. Quick Title

Abandoned buildings and those with serious tax defaults could impair the large scale rehabilitation effort in the target areas. The process of taking title to these properties may involve delay-producing equitable proceedings and, in many states, a statutory redemption period of up to two years after foreclosure.[98] Under the latter provisions there is a disincentive to make improvements on the acquired property as the landlord may reclaim title once others have made significant expenditures.

States thus should pass legislation shortening and simplifying the process of acquiring buildings through tax defaults. Also, the ability to order swift abandonment and demolition would be useful. The federal government might set up model criteria for such laws.

2. Modified Code Enforcement

In many inner-city areas, buildings in violation of housing codes are allowed to remain occupied. Once a building permit is issued to begin rehabilitation, though, the renovation must meet building code standards for new construction or the building will not get an occupancy permit.[99]

Codes must be flexible to meet the needs of a rehabilitation program designed to emphasize the eradication of serious dangers to health and safety and the provision of a flow of services, rather than to emphasize the use of heavy capital improvements. Hence, many cities may have to modify their codes to qualify for this program.

98 H. Hoagland & L. Stone, Real Estate Finance 23 (4th ed. 1969).

99 Telephone interview with Cullen Dubose, Director of Construction Operations of Michigan State Housing Development Authority, Mar. 20, 1974.

3. Receivership

Receivership, equitable in nature, is an important tool when the threat of code enforcement and the promise of assistance under the proposed program are not enough to get a landlord to repair his premises.[100] Under appropriate enabling legislation, the court-appointed receiver would take possession of the building and would have prescribed rights to finance repairs and bring the building up to code level.

Two problems have traditionally plagued receivership as a remedy. First, the security tied to the receivership certificate financing is often junior to existing indebtedness.[101] This makes financing difficult. The Illinois Supreme Court, however, in 1970 upheld a statute that gave receivership liens priority over all existing finances. Despite claims of due process and contract clause violations, the court held that the contract clause of the U.S. Constitution is not an absolute restriction and contracts "may be subject to the reasonable and legitimate exercise of police power of the State."[102]

The second problem is simply economic — to obtain financing for improvements that the tenant can afford. The two problems work hand in hand to limit the effective use of receivership in inner-city properties. The funding tools provided under the comprehensive program would both eradicate the need for first lien status and drastically reduce the cost of financing. In many cases an effective refinancing could decrease rents. Thus, receivership power becomes an effective method to enforce and implement the guidelines of the impact program on a comprehensive basis.

Conclusion

This proposal has grown out of the strong conviction that the cities need realistically framed, comprehensive assistance now. For far too long, policymakers have been deflected from meaningful

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100 *See* Comment, *Receivers' Certificates — Valid First Liens for Slum Rehabilitation*, 1970 U. Ill. L.F. 379, 381-84.

101 *Id.*

102 Community Renewal Foundation, Inc. v. Chicago Title & Trust Co., 44 Ill. 2d 284, 290, 255 N.E.2d 908, 912 (1970).

involvement in urban areas by calling for long range utopian solutions and, when that fails, by developing extremely costly, inefficient, and disjointed housing programs. Characteristic of these sporadic attacks on urban decay has been the § 236 rehabilitation program.

The proposed program is designed as a policy tool to frame a rational urban strategy to save those areas which can be saved and to do so by a combined housing and community development funding approach. Its emphasis is one of neighborhood preservation based on long-term provision of housing services. The scattered, capital-intensive rehabilitation that has characterized the government's efforts to date must give way to a strategy that provides for a flow of urban services, only one of which is housing.

Most important is the underlying theme that government at all levels must be selective in allocating limited resources to urban areas. This selectivity must take the form of a desire to ensure that the investment of resources will be comprehensively administered in areas that are chosen for their potential to retain these benefits.

The selectivity must also come from an intelligent working partnership among the three major levels of government. Each government must contribute its appropriate share of capital and human resources. This Note is addressed most directly to the federal government, because of this writer's strong conviction that, notwithstanding the new federalism approach which rationally attempts to delegate much of urban problem solving to state and local levels, the leverage for program development and implementation exists and will continue to exist on the federal level.

*Peter R. Morris**

*Member of the Class of 1975 at Harvard Law School.

BOOK REVIEWS

THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH. By *The Rockefeller Brothers Fund,* New York: Thomas Y. Crowell Co., 1973. Pp. 318, index. $3.95.

*Reviewed by Basile J. Uddo**

In the summer of 1972 the Citizen's Advisory Committee on Environmental Quality created its blue-ribbon Task Force on Land Use and Urban Growth. The Task Force brought together an impressive array of able participants from various disciplines.[1] Unfortunately, despite the expertise of the authors and the commonsense approach adopted in identifying the problems of land use, the Task Force's report, *The Use of Land,* is often naïve in its recommendations and analysis. Although its objective — a more pleasing human environment — is appealing, the report is inadequate in terms of recommended implementation. The reader is first presented with a catalogue of evils that have emerged in American land use. Then the report turns optimistically to possible solutions. The intervening questions of proximate causes and the possible obstacles to implementation generally are not considered.

The report's chief value is as a nontechnical, thought-provoking work to stimulate the layman's awareness of land use problems. A chief defect is that, despite the report's claim to the contrary,[2] it loses sight of the practical problems in implementing proposed solutions.[3] The report begins with the admirable assumption that Americans must begin to view land as a resource, as limited as

*Instructor of Law, Boston University School of Law. B.B.A., 1970, Loyola University, New Orleans; J.D.. 1973, Tulane; LL.M. candidate, 1974, Harvard Law School.

1 The Task Force prided itself on its balanced, interdisciplinary complexion. Representatives were included from banking, law, planning, government, education, and civil rights and citizen action groups (pp. 1-2).

2 The report claims to be "one that acknowledges the political constraints in our cities, states, and federal government, one that realistically assesses what we can and cannot influence . . . . " (p. 5).

3 The failure to consider these practical problems will be treated in this review. Generally, they concern the report's failure to recognize that private interest pressures will greatly affect local government attitudes toward land use regulations.

minerals, water, and clean air (pp. 7, 15-16, 24). A more realistic assumption would be that nothing short of a full-scale land crisis will so drastically restructure the American attitude toward land.[4] In fact, even a crisis is no guarantee that this salutary attitude will emerge. For example, the energy crisis has recently been responded to with popular skepticism and selfishness, precluding effective voluntary remedial controls.[5] Thus one notes at the outset that the authors display a probably unjustified optimism.

The report recommends balancing rational development and such values as environmental protection, a middle ground approach which is hardly novel and offers no unique insights.[6] It entrusts the ultimate responsibility for the balancing to local authorities.[7] Though the authors admit the need for state and federal involvement, they feel that the municipalities must be the ones to enact and enforce workable land use regulations (p. 19). The optimism inherent in this suggestion may be warranted for a few areas (notably those used as reported examples), but hardly for the many areas that will have to cooperate if rational land use is to become a national reality. The reporters seem to overlook the fact that many municipal governments are strongly influenced by development interests.[8] Even if innate

4 For a further discussion of this attitude see B. SIEGAN, LAND USE WITHOUT ZONING 222-24 (1972); Dunham, *Property, City Planning, and Liberty*, in LAW AND LAND 28 (C. Haar ed. 1964). *See also* J. CRIBBET, W. FRITZ & C. JOHNSON, CASES AND MATERIALS ON PROPERTY ch. 1 (2d ed. 1966) (discussing the development of property as a legal institution). The traditional American attitude toward property largely relies upon statements like this:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

21 W. BLACKSTONE, COMMENTARIES *2.

5 For examples see TIME, Feb. 25, 1974, at 26; U.S. NEWS & WORLD REP., Feb. 25, 1974, at 13.

6 Other authors have already taken this position. ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 2, 1970); S. 3354, 91st Cong., 2d Sess. § 401 et seq. (1970); LAW AND LAND (C. Haar ed. 1964).

7 "Athough we recommend a number of measures to inject higher levels of government into the development guidance process, we think that the broad base of regulations should be established by local decisions" (p. 19).

8 *See generally* Comment, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972) (discussion of the weaknesses of zoning and zoning boards under pressure from private interests).

conservatism were not motive enough to shun meaningful regulations, dependence upon continued development is.

The body of the report deals with a list of specific findings and suggestions related to the problem at hand. Generally, these findings are informative and merit some individual consideration. High on the Task Force's list of priorities is the preservation of open spaces (p. 103). The reporters betray an initial premise of the study, the commitment to local regulation, by relying heavily upon federal (and sometimes state) involvement to secure effective open space preservation (p. 106). Federal tools are varied in form and highly effective since they generally appeal to economic considerations via the tax system (pp. 112-13). The Task Force recognizes this and recommends encouragement of estate tax breaks[9] and extension of charitable status to land preservation groups (p. 113).[10]

On the state and local level, the report suggests acquiring green space by noncompensatory means (p. 135).[11] The problems in implementing this proposal would be enormous. The reporters' idea that land development rights will some day be viewed in the same light as separable mineral rights not only is counter to the American philosophy,[12] but also overlooks implementation

9 To facilitate the acquisition of open spaces by the federal government the reporters make one particularly interesting suggestion — payment of federal estate taxes by transfers of land to the government. The fair market value of the land would be offset against the estate's federal tax liability (p. 113).

10 The report fails to note a possible complexity in such a system. Presumably these groups would wish to influence legislation. Since this is proscribed activity for charitable organizations, separate foundations would have to be formed to perform this function. INT. REV. CODE OF 1954, § 501(c)(3), Treas. Reg. § 1.501(c)(3)-1(c)(3) (1974).

11 The reporters allude to the English Town and Country Planning Act (1947) as an example of what can be done to effectuate this type of land use regulation (p. 133). However, the American reaction probably will be that the British are more likely to accept this socialized view of property rights. This comment is not intended to discourage such regulation but to point out a likely public response not anticipated by the report. Additionally, the report fails to recognize that the 1947 version of the Act has been widely recognized as deficient:

> In spite of hopes and best intentions of planners and legislators, it is generally conceded that the system [the 1947 Act] did not work well in practice . . . . Consequently, Parliament abolished the development charge [one aspect of the system] in the Town and Country Planning Acts of 1953 and 1954.

Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L.J. 635, 644-45 (1974).

12 *See* note 4 *supra*.

problems that might well produce unrecoverable social costs in excess of the ultimate benefit.[13] The Task Force feels, however, that many urban areas would benefit by division of property rights through the planned unit development (P.U.D.)[14] and transferable development rights[15] (pp. 138-39). The report admits that no substantial use has been made of these techniques and that public and legal attitudes toward them have not yet reached a consensus.[16]

Even if P.U.D.'s and transfers of development rights can withstand judicial scrutiny, the report suggests no way to motivate local authorities to enact the firmer development regulations necessary to ensure that developers make use of them. Today developers know that soft zoning and planning laws (and boards) allow them sufficient freedom without requiring some amenity

13 For a discussion of the implementation problems, see Rose, *supra* note 11, at 644-45. For a discussion of the mitigation of these problems, see Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 122-23 (1973).

14 The P.U.D. (also sometimes known as cluster zoning) is a land use regulation device allowing a developer to deviate from traditional single use, lot-by-lot subdivisions to create a more flexible mixed use development. In return for the suspension of traditional zoning regulations, the developer provides certain predetermined amenities, *i.e.*, open spaces, municipal facilities, school buildings, recreational facilities. For further explanation of P.U.D.'s, see U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE LEGISLATIVE PROGRAMS 5 (Cum. Supp. 1970). *See also* Babcock, Krasnowiecki & McBride, *Planned Unit Development, Model State Statute*, 114 U. PA. L. REV. 140 (1965).

15 Development rights transfers can be used to relax economic pressures on open spaces and historical landmarks. These land uses are generally less economically productive than would be allowable under the prevailing zoning provisions. To encourage their preservation the municipality could provide for sale of the unused right to develop the land. This compensates the owner for not fully exploiting the land. The rights would be salable on the open market to developers who could then increase their intensity of development at some other site beyond zoning maximums. *See* Elliot & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56, 72 (1973); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85-86 (1973).

16 The lack of judicial authority and resulting speculation on the legal basis of development rights transfers is discussed in Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 602 (1972). For attitudes on P.U.D.'s, see Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960). *See also* Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965); Mandelker, *Reflections on the American System of Planning Controls and a Response to Professor Krasnowiecki*, 114 U. PA. L. REV. 98 (1965); Craig, *Planned Unit Development as Seen from City Hall*, 114 U. PA. L. REV. 127 (1965); Annot., 43 A.L.R.3d 888 (1972).

(*i.e.*, open space) as a quid pro quo for the right to develop. Without stricter regulations, P.U.D.'s and development transfers are emasculated. Therefore, we return to the earlier criticism that the authors' reliance upon local control rests on an unduly optimistic view of the local desire to significantly control development.

The report suggests that municipalities create the atmosphere necessary to divide up property rights by changing the view from "bottom up" to "top down" (p. 22). That is, governments should no longer allow land owners to feel that ownership of land brings with it ownership of development rights, but rather that society sends down to the landowner those circumscribed rights that it decides to grant. Perhaps creation of this view of land ownership is possible, but it does represent a significant departure from traditional American attitudes toward property.[17]

Other specific recommendations in the report also depend upon certain philosophical attitudes toward growth which should be understood. As a prerequisite to its specific plans, the report suggests that the country adopt a new growth policy. This new policy is similar to the Task Force's suggested transformation of attitudes toward property rights and suffers from the same deficiency.

The reporters sense an amorphous "new mood" (p. 33) that seriously questions the traditional growth orientation of American cities.[18] They say this new mood springs in part from humanistic concerns.[19] As examples the writers cite several recent political or quasi-political occurrences (p. 35). However, as they point

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17 *See* note 4 *supra*. The taking issues this suggestion raises are considered in the text following note 25 *infra*.

18 The report describes the mood on page 33:

> This mood defies easy generalization because it springs from a melange of concerns — many that are unselfish and legitimate, some that are selfish and not so legitimate. The mood is both optimistic and expansive in its expectations of the future, and pessimistic and untrusting about inevitable change, even (perhaps especially), in places where change is the constant. Its demands range from managed growth to no growth, from "stop-til-we-plan" to "stop," period.

19 "But the new attitude toward growth is not exclusively motivated by economics. It appears to be part of a rising emphasis on humanism, on the preservation of natural and cultural characteristics that make for a humanly satisfying living environment" (p. 34).

out,[20] these occurrences could also be explained by reference to justifications other than humanism. For example, Colorado's rejection of the Olympic games was often justified in economic terms.[21] And certainly the Boca Raton growth ceiling ordinance is as much a case of exclusionism as it is one of humanism.[22] Thus the Task Force may again err on the side of optimism by defining a major element of the new mood in terms of humanistic concerns.[23]

Despite its emphasis on humanism the report clearly lacks sufficient consideration of the problems and needs of low income and minority groups. Thus the "public policies" which the report says should be developed in response to these new attitudes "would impose their heaviest burden on the least advantaged members of society" (p. 53). While the report highlights the problems of discrimination and exclusion, it offers no solutions. Recognizing that the new mood is thought to be tailored to white middle class interests (pp. 53-54), the reporters imply this criticism is unjustified, but never say why or what should be done about it. As it is presently constituted the new mood is an illustration of the haves protecting what they have to the exclusion of the have-nots.[24] This image will not be shed until the purported humanism incorporates the concerns of the disadvantaged. Therefore, until a commonality of perspective as to what constitutes

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20 *See* note 18 *supra*.

21 The report itself points out the economic concerns of Coloradans: "Other citizens, concerned about rising property taxes, joined with the environmentalists in opposition. They insisted that, on balance, the *costs in public dollars* alone would far outweigh whatever revenues were generated" (p. 44) (emphasis added).

22 "This was El Camino Real, or the King's Highway, which led to the Mizner principality of Boca Raton, the most snobbish of all the Florida real estate subdivisions." A. JOHNSTON, THE LEGENDARY MIZNERS 235 (1953), quoted in C. HAAR, LAND-USE PLANNING (2d ed. 1971).

23 If humanism, as it is commonly understood, were really a major component of the new mood, would the report have to note the concern of low income groups that decent, affordable housing will be the victim of post-new mood development (pp. 53-55)?

24 The report acknowledges this exclusionary aspect (p. 53):

> If Boulder or Boca Raton takes measures to limit its population, for example, the price of land and homes may be driven up, thereby pricing out the poor, and probably many of the middle class . . . .
>
> . . . [I]f large tracts of open spaces or wooded areas are to be preserved, a possible effect, whether intended or not, could be to close off potential housing sites.

humanistic land use can be achieved, the report's suggested growth policy will not, indeed, should not, be readily accepted.[25]

Understanding these basic philosophical weaknesses, one can examine more closely other specific proposals of the report. The writers suggest that "state and local legislative bodies adopt stringent planning and regulatory legislation whenever they believe it fair and necessary to achieve land-use objectives" (p. 173). To protect this tougher legislation the Task Force proposes that the courts relax the compensation requirement and allow these enactments to be upheld as merely regulatory (pp. 173-75).

The report further recommends an increase in the resources available to government attorneys who must argue in favor of these anticipated regulations.[26] It recommends that private and governmental groups mobilize their forces to support government attorneys with man hours and expertise (pp. 172-75). This, the report asserts, would balance the disparity of legal power that now favors the affluent developer when issues of responsible regulation versus confiscation are raised. This partial measure makes sense because, presumably, the judicial process functions with greater fairness when both sides wield commensurate legal resources.[27]

This, however, does not create workable standards for defining the limits of a taking. The mere fact that government can become more persuasive in assessing and presenting the social costs which argue against invalidating a land use regulation does not necessarily enable a court to decide how these intangible considerations should be weighed against raw property values.

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25 For example, the view taken by Claire Stern of the Long Island Environmental Council is hardly what we commonly think of as humanistic; however, it is consistent with the approach suggested by the report:

> Although she believes blacks need more housing opportunities on the Island, she says that "until better land-use decisions are made, I'll stand in opposition to density development, although my gut feeling is that this is arbitrary and wrong" (p. 55).

26 "The government has a more difficult task [than the developer]. It must show the value to society of limiting development on a land area or saving a historic building. . . .

All too often, however, government attorneys cannot spare the time for the extensive preparation required" (p. 172).

27 For a further discussion of this point see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 284-302 (1973).

In answer the authors state that along with this buttressing of legal capability the courts should reassess their method of examining land use regulations (p. 174). First, a presumption should be created that any change in an existing ecosystem will have adverse consequences difficult to foresee. This they assert would "build into common law a requirement that a prospective developer who wishes to challenge a governmental regulation prepare a statement similar to the environmental impact statements now required of public agencies under federal programs" (p. 174). But increasing the bureaucratic requirements for developers may serve only to make the final outcome more costly, for in the final analysis the determination will be a contest of experts not unlike present courtroom battles.[28] In contrast, if standards and guidelines were provided, use of the impact statement would create an effective superstructure for resolving the taking issue.[29]

The second suggestion for reexamining the judicial attitude toward land use regulations goes to the heart of the economics of land ownership. In the words of the report:

> It is time that the U.S. Supreme Court re-examine its earlier precedents that seem to require a balancing of public benefit against land value lost in every case and declare that when the protection of natural, cultural, or aesthetic resources or the assurance of orderly development are involved, a mere loss in land value will *never* be justification for invalidating the regulation of land use (p. 175) (emphasis added).

As a legal standard this is deficient since there is no theory upon which the Court could issue a mandate to ignore diminution of property values, especially to protect such things as "aesthetic resources," since it is difficult, if not impossible, to secure agreement as to what these are.[30] The report is saying in effect that

28 The difference will be one of degree, *i.e.*, the government's case will be better prepared. The difficult judicial determination of regulation versus taking must still rely upon imprecise guidelines.

29 Presumably, the impact statement would produce the information needed to apply the standards and guidelines most effectively.

30 *See* Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1969); Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. FLA. L. REV. 430 (1965). *But see* Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973).

we shall balance the interests but the developer shall have no interests to balance since mere land value is not a valid concern. Here again, the Task Force has substituted naïve generalities where it might have suggested manageable standards. This leaves the taking issue as confused as ever.[31]

The Task Force also examined the use of incentives to encourage the kind of development needed for America's future growth. Generally, the report's suggestions in this area are somewhat more realistic and offer at least minimal guidelines for implementation. The analysis begins by recognizing that the local control initially recommended by the report may be used in too exclusionary a manner to achieve the desired growth pattern (pp. 223-25). Local areas have historically established themselves as the guardians and spokesmen of those who were there first (p. 225). This produces an inclination to exclude what will adversely affect (in a real or imagined way) the "natives." As a threshold solution the reporters turned to the federal government to establish a national land use policy that would be the foundation for state legislation directed at standardizing land use regulations throughout the country (p. 240).

Implicit in this federal and state involvement is an active role for the courts. The report proffers a rule of moderation between the courts' role as protector of minority and low income groups and its role as protector of valid community interests (p. 243). This ideal may never be achieved since it relies on case-by-case vigilance rather than permanent changes in the system that would better protect *both* sides. The authors suggest that grassroots watchdogging may serve the function of counterbalancing development powers that threaten the disadvantaged:

> The continuing efforts of civil rights groups and other litigants to obtain court decrees invalidating exclusionary regulations are encouraged as essential steps toward achieving the state legislation and administrative action that are ultimately necessary to safeguard fundamental rights and assure needed development (p. 243).

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31 For a discussion of the complex taking issue, see B. SIEGAN, LAND USE WITHOUT ZONING 224-27 (1973). *See generally* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973).

The Task Force does go on to suggest some specific incentives to encourage acceptable development. For this it relies on the large scale unit development (usually a P.U.D.) (p. 250). The writers adequately describe the use and benefits of the P.U.D., but they mention without suggested solutions several difficult obstacles to its practical implementation (pp. 250-54).

The authors predicate use of the P.U.D. upon local acceptance of the concept as evidenced by a proper regulation or ordinance. The report seems to assume that localities can be readily encouraged to enact such ordinances (pp. 27-29). However, it is likely that some communities will find opposition from development interests. Though this opposition may vary in kind and intensity, one must consider the possibility that significant pressure can be asserted against the P.U.D.[32]

Developer opposition arises for two reasons. First, developers in many areas have traditionally enjoyed a free hand in what they do and may find the P.U.D. an example of giving more than they get. Under classical multilot subdivision practice, developers generally can (or may believe they can) develop land more profitably without regard for open spaces, recreation facilities, or other amenities. Even where they face large minimum lot sizes and other zoning restrictions they may have greater success with rezoning, variances, and exceptions than the community would like to admit.[33] Under these circumstances developers would hardly welcome a concept that would put them under the greater scrutiny of P.U.D. plan review and possibly cause them to sacrifice large amounts of land for amenities in order to gain final approval.

Second, small developers would seem particularly opposed since, as the Task Force admits, P.U.D.'s work best for large-scale developments. In fact the report recommends local encouragement of only large-scale projects (pp. 248-54) because the costs of P.U.D.'s could only be borne by large (often corporate) developers. The small-scale developer would face not only the disparity of size and economic power, but also the eventual antipathy of local government catering only to large-scale projects. This poses a

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32 *See* Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. PA. L. REV. 3, 4 (1965); Krasnowiecki, *supra* note 16, at 78-97.

33 *See* note 8 *supra*.

significant threat to the small developer — a threat that is not thoroughly addressed by the report (pp. 251, 254). Further, the report goes on to suggest a state participation that would essentially assure the large developer high-level assistance:

> The states should establish governmental entities, comparable to New York's Urban Development Corporation, responsible for assisting and when necessary directly undertaking large-scale projects.
> These entities should have the full range of powers, including the power of eminent domain, the power to override local land-use regulations, and the power to control the provision of public utilities, when necessary, to overcome the barriers that now prevent most developers from operating at the larger scales that the public interest requires (p. 261).

In essence the report suggests the concentration of not only economic power but also the full array of governmental power in the hands of a few large developers. As bigness has not proven itself synonymous with quality or human concern, another source of opposition to the report's proposal may well be suspicious citizens.[34]

All this is not to say that the P.U.D. is a bad approach to development. Indeed P.U.D.'s do offer an important avenue for rational, high quality residential development.[35] These issues are raised merely to point out the report's chief weakness — failure to fully recognize the source and nature of opposition to its suggestions.

The Task Force report is generally useful, but in a very limited sense. It impressively highlights the major problems facing future rational land use. But in producing a commonsense view of the problem it often oversimplifies, exhibits excessive optimism, and recommends inadequate strategies for implementation. Perhaps its chief value as a policy guide is that it may heighten public awareness of the problems and issues of land use.

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34 *See* Lloyd, *supra* note 32, at 6; Krasnowiecki, *supra* note 16, at 65-78.
35 *See* Lloyd, *supra* note 32, at 3-14; Mandelker, *supra* note 16, at 98-105.

MATERIALS ON LEGISLATION. By *Horace E. Read, John W. MacDonald, Jefferson B. Fordham, William J. Pierce,* New York: The Foundation Press, Inc., 3d ed. 1973. Pp. 1039, index. $17.50.

*Reviewed by Richard B. Stewart**

This, the third edition of a standard casebook on legislation, bears the names of no less than four authors and displays both the strengths and weaknesses often associated with such productions. Regrettably, it also reflects the low intellectual estate of the conventional law school course on legislation.

The work is a patiently accumulated horde (1039 pages) of opinions and writings by lawyers on legislation and the legislative process. No ingredient of the conventional study of legislation in law schools has been overlooked,[1] and there are in addition mildly exotic materials on linguistics, the theory of sanctions,[2] and, rather quixotically, interstate compacts. Throughout one finds evidence of careful research, frequently seasoned with thoughtful queries. In addition to diversity of subject matter, the work's multiple authorship also generates useful contrasts in perspective and tone, from speculative ruminations on statutory interpretation to pithy, practical advice on drafting.

But, as the work at hand demonstrates, third editions are sometimes hostage to the past, and the impress of four pairs of editorial hands is not always happy.[3] Aggregation is a doubtful

*Assistant Professor of Law, Harvard Law School. A.B., 1961, Yale University; B.A., 1963, Oxford University; LL.B., 1966, Harvard Law School.

1 The work includes materials on legislative organization, procedure and reform, drafting and the form of statutes, special constitutional limitations on retroactive or special legislation, legislative investigations, lobbying, legislative ethics, and a long section on statutory interpretation. *Compare* C. NUTTING, S. ELLIOTT & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION (4th ed. 1969); F. HORACK, JR., CASES AND MATERIALS ON LEGISLATION (2d ed. 1954); A. LENHOFF, COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION (1949). *But cf.* F. NEWMAN & S. SURREY, LEGISLATION, CASES AND COMMENTS (1955). While neither a legislative case history nor a drafting exercise is provided, the authors quite properly suggest (p. xvi) that such matters, while valuable, are better treated through supplemental materials at the instructor's discretion.

2 *Compare* E. FREUND, STANDARDS OF AMERICAN LEGISLATION 215-73 (2d ed. 1965). The 100 pages devoted to sanctions, while often of intrinsic interest, bear scant relation to anything else in the work under review. The relevance to the subject at hand of decisions such as Penfield Co. of California v. SEC, 330 U.S. 585 (1947) (sanctions for disobedience of SEC subpoena) (pp. 679-84), is far from obvious.

3 *But see* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHS-

recipe for scholarship or pedagogy. There are, for example, some 200 pages devoted to state constitutional restrictions and other legal doctrines relating to statutory form. Much of the material — concerning matters such as the adequacy of a bill's title — is antique and calculated to numb the interest of even a first year student.[4] While some of these doctrines still display surprising vitality[5] and deserve coverage, the requisites could surely be communicated in far briefer compass. A smaller, but still significant block of materials is devoted to theories of judicial precedent and stare decisis, presumably to establish the necessity of legislation to supply a dynamic element in the development of law.[6] But the apparently intended thesis is largely dated and of limited significance. The premise generative of most legislation in past decades has not been doctrinal ossification in the common law, especially now that the judges are assuming a more active and creative role. The impetus behind most statutes has rather been the need to devise new governmental machinery to cope with the complex exigencies of a highly developed urban society.[7] The machinery chosen has been the administrative agency, a matter which receives altogether short shrift in these materials.

LER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973). It is no disservice to the first three named authors to note that the second edition still bears the stamp of an unusually fruitful collaboration between the authors of the first edition, Professor Wechsler and the late Professor Henry Hart.

4 The tedium is partially relieved by the droll character of some of the decisions. *E.g.*, Commonwealth v. Massini, 200 Pa. Super. 257, 188 A.2d 816 (1963) (shooting of neighbor's cat held not punishable under statutes forbidding killing of "any equine animal, bovine animal, sheep, goat or pig of another person") (pp. 199-200); *In re* Grant's Estate, 377 Pa. 264, 105 A.2d 80 (1954) (tax bill held inapplicable to estate of decedent who died at 11:55 a.m. on day bill signed, absent evidence as to time of signing) (p. 216).

5 *E.g.*, Indiana *ex rel.* Pearcy v. Criminal Court, 274 N.E.2d 519 (Ind. 1971) (attempted statutory codification, termed "Superbill," invalid under state constitutional ban on statutes embracing more than one subject) (p. 189).

6 In place of the doctrine of stare decisis, a far more fruitful starting point for discussion of the relation between judicial and legislative lawmaking would be Professor Posner's provocative claim: "There is a natural antagonism between judicial and legislative attitudes . . . . Judicial rulemaking tends toward efficiency maximizing while the legislature gives greater weight to the redistribution of wealth." R. POSNER, ECONOMIC ANALYSIS OF LAW 387 (1972).

7 This premise is recognized, but never developed, in various excerpts included in the introductory section of the casebook, "Section 1. Historical Emergence of Legislation as the Chief Instrument of Change and Innovation in the Law" (pp. 1-5).

Beyond questions of emphasis in coverage, there is a lack of coherence in the treatment of the various topics here collected. The materials on statutory construction, legislative procedure, apportionment, legislative drafting, investigation, and other miscellaneous topics relating in one way or another to legislatures appear to be without integrating force either of pedadogical purpose or intellectual structure. This is not due solely or even primarily to the accretive tendencies of four-author third editions. The root difficulty lies in the failure to conceive of "legislation" as the study of legislatures as lawmaking institutions; instead the authors approach the subject as one would a category of judicial decision akin to torts or constitutional law. A good half of the materials consist of judicial opinions that refer in one way or another to the legislature or legislation,[8] and much of the remainder is composed of commentary on judicial decisions. Over a quarter of the entire work is devoted to statutory interpretation. It is rather as if one were invited to teach a course in judicial procedure and organization from the *Congressional Record.*

There is, to be sure, some discussion of matters such as legislative procedure, lobbying, the role of the executive in lawmaking, and legislative reform. But the treatment is too often summary and abstract. A student exposed to these materials might obtain quite a fair knowledge of what courts say about legislatures and of the rudiments of drafting. But he or she would emerge with only the dimmest perception of how legislatures actually function, how one might be an effective participant in the legislative process,[9] or how legislatures interrelate with other lawmaking organs in the legal process.

The financing of election campaigns receives but two pages, despite its constitutional ramifications and immense practical and political importance. Lobbying and its regulations are accorded roughly the same number of pages as interstate compacts.[10]

8 The reference in the opening sentence of this review to the work at hand as a "casebook" is thus entirely apt.

9 Apart from draftsmanship, the role of the lawyer in the legislative process, whether as legislator, legislative staff, legislative counsel for an executive department or agency, or counsel for private clients, receives little attention. Of course, this criticism might be directed in general against the use of casebooks to teach lawyers the skills of their profession.

10 For the regulation of election campaigns, see pages 454-55 and 730-31;

Major, vital issues, including legislative reform and executive withholding of information, are given scant, almost journalistic treatment,[11] and such important matters as impoundment, the legislative budget, legislative controls on the appointment power, and the justiciability and institutional wisdom of congressional lawsuits against the executive are not effectively covered at all.[12] The question of the legislature's capabilities as a lawmaking and policymaking body vis-à-vis the executive — a question which may be of even greater significance on the state level than the national — is almost wholly ignored. So is the entire matter of delegation of legislative powers to administrative agencies and legislative oversight.[13]

This is not to urge the transformation of the work under review into a political science text. The capacities and functioning of the legislature as a lawmaking body, the impact of legislative procedures on outcomes, the relation of the legislature to other lawmaking bodies are issues that are not only relevant to lawyers but peculiarly their province, whether their concern be academic or the advancement of clients' interests. The legislative process is not mere "politics" transformed into "law" only through the alchemy of judicial opinions.

Even if we limit our concern to judicial doctrine, underlying conceptions of the legislative process are at work. The rigor with which judges enforce state constitutional limitations such as those prohibiting multiple subjects in a single bill must inevitably reflect the judges' understanding and evaluation of logrolling practices. In interpreting statutes judges must surely address the question of how legislative decisions are actually made. Every

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lobbying is treated on pages 424-52, while interstate compacts are treated on pages 688-709.

11 Regarding the withholding of information by the executive, for example, see pages 393-98.

12 Among these issues only impoundment receives independent treatment, in a single paragraph seemingly added as an afterthought on page 506.

13 While there are materials in the section on sanctions relating to administrative agencies, they are directed to the substantive content of administrative controls rather than the lawmaking relation between legislature, executive agency, and court (*see* pp. 584-85, 641-79). The closest the authors manage to approach to this complex subject is in the extended chapter on statutory interpretation, where they devote a section to the deference courts pay to administrative interpretation of statutes (pp. 942-56).

theory of statutory interpretation betrays an implicit model, real or idealized, of the legislative process. This fact is barely hinted at near the very end of the authors' lengthy section on statutory interpretation, where they excerpt (pp. 1006-10) an article by Bishin[14] arguing that legislators as a whole pay little attention to the details of legislative history and therefore it is a shaky basis for statutory interpretation.[15] But the same point often applies with even greater force to the actual language of the statue, which is the usual starting point for judicial analysis.

With knowledge of these facts, a judge may nonetheless rest on statutory phraseology or legislative history, either because he accepts a de facto delegation of lawmaking responsibility within the legislature to committees or subcommittees as legitimate or inevitable,[16] or because such a course may be the only way to impose a measure of responsibility on the legislature or to contain the existential dilemma of his own discretion. By the same token, a judge's awareness of the tactics of legislative compromise may make him hesitant to broadly extend a discerned statutory purpose or policy in the face of seemingly illogical limitations[17] or calculated ambiguity.[18] There are, of course, alternative postu-

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14 Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965). There is also a pertinent paragraph from Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930), reproduced at page 781.

15 Bishin, however, points out that the opponents of particular items of controversial legislation will be keenly interested in its legislative history. This generates a proliferation of manufactured legislative history on all sides, *see* F. NEWMAN & S. SURREY, LEGISLATION, CASES AND MATERIALS 158-78 (1955), and the judge who hazards to discern "legislative intent" in such legislative history had best be aware of the pitfalls. Of course, awareness of the manufacture of legislative history may not deter a judge from assuming ignorance of the practice if it suits his purposes. *See, e.g.*, Brotherhood of Maintenance of Way Employes v. United States, 366 U.S. 169 (1961).

16 *See* SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.): "But courts . . . recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way."

17 *See* 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951): "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

18 *But see* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Sierra Club v. Fri, 412 U.S. 541 (1973), where the Court held, on the basis of highly ambiguous statutory language and legislative history, that the Clean Air Amendments

lates for a philosophy of statutory interpretation. An understanding of the legislative process in operation cannot resolve difficult problems of construction, but it is surely one prerequisite to wisdom.

The legislature is arguably our most important but least examined lawmaking institution. Despite its conventional virtues, the work under review is a testament to this unhappy state of affairs.

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of 1970 prohibit any substantial degradation of air quality in any region of the country, even if existing levels of pollution within a region are well under those mandated by national standards established under the Act. This decision, which will have grave economic and social consequences for such regions, is the sort for which Congress should be required to take explicit responsibility. In this regard, see L. Hand, *How Far is a Judge Free in Rendering a Decision?*, in NATIONAL ADVISORY COUNCIL ON RADIO IN EDUCATION, LAW SERIES I, at 5 (1933):

> But the judge must always remember that he should go no further than the government would have gone had it been faced with the case before him. If he is in doubt, he must stop for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result would be.

Quoted in Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 375 n.11 (1947) (p. 827 n.11).