

Permit Coordination Study

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Abstract

This policy focus paper studies coordination of land use regulatory programs. It consists of an introduction and general observations, a review of current and recent literature, and two case analyses.

The introductory section describes the need for coordination of land use permitting programs in the more complex regulatory environment engendered by recently enhanced federal land use requirements affecting wetlands, endangered species, telecommunications, fair housing and historic preservation. These programs regulate specific environmental features and other activities nationwide. In contrast, local land use controls are broad in regulatory scope, but limited in geographic range. We then suggest that programs for coordinating disparate land use and environmental programs can be regarded as successful if they provide more regulatory certainty for landowners, a greater degree of environmental protection and increased public participation. We suggest that aside from habitat conservation plans there are rather few examples of such coordination now, and that there be a further analysis of the federal wetlands program, which has largely functioned independently of other land use regulations.

The Bibliography covers some 39 articles analyzing the effects of administration of separate land use programs. These articles suggest that the one primary focus of federal-state local permit coordination has occurred with habitat conservation plans developed pursuant to the federal Endangered Species Act. The merits of such plans are discussed at some length along with other approaches to land use regulation directed at ecosystems rather than at specific environmental features or particular jurisdictional limits.

The two case studies analyze state land use coordination programs in Long Branch, New Jersey and Cape Cod, Massachusetts.

The first case study, concerning Long Branch, New Jersey, describes a special state regulation adopted for the New Jersey Coastal Zone covering the Long Branch waterfront. In this regulation, the New Jersey coastal zone agency incorporated Long Branch's municipal design standards in the New Jersey Coastal Zone rules and provided for a unified permit to be granted by the City. That case study describes how the permit has been working to provide greater regulatory certainty and environmental protection.

The second case analysis involves the Cape Cod Commission's joint review program with the Massachusetts Environmental Protection Act process administered by the State Secretary of Environmental Affairs. After ten years, it appears that this process has enhanced public participation in environmental reviews. The Commission combines environmental impact and substantive review of the merits of projects when it conducts public hearings to determine the scope and contents of environmental impact reports. This joint process, in which both the environmental report and substantive aspects of the project are considered together by a single agency, has increased public input into the environmental analyses. Thus, as with Long Branch, this case study suggests that joint permitting procedures can improve land use processes.

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Permit Coordination Study

In the 1970's Senator Henry Jackson (D. Wash.) put land use planning on the national agenda with his proposed "Land Resource Planning Act"¹. That bill, never adopted, would have provided grants to the states for the purpose of, among other things, "insuring that state land resource program[s] [are] coordinated with the planning and other relevant activities and programs of the State agencies, local governments, ... and federal agencies"². Federal programs and project activities on federal lands, including grant of permits, had to be consistent with approved state programs except in cases of overriding national interest as determined by the President.³ The Act also envisioned a role for local governments.⁴

Senator Jackson's initiative died and has never been revived. Even today, the notion of coordinating local, state and federal permitting has proved very controversial. The proposed chapter 16 of the set of Growing Smart© model statutes, published by the American Planning Association, and entitled "The Cooperative Federalism Act" was rejected by the Growing Smart© Policy Directorate. It was the only such proposed initiative rejected in its entirety. Environmentalists on the Directorate feared dilution of federal standards while local governments feared that unfunded mandates were being thrust upon them.⁵

Nonetheless, the problem of regulatory coordination will not go away. Over the decades, federal land use regulation has grown more, not less intense. Wetlands regulation has now become so much of a part of land use controls that the Supreme Court has recently stepped in to insure some continuing level of local autonomy.⁶ Historic preservation and other environmental and preservation programs affect local permitting as well.⁷ Both the Telecommunications Act of 1996,⁸ and the Fair Housing Amendments Act,⁹ impose federal restraints over local land use approvals and permitting. So does the Religious

1 One version was S-984, 94th Congress First Session (introduced March 6, 1975).

2 S-984, §105(a)(10).

3 Ibid. §109.

4 §108.

5 These observations are based on the author's participation in the Growing Smart© Directorate meetings that dealt with the subject.

6 *Solid Waste Agency of Northern Cook County v. U.S. Army Corp. of Engineers*, 531 U.S. 159 (2001).

7 For a compendium of federal programs affecting local land use decisions, see Buchsbaum, *Federal Regulation of Land Use*, 25 *Urb. Lawy.* 589 (Summer 1993). This article is described in the Bibliography section of this Report.

8 47 U.S.C. §332.

9 42 U.S.C. §3604.

Land Use and Institutionalized Persons Act, which gives churches, synagogues and mosques a federal leg up in the local land use process.¹⁰

Moreover, the federal courts have gotten more active in the area of land use regulation. Even though federal judicial intervention based on takings or substantive due process doctrines has not been uniform, clearly the use of the federal constitution to review, or as some would have it, second guess, local decision making has gained force over the past 20 years.¹¹

Even the latest federal Supreme Court explication of the subject¹² leaves a huge degree of uncertainty since it suggests that local decisions may lead to takings damages if they are analyzed under the very complex and highly unpredictable three-part test envisioned in Penn Central Transportation Co. v. City of New York.¹³ The opinion even goes further and suggests that damages may be available if a decision is arbitrary, even if it does not result in a total deprivation of the land's use or value.

Given this increasingly intense interaction between federal legislative/judicial land use requirements and state and local permitting processes, it is surprising that so little attention has been given to inter-governmental coordination of land use controls.

The body of work included in this policy focus paper attempts to address this issue. The first part of this study consists of a literature search encompassing leading articles published between approximately 1993 and the present that address permit coordination. These articles were selected because they were most on point with respect to the specific issues of permit coordination. While the bibliography is a select sample of articles reviewed for an approximate nine-year period, it does not, of necessity, reference all potentially relevant articles. In general, articles which dealt with the more general aspects of regional land use planning were not included.

The articles do address the issues of environmental or cooperative federalism, that is, environmental regulation at the state, federal or local levels. They discuss the existing processes for delegation of federal regulation under the Clean Water Act, and the utilization of habitat conservation plans to coordinate protection of endangered species

¹⁰ 42 U.S.C. §2000cc

¹¹ See, for example, *Woodwind Estates v. Gretkowski*, 205 F.3d 118 (3rd Cir. 2000) holding under substantive due process that not only the Board, but individual members of a Board could be liable in damages for an arbitrary failure to approve a proposed lower income housing; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), sustaining a multi-million dollar takings claim against a locality on the ground that a jury could have found that the City's actions lacked any rational basis; *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). (taking found in a ripe case of deprivation of all use)

¹² *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Commission*, 122 S.Ct. 1465 (2002).

¹³ 438 U.S. 104(1978).

habitats under the Endangered Species Act. They discuss such approaches as joint hearings, delegation of permitting authority and collaboration on information sharing and mapping. Issues such as balance between local responsiveness to local conditions and the need for broader approaches for dealing with, for example, endangered species, are also identified in these articles. Questions relating to protection of entire eco-systems and the role of state government are also analyzed in that regard, particularly in California.

The articles suggest a general consensus that environmental land use regulation continues to suffer from lack of coordination. Federal programs tend to have a single-issue orientation towards particular environmental goals even if they cover large areas. Localities, with their limited geographic range and interest may evolve broad land use programs, but do not consider the region as a whole. Thus, permitting systems based on broader concepts such as ecosystems, watershed protection or regional land use impacts still do not exist.

Some examples are noteworthy. Although the Environmental Protection Administration under the §404¹⁴ program has the power to delegate wetlands permitting to states, only Michigan and New Jersey have opted to assume this duty. Further, the Clinton Administration's 1993 initiative "Protecting America's Wetlands: A Fair, Flexible and Effective Approach"¹⁵ never really took hold. Its suggestion for cooperative state, local and federal watershed planning has never really been implemented, as the Army Corps and the states have continued to make separate decisions on a permit-by-permit basis.

As distinguished from wetlands, some progress has been made nationally in the area of habitat conservation. §10 of the Endangered Species Act¹⁶ provides for federal permits allowing incidental, that is unintended, taking of endangered species through disruption of habitat where there is in place a habitat conservation plan ("HCP") which provides for the better protection of species' habitat. Under such plans, large areas of habitat may be set aside and protected from development, while development in a relatively small area is permitted to proceed. This approach is intended to address the "death by 1,000 cuts" potential for individual incursions on habitat that ignore the cumulative affect of a series of such incursions. On the other hand, the plans with their "no surprises" element are expected to give developers, or local governments proposing public improvements, some assurance as to where development activity can occur so that rational local and private planning can take place. One book by Porter and Salveson¹⁷ examines a number of case studies involving HCPs and concludes that while many have been effective, the process engenders a great deal of uncertainty, expense and difficulty of its own. Nonetheless, there is substantial agreement that the coordinated regional planning and permitting engendered by habitat conservation plans can be superior, as also suggested in the Craig Arnold article "Conserving Habitats and Building Habitats: The Emergent Impact of the

14 33 U.S.C. §1304.

15 White House Office of Environmental Policy, 8/24/93.

16 16 U.S.C. §1509

17 *Collaborative Planning for Wetlands and Wild Life: Issues and Examples* (Island Press 1995).

Endangered Species Act on Land Use Development”.¹⁸ Also of interest in this regard are the concluding chapters of Endangered Species Act: Law Policy and Perspectives, by Baur and Urban.¹⁹ The articles in that collection of essays suggests that, with some dissent, the habitat conservation process provides a promising vehicle for species conservation while giving land owners necessary development flexibility. The dissent suggests that the federal “no surprises” policy, which bars changes in the plans even when the data respecting endangered species habitat is found, poses all too significant risks for the preservation of such species. This point of view is also found in Doremus, “Preserving Citizen Participation in the Era of Reinvention”.²⁰ Nonetheless, even the dissenting essays applaud the regulatory certainty that regional planning and permitting can provide. The importance of public participation in such plans is likewise emphasized by all concerned.

Debate over the habitat conservation plans does suggest that they provide a model, albeit an improvable one, for ecological protection and regulatory certainty. Thus, the HCP analysis suggests that permit coordination, the theme of this project, has promise as a way of encouraging and guiding private development while protecting environmental values.

California initiatives particularly the Natural Communities Conservation Planning (“NCCP”) process, may also provide a model for coordination of permitting and planning. Two of the articles deal with the subject and would suggest that state initiatives can draw together local governments, private entrepreneurs and federal regulators as a model for environmental management. Wheeler, “The Ecosystem Approach”, *New Departures for Land and Water*,²¹ and Ebbin, “Is the Southern California Approach to Conservation Succeeding?”²² These articles appeared in a particularly valuable collection published in 1997 by the Ecology Law Quarterly. That collection contains an additional essay, Kagan, “Political and Legal Obstacles to Collaborative Ecosystem Planning.”²³ This article bemoans the fact that collaborative efforts such as have occurred with endangered species are the exception and not the rule for other programs.

It thus does appear that land use planning plan for endangered species provides a model, albeit not a perfect one, for a future regime of permit coordination that was initially envisioned in the Jackson legislation.

Aside from the articles in the Bibliography, this paper explores two additional particular approaches to permit coordination. These are described in case studies appended to the paper.

18 10 *Stanford Envir. L. J.* 1 (1991).

19 ABA Section of Environment, Energy and Resources of 2002.

20 25 *Ecology L.Q.* 707 (1999). Doremus is particularly concerned about citizen participation in the formulation of HCP’s.

21 24 *Ecology Law Quarterly*, 623 (1997).

22 24 *Ecology Law Quarterly*, 695 (1997).

23 24 *Ecology Law Quarterly*, 871 (1997).

In the first of these, the Long Branch Coastal Permit Rule,²⁴ this author describes how, following a series of lengthy consultations, New Jersey Coastal Area Facilities Review Program agreed to accept the City of Long Branch's design standards as the coastal review standards for the City's waterfront. Accordingly, developers proposing projects in Long Branch need only seek a single permit from the City, rather than being forced to obtain a lengthy and a potentially conflicting land use review from the state. This program became part of the New Jersey Coastal Zone Management Program under the Federal Coastal Zone Management Act.

Where Long Branch and state policies appeared to conflict on their face, the state and Long Branch local authorities worked out their differences. For example, the state had required two off-street parking spaces for each residential housing unit. Long Branch proposed one off-street parking space but, to conserve land in its valuable waterfront area, proposed that the second space would be provided by either on-street or in a parking facility to be managed by the City or its parking authority. Similarly, a state objective barred lengthy building facades along the waterfront. It accomplished this objective by requiring that buildings be longer perpendicular to the waterfront than along it. Long Branch proposed, as an alternative, substantial side set backs between buildings. The state accepted both these approaches. As a result of this state-local collaboration, the objectives of both the city and the state for redevelopment have been achieved and the time required for obtaining permits along the waterfront has been considerably lessened. This circumstance provides a substantial incentive to development in this urban area as contrasted with development in suburban jurisdictions, that is, it favors concentrated development over deconcentrated or sprawl development. Since the Long Branch permit has been incorporated into the state's coastal zone management program as approved by the federal government, all three levels of government have collaborated on a coordinated permitting program.

The second case study involves a coordinated review process between the Cape Cod Commission and the Massachusetts Executive Office of Environmental Affairs of projects subject to review under the Massachusetts Environmental Policy Act ("MEPA") and the Cape Cod Commission Act. These tend to be larger significant development proposals, such as major supermarkets or mixed-use complexes. MEPA is a state statute providing for environmental impact reports on the model of the National Environmental Policy Act. Projects subject to MEPA also qualify as Developments of Regional Impact, under the Commission's jurisdiction. The case study addresses coordinating of these two processes—state MEPA review and Commission permitting. The joint review process between the state and the Cape Cod Commission, which is legally a branch of Barnstable County government, has effectively enhanced public input into the environmental review process while furthering the Commission's regional growth management objectives. A concrete timeline leading to decisions by both agencies is part of this process. It is regarded by the Commission as a significant source of savings for approvable developments. This model has been part of the Cape Cod Commission's overall success as a land use planning agency. Thus, while it only involves a joint review process, and

24 N.J. Admin. Code 7:7-7.4.

does not centralize permit decisions, it does coordinate the treatment of environmental concerns. In addition, the Cape Cod Commission has likewise established collaborative processes with Barnstable County in which Cape Cod is located and several communities in that county. These processes coordinate the scope of local and Commission regulation.

The experiences with habitat conservation plans, and in Long Branch and Cape Cod, suggest that permit coordination can succeed, both environmentally and economically. These examples further suggest that the dearth of attention paid to such coordination on the federal level cannot be justified. There is good reason to believe that coordinated planning and permitting will provide environmental results that are at least as good and perhaps better than individual “death by 1,000 cuts” permitting decisions. Further, such processes actually enhance local government and state powers since they assure that these levels of government will not find their decision making arbitrarily overruled by single purpose federal agencies acting under narrowly defined federally regulated statutes. And they can enhance citizen participation.

In sum, the literature search and the case studies all suggest a need for analysis of concrete proposals—those referenced in the Bibliography may be a starting point²⁵—for coordination of federal land use programs with those administered at the state and local level.

Suggestions for Further Analysis and Tentative Observations for Program Design

As the conclusion of the prior section indicates, permit coordination should be on the policy agenda. Further analysis would be very useful. The articles described and the Long Branch and Cape Cod experiences suggest that joint permitting based on planning coordination can yield significant public and private benefits. Further study of particular programs would provide additional data to test this hypothesis.

For example, the experience of Michigan and New Jersey in administering the federal wetlands program proved to be beyond the scope of this study. Yet it should be examined. Why other states have declined delegation of this program is also important. Since this program has become one of the most controversial federal programs, its experience with delegation should be instructive. The reluctance of planning bodies such as APA in its Growing Smart project, to adopt proposals for federal-state-local coordination is a factor that indicates a need for further analysis of such programs from the state and local as well as federal perspectives.

In addition, EPA has had a National Environmental Performance Partnership System as described in three of the articles. Martin & Kern, “The Seesaw of Environmental Power

25 See Buchsbaum, Model Acts, Integrating Federal Permitting with Local Land Use Planning and Regulation; Vol. 1 Growing Smart Working Papers, (American Planning Association 1998), at 185, proposing a “Cooperative Federalism Act.”

from EPA to the States: National Environmental Performance Plans”²⁶, Kraft and Scheberle, “Environmental Federalism at Decade’s End: New Approaches and Strategies”²⁷. While this system appears more directed at enforcement standards, rather than planning or permitting, it does represent a very significant federal-state initiative.

As to program design, the Long Branch, Cape Cod and HCP experiences suggest some particulars for the design of a more efficacious system. Consolidation of review processes so they flow together, is one. Second, coordination of substantive planning standards as in the HCP’s and Long Branch is another. Third, there is need to emphasize enhancing public participation, as in Cape Cod, through joint hearings. Fourth, stability of regulation appears to be another aspect of coordination. The hypothesis that these four phenomena result from planning/permit land use coordination should be used for further research and in the design of regulatory program reform.

Finally, and critically, the literature and case studies suggest three criteria by which permit coordination mechanisms should be judged, as contrasted with normal case-by-case permitting by different levels of government. First, do they enhance environmental protection? Second, do they provide certainty on a case-by-case planning process to the regulated community? And, finally, do they enhance citizen participation in the regulatory process?

The further research suggested above should help in determining whether permits systems with four design criteria review of consolidation, planning coordination, joint hearings and stability of regulation meet these three performance objectives.

26 9 Vill. Envtl. L.J. 1 (1998).

27 28 Publius 131 (1998).

Bibliography

The following are summaries of articles addressing coordination of planning efforts at federal, state, and local levels. The articles are grouped by topic, with the most recent articles first in each category.

Environmental

Holly Doremus. Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example. Symposium: Power, Politics, and Place: Who Holds the Reins of Environmental Regulation? 25 Ecology L. Q. 707 (No. 4, 1999).

In this article the author argues that strengthening citizens' roles in enforcing environmental statutes has played a critical role in their effectiveness. The author expresses concern that a newly popular practice under the Endangered Species Act (ESA) does not allow for meaningful citizen participation. Under the ESA "takes," which are actions that harm, harass, or kill endangered animals, are prohibited unless the Secretary of the Interior has issued a permit authorizing takes under certain circumstances. In order to obtain such a permit, an applicant must submit a habitat conservation plan (HCP) showing that the takes will be incidental to a lawful activity, and that impacts will be minimized and mitigated to the maximum extent possible. From the creation of the permit program in 1982 to 1992, only 14 permits were issued. From 1992 to 1997, however, over 225 permits were issued.

Citizen participation in the permit process is limited because the process is decentralized, the public is shut out of the initial negotiation of terms between the applicant and the Fish and Wildlife Service, the HCP documents are dense, and permit holders are protected from citizen suits so long as they comply with the permit terms. If the permitted activity ends up having an unforeseen adverse effect on protected species, there is no procedure for redress. The author argues that since the HCP permitting process has become so prevalent, citizen participation early on in the process is needed to ensure that endangered species are protected.

Paul S. Weiland. Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials. 18 Va. Env'tl. L.J. 467 (1999).

This article discusses the effects of state and federal preemption on local efforts to implement environmental policies. The article first presents the history of preemption and then examines three instances of federal preemption (regulatory takings, statutory preemption in the cleanup of hazardous waste sites, and the commerce clause implications of the transport of solid waste) and three instances of state preemption (regulation of pesticides in Massachusetts, regulation of water quality in California, and regulation of hazardous waste in Idaho). In each of these cases a local ordinance that was

enacted in order to protect public health or a locality's environment, such as water quality or landfill capacity, was struck down due to preemption by a state or federal statute.

Preemption of local environmental regulations stifles governmental innovation at the local level, inhibits responsiveness by rendering the level of government closest to the concern unable to take action to address it, forces local government officials to become lobbyists rather than act as lawmakers if they want to effect change, and may shift costs and benefits, adversely affecting residents who may be less able to pay than those who would bear the costs of certain actions if local regulations were not struck down.

Preemption allows federal regulations to create not just a floor of environmental protection, but also a ceiling, disallowing localities from enacting more stringent rules. This may or may not be the best means of protecting the environment, but it does have the advantage of creating a more uniform and predictable set of rules for developers and it encourages the coordination necessary to overcome negative externalities.

Michael E. Kraft and Denise Scheberle. Environmental Federalism at Decade's End: New Approaches and Strategies. 28 *Publius* 131 (Winter, 1998).

This article examines the efforts of the Environmental Protection Agency in the late 1990s to respond to criticism regarding implementation of environmental regulations. In the 1980s and 1990s, states improved their institutional capacity and adopted innovative environmental programs, prompting conflicts with federal command and control regulations. In response the EPA initiated three programs, the Common Sense Initiative, Project XL, and Performance Partnership Agreements with the states.

The Common Sense Initiative involves bringing together leaders of business, labor, and environmental groups, and state officials with the EPA to work cooperatively toward improving environmental protection while lowering costs for those involved. Streamlining permitting and paperwork is also a goal. Project XL is a more limited initiative in which the EPA works with individual industries to streamline regulatory permitting processes, encourage industries to become more involved, and identify strategies that are more cost-effective. Finally, Performance Partnership Agreements under the National Environmental Performance Partnership System seek to give states that have strong environmental programs greater flexibility in program operations and spending authority, while allowing the EPA to expend more time and resources on states with weaker programs.

The authors find these federal initiatives an appropriate step toward achieving sustainable development considering the environmental protection efforts states and localities have undertaken in recent years, but note that the federal statutes under which the EPA operates limit the real impact of these initiatives. Communities seeking to implement sustainable development programs should focus on setting the agenda for the long term while advocating statutory reform that will allow the EPA greater flexibility in dealing with the state, local, and private entities it regulates.

Joyce M. Martin and Kristina Kern. *The Seesaw of Environmental Power From EPA to the States: National Environmental Performance Plans*. 9 *Vill. Envtl. L.J.* 1 (1998).

In this article the authors note the shifting balance of power between the states and the federal government in the area of environmental legislation. Prior to the 1970s environmental protection was a voluntary state enterprise, with dismal results. At that point the federal government became involved, mandating standards and enforcing them itself. While some federal environmental legislation still operates on this model, much of it has shifted to a cooperative federalism approach, in which the federal government sets standards and allocates funding and then contracts with interested states to administer the programs. The EPA has established the National Environmental Performance Partnership System (NEPPS) to facilitate this relationship between the federal government and state agencies. States may enact regulations that are more stringent than the federal guidelines, but not less stringent. NEPPS also encourages states to develop their own assessments of goals and strategies.

This arrangement has not been without difficulties. In recent years states have incurred shortfalls due to increased statutory and program demands and limited federal funding. Because federal funding has not kept pace with increased demands, the ability of some states to satisfy federal mandates has been called into question. Citizens in several states have petitioned the EPA to withdraw delegated programs in their states because the state regulators have instituted few or no enforcement actions in recent years. The statutory authority to implement and enforce programs is governed by delegation, which has made it difficult for Congress to reauthorize some major bills. The structure of NEPPS agreements also does not ensure national uniformity, a major environmental protection goal. NEPPS relies on “environmental indicators” to determine effectiveness, but this method is imprecise because there is no uniform understanding of what these indicators are, and no objective indication of what constitutes an improvement in one of the indicators.

Cymie Payne. *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*. 28 *Envtl. L.* 519 (Fall, 1998).

This article examines Massachusetts’ wetlands regulation system, which balances statewide supervision with local implementation by local conservation commissions. These commissions are comprised of five to seven appointed, unpaid citizens, who are responsible for local natural resource policy and permitting activities related to a town’s wetlands. The author devotes the bulk of the article to evaluating Massachusetts’ system against the standard critiques of localism, such as jurisdictional limitations, political acceptability, funding, and limited scientific expertise as well as against the type of efficiency analysis that has been directed at command and control regulation such as the Clean Water Act.

The author concludes that the beneficial aspects of the Massachusetts system outweigh its drawbacks. The commissioners tend to be committed, knowledgeable about the land involved, and impartial due to appointment, local jurisdiction, and lack of pay. The commissions have the flexibility to work with applicants on alternatives or modifications to potentially problematic projects rather than simply rejecting them. The major drawback of the system is the lack of scientific, engineering or legal training by commissioners, resulting in numerous incorrectly carried out assessments. Since implementation there has been a dramatic reduction in the rate of wetland loss, although the system has not protected species diversity well.

The importance of local input and control in Massachusetts is evident in its wetlands procedure. The Army Corps of Engineers generally refuses to issue permits until state and local permits have been issued, which supports local authority. People proposing activities that might affect wetlands must inform both the local commission and the state Department of Environmental Protection (DEP). The DEP sets all standards administered at the local level, and provides the appeal function for applicants aggrieved by a commission's decision. Prior to notifying the local commission, applicants must apply for all other required local permits, variances, and approvals.

Tobie Murray. An Endangered Habitat to Help Landowners Protect Wildlife. Symposium: The Ecosystem Approach: New Departures for Land and Water. 24 Ecology L. Q. 689 (No. 4, 1997).

The author of this piece presents his expensive, time-consuming experience with the Endangered Species Act as the owner of a tree farm in Washington, and proposes an Endangered Habitat Act as an alternative. He contends that landowners cannot control species, but can control habitat. His proposed act would state requirements positively and prospectively in Model Habitat Plans so that landowners would know the plans' parameters from the outset and could take pride in participating. The requirements would be definite and would not change over time with a given landowner. Participation in the act would be voluntary with landowners attracted by the promise of blanket immunity from the requirements of the ESA. Each region's requirements would be established by agreement among federal, state, and local agencies, eliminating multi-tier regulation, and would be based on the best available science at the time of establishment.

Daniel B. Rodriguez. The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law. Symposium: The Ecosystem Approach: New Departures for Land and Water. 24 Ecology L. Q. 745 (No. 4, 1997).

In this article the author contends that local government is a critical level for ecosystem protection and that local government can be well suited to the task because it is accustomed to the messy land-use determinations required. The author argues that the appropriate federal role for cooperating with localities in ecosystem protection should be creating legal structures to ensure that local programs do not harm fragile ecosystems,

and formulating appropriate incentives to encourage state and local governments' efforts at ecosystem management.

The author notes that unlike fixed state and federal boundaries, local boundaries are fluid, which can add a level of uncertainty to policy development, but also can provide opportunities to augment ecosystem protection strategies. The author puts forth several suggestions for ways local governments could protect ecosystems including: creation of limited regional governments, creation of special purpose governments exclusively for ecosystem management, inter-local collaboration to form a regulatory agency-type institution, revenue sharing among localities to finance ecosystem management, special assessments to finance ecosystem management, and rethinking or even repeal of the doctrine of implied preemption so that local efforts would be less conditional and more permanent.

Joseph Sax. *The Ecosystem Approach: New Departures for Land and Water*, Closing Remarks. Symposium: *The Ecosystem Approach: New Departures for Land and Water*. 24 *Ecology L. Q.* 883 (No. 4, 1997).

In this piece, the author speaks about the “crisis” that prompted creative approaches to implementing the Endangered Species Act. In 1994 people were arguing that the inflexibility of the ESA’s “no take” provision was destroying the value of property. When the 104th Congress was elected in 1994, the Clinton administration became concerned that if the ESA came up for revision at that time, species protection efforts would suffer, so they looked for ways to fairly and effectively implement the act to avoid revision. They decided to concentrate on the provision authorizing creation of Habitat Conservation Plans. By implementing a “no surprises” policy, the federal government was able to entice private landowners to create voluntary HCPs to address land use and species protection issues based on the best available science, with the promise that the government would not change the rules later. As a result, the ESA has become a tool for promoting environmentally-oriented land-use management for private as well as public land.

Charles Wise and Rosemary O’Leary. *Intergovernmental Relations and Federalism in Environmental Management and Policy: The Role of the Courts*. 57 *Public Administration Review* 150 (No. 2, March/April 1997).

This article reviews court interpretations of governmental roles in several areas of environmental law. The authors recognize the trend toward decentralization and note the confusion that frequently results from local, state, and federal agencies attempting to define their roles in a myriad of environmental programs. The courts are frequently called upon to resolve conflicts between levels of government. Because courts decide these matters on a case-by-case basis the results are not always consistent, leading to added confusion for planners, developers, and governmental agencies. Federal and state courts also often decide cases inconsistently making planning projections even more difficult.

The article examines court involvement in defining regulatory takings, laying out rules that give state and local governments guidelines but not bright line tests. State courts also have rendered decisions affecting the ability of localities to regulate pesticides and toxic substances with different states arriving at different resolutions. Federal courts have made decisions affecting local and state attempts to regulate disposal of solid, hazardous and radioactive wastes, usually finding those attempts unconstitutional. Finally federal courts have been called upon to determine under which federal environmental statutes the federal government has waived sovereign immunity such that federal agencies can be sued for failing to maintain federal lands.

The article concludes that only Congress can legislatively arrange intergovernmental relations, and the courts have held that Congress must be explicit when it does so. Court decisions on the matter point in so many directions that they offer no clear policy guidance to states wishing to initiate environmental management. The authors conclude that brighter lines are needed to empower states in this area.

Douglas P. Wheeler. The Ecosystem Approach: New Departures for Land and Water, Keynote Address. Symposium: The Ecosystem Approach: New Departures for Land and Water. 24 Ecology L. Q. 623 (No. 4, 1997).

In this address the author discusses the implications for state planning of California's experiment with ecosystem management using the Natural Communities Conservation Planning (NCCP) process. The author recognizes that developers and environmentalists in southern California have competing interests and argues that an ecosystem-based approach best takes both interests into account when undertaking land-use planning. The author uses the example of the California gnatcatcher, which was listed as an endangered species under the Endangered Species Act and which depends on coastal sage scrub for its habitat. California decided to focus on protecting the gnatcatcher's habitat, i.e. acres of coastal sage scrub, which accomplished protection of the gnatcatcher as well as anticipatory protection of all other species in the same ecosystem. The California Environmental Quality Act requires environmental mitigation, which provides a major source of land to be preserved as habitat. California is considering expanding the NCCP process and integrating state law habitat requirements with responsibilities under federal environmental laws.

Marc J. Ebbin. Is the Southern California Approach to Conservation Succeeding? Symposium: The Ecosystem Approach: New Departures for Land and Water. 24 Ecology L. Q. 695 (No. 4, 1997).

In this article the author lauds the conservation efforts of Orange and San Diego counties based on their economic, ecological, and intergovernmental benefits. These counties and three others in southern California have enacted the Natural Community Conservation Planning (NCCP) program. In this program, counties engage in region-wide planning that seeks to protect habitat, rather than species. The program allows regions to be

ecologically proactive, rather than waiting for species to become endangered. The program also has economic benefits as the goals and sometimes even preserve areas are set out clearly from the start and do not change over time. The vast majority of the scientific study is done at the beginning of the program and policies are enacted that reflect the findings of conservation biologists. The program's "no surprises" policy is a major benefit to developers. Finally, the program streamlines local, state, and federal regulatory processes by collapsing many of them into a single, unified process executed by the local government. Local officials even review plans for compliance with state and federal endangered species plans. Compliance with the comprehensive local plans exempts developers from the less predictable Endangered Species Act requirements, and reduces the extent of environmental documentation needed under the National Environmental Policy Act and the California Environmental Quality Act.

Robert A. Kagan. Political and Legal Obstacles to Collaborative Ecosystem Planning. Symposium: The Ecosystem Approach: New Departures for Land and Water. 24 *Ecology L. Q.* 871 (No. 4, 1997).

In this brief article the author contends that collaborative ecosystem management efforts, such as the Inimim Forest Management Plan or San Diego county's ecosystem approach have mainly been created in an attempt to avoid the deadlocks of litigation that plague most environmental/land use decisions. The author wonders why such collaborative efforts then are the exception and not the rule. He concludes this is due to land-use governance being fragmented among numerous local governments, political fragmentation between levels of government and within levels of government resulting in fragile collaborative agreements, and lack of consensus about who should pay for major advances in ecosystem management.

Daniel C. Esty. Revitalizing Environmental Federalism. 95 *Mich. L. Rev.* 570 (December, 1996).

In this article the author examines the recent trend toward decentralizing control of environmental regulation, returning much of it to the states. The article starts with the premise that regulation is desirable because the nature of environmental problems makes it difficult, if not impossible, for people to comprehend the diversity or extent of the harms they suffer or what value to place on them. Additionally, the transaction costs of constantly negotiating or suing over private rights would be overwhelming. Private property rights, furthermore, inadequately protect environmental "public goods" like the atmosphere.

Some regulations fail to effectively deal with environmental problems because regulations are only as effective as the information on which they are based, administrative costs can outweigh benefits, and mismatches between the jurisdiction of the regulating government and the scope environmental harm can lead to skewed cost-benefit analyses. Collaboration among decentralized governments may be able to address

some environmental issues but their success depends on factors that make a centralized response desirable in most cases.

The author traces the history of environmental regulations first through centralization and then through the current move to decentralize. Proponents of decentralization argue: 1) diverse approaches, i.e. “states as laboratories,” will result in better regulations, 2) decentralization will lead to regulatory competition rather than a race to the bottom among governments, 3) decisions made by smaller governments will be more representative of peoples’ views and less prone to distortions from interest groups, 4) morally, jurisdictions should only have to pay for protections they choose, and 5) interjurisdictional pollution spillovers are not really a problem. The author contends that these arguments are flawed and that many of them are stronger arguments against uniformity than centralization.

The author concludes that the best approach to regulating complex environmental issues is utilizing a multi-tier regulatory structure that seeks the best fit between specific environmental problems and regulatory responses, rather than relying on one level of government, federal or state, to fix all problems. For example, a central authority performs data collection and analysis best because of the scientific knowledge and technical capacity required. Flexible regulatory tools, such as setting pollution limits nationally but allowing individual factories to determine how they will meet the goal achieves many of the benefits of decentralization without incurring the costs.

Thomas T. Ankersen and Richard Hamann. Ecosystem Management and the Everglades: A Legal and Institutional Analysis. 11 J. Land Use & Envtl. L. 473 (Summer, 1996).

In this article the authors analyze a number of examples of ecosystem-based approaches to environmental protection in an attempt to glean which attributes of these approaches would best effectuate ecosystem management in the Florida Everglades. The article first notes the impediments to effective ecosystem management caused by geographic, institutional, and procedural boundaries. Not surprisingly, it is difficult, if not impossible, for governmental agencies with different jurisdictions and purposes and independently developed procedures to coordinate management of ecosystems that cross all of these boundaries.

Florida has made some attempts to address these problems by consolidating dredge and fill and surface water permits into a single environmental resource permit, by making it a priority to delegate regulatory and land management authority to the appropriate level of government, and by requiring local governments to act consistently with the state comprehensive plan and strategic regional policy plans. The authors note,

however, that there is no requirement that plans preserve ecosystem functions or be consistent with water management districts’ regional plans. The Interagency Task Force on the South Florida Ecosystem and the Governor’s Commission for a Sustainable South Florida both have addressed ecosystem management in South

Florida. Their efforts have emphasized avoiding jurisdictional overlap by utilizing place-based management with geographic boundaries determined by ecology such as watersheds. The Governor's Commission also advocated requiring local land-use planning to be compatible with the water management district's water supply planning and mandating coordination among the five regional planning councils within the boundaries of the Greater Everglades Ecosystem.

The article explains the difficulties caused by the "best science available" requirement and "adaptive management"—a policy of proceeding with incremental, reversible steps when dealing with scientific uncertainty. The article concludes that the current regulatory framework makes adaptive management problematic. The article then considers various intergovernmental collaborative forms, including regional compacts, federal-interstate compacts, and inter-institutional and intergovernmental coordination mechanisms, and evaluates what they might have to offer South Florida. The authors conclude that the ideal is not coordination of institutions but merger into a single entity responsible for managing the ecosystem as a whole. Recognizing the improbability of this occurring, the authors advocate at least merging the federal agencies and having only one federal entity involved. The authors also argue the benefits of "soft management" coordination, requiring mandatory consultation between responsible agencies.

Robert W. Adler. Addressing Barriers to Watershed Protection. 25 *Envtl. L.* 973 (Fall, 1995).

This article examines efforts at watershed protection in the United States and proposes ways to overcome barriers to protection. Watershed-based protection attempts have been part of a larger movement to protect the health of entire ecologic systems rather than just addressing individual impairments, an approach that has proven ineffective. Numerous federal, state, and local statutes contain provisions that protect aspects of watersheds, many of which overlap. The author argues that effective watershed protection depends on more comprehensive authority than currently exists.

The author presents the scientific case for considering water resource management in terms of watersheds, defined as "the entire surface drainage area that contributes water to a lake or river." This approach identifies and prioritizes all problems within a watershed, and targets expenditures to achieve the greatest results for the watershed as a whole. Protection of watersheds is complicated by the fact that different agencies and levels of government usually administer the various components of watersheds, and each level guards its authority jealously. Additionally, governmental agencies tend to treat various watershed-related issues as separate rather than related problems. This patchwork approach to watershed protection had led to gaps in protection, such as problems with polluted runoff, and an emphasis on water resource use and development rather than restoration and protection. Organizing protection efforts around specific watersheds can emphasize regional identities helping to overcome problems caused by parochial politics.

Numerous federal statutes have addressed water resource production and protection through the years. The author examines these statutes and discusses how they affect various aspects of watersheds and how they work in conjunction with state and local programs. The author notes that place-based programs under federal statutes, such as the Tennessee Valley Authority and the Great Lakes Program have been the most successful at achieving their goals. These programs work by galvanizing regional support for protecting the watershed and by coordinating with local efforts rather than imposing federal programs on localities.

The author recommends watershed protection be planned and implemented at multiple, nested levels: local, regional, state, and federal, with roles and responsibilities allocated among them as appropriate. In cases of large multi-state watersheds, for example, the federal government needs to have a strong presence to ensure goals and progress that are equal throughout the watershed. In general, national goals and requirements may be appropriate, with state and local governments retaining flexibility in implementation of programs. The author acknowledges that setting the boundaries for protection is problematic but argues it is necessary for all involved parties to agree on a boundary framework in order for watershed and other ecosystem-based programs to operate effectively.

Oliver A. Houck and Michael Rolland. Symposium: Environmental Federalism: Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States. 54 Md. L. Rev. 1242 (Summer, 1995).

This article examines wetland regulation, primarily under section 404 of the Clean Water Act. The authors argue that despite recent efforts to reduce the federal role, the case for the federal government to assume the primary responsibility for protecting wetlands is as strong as it was in 1972 when Congress enacted the Clean Water Act. Wetlands protection is essential to several national goals including ensuring high water quality, promoting fish and other wildlife populations, and providing flood control. The harms caused by wetland development are cumulative; while the negative effects of loss of wetland may seem imperceptible for a single project, the cumulative wetland destruction that results from many projects causes catastrophic nationwide problems. States have not adequately protected wetlands—almost all contested federal wetlands permit decisions are for projects that already received all necessary state approvals. As a result, section 404 of the Clean Water Act invests the Army Corps of Engineers (Corps) with the power to issue permits for wetland development under Environmental Protection Agency (EPA) guidelines and subject to an EPA veto. These two federal agencies administer the program with “no overall net loss to wetlands” as their policy. Other federal statutes and programs such as the Fish and Wildlife Coordination Act, National Environmental Policy Act, and Endangered Species Act add layers to the approval process for wetlands development as do state statutes. The authors argue that this is desirable as the cumbersome process itself may dissuade some developers from looking to wetlands for their projects. The politically and economically difficult goals of protecting highly

desirable wetlands from development may be impossible with efficient “one-stop permit shopping.”

States may assume the permitting process under section 404 if they establish a program that complies with federal guidelines set by the EPA. The EPA maintains oversight of these programs. As of the date of the article, only Michigan and New Jersey had opted to assume this duty. Michigan’s program asserts concurrent jurisdiction, providing for a single application for all state and federal permits. While relatively few conflicts have arisen between state and federal decision-makers, there have been occasions where state authorities issued permits that the EPA has objected to, resulting in a federal veto of the state-issued permit. Other than New Jersey, the rest of the states that have considered assuming permit duties under section 404, have ultimately decided against it.

Section 404(e) provides for the Corps to issue State Programmatic General Permits, a more limited delegation to states that allows states to assume permitting duties generally for smaller projects with limited impacts. The Corps’ issues these permits to reduce duplication between state and federal regulatory processes so that the processes complement each other. Fifteen states operate under these permits.

The article also examines delegation under section 402 of the Clean Water Act, having to do with pollution discharge permits, over which nearly forty states have assumed control, and delegation under the Coastal Zone Management Act, which accords states great flexibility in determining the best way to protect and develop the coastal region of their state. The authors posit that the bulk of enforcement under these statutes have been effectively delegated to the states because section 402 deals with objective federal pollution standards, rather than messy cost-benefit analyses like section 404, and the CZMA is federally funded and is not aimed at protecting a single resource but rather minimizing development impacts.

Finally the article examines three proposals for more extensive delegation of wetlands protection to the states with much less stringent federal oversight. The authors conclude that the lack of federal standards and safeguards in these proposals render these programs ineffective means of protecting wetlands.

Douglas R. Porter and David A. Salvesen, Ed. Collaborative Planning for Wetlands and Wildlife: Issues and Examples. Island Press, 1995.

This book introduces the problems traditional governmental regulations pose for development affecting wetlands and wildlife and for the wetlands and wildlife themselves. Case-based decisions that do not take into account the cumulative impact of other similar decisions can lead to a “death by one thousands cuts” for delicate ecological systems. On the other side of the equation, uncoordinated regulations leave developers with numerous, expensive, overlapping, and sometimes contradictory procedures to go through. To combat this, the book suggests area-wide planning, which unlike traditional regional planning focuses on the conflict between protection and development within a

discrete geographical area such as an endangered species habitat or a watershed. Area-wide planning is intended as a collaborative effort in which all interested parties get together and negotiate a balance between development and protection that offers something to all of the parties and spreads costs fairly. The main drawback is the extensive time and talent involved in arriving at such solutions.

After explaining the area-wide planning process in detail, the book examines the Habitat Conservation Plan process under the Endangered Species Act. The book evaluates the effectiveness of numerous HCPs, concluding that while many have been effective, on the whole the process is too uncertain, expensive, and limited to be an adequate tool for protection and development on its own. The rest of the book is devoted to in-depth examinations of planning, development, and protection efforts in various places, including: a regional, multi-species approach in the Balcones Canyonlands, multi-species planning in Southern California, advanced planning and permitting for wetland management in the Columbia River estuary, special-area management planning in New Jersey's Hackensack Meadowlands, conservation and development balancing in Chiwaukee Prairie, Wisconsin, wetlands protection and growth management under Maryland's Chesapeake Bay Critical Area Program, wetlands management under Anchorage, Alaska's plan, a planning study in the East Everglades, and collaborative planning for development of wetlands in Bolsa Chica, California.

Anna Mastracco et. al. Federal and State Coordination: Wetlands Protection. 46 Admin. L. Rev. 447 (1994).

This article, part of larger project examining federal and state coordination in a number of areas, looks at federal, state, and local roles in protecting wetlands. The article first considers section 404 of the Clean Water Act, and the Environmental Protection Agency and Army Corps of Engineers' roles under that act. It then turns to state roles under the Clean Water Act and administering their own programs. The Clean Water Act requires states to certify that proposed discharges will meet the state's water quality standards. Because state standards may be more stringent than federal standards, this gives states a veto over federal permits. Michigan and Louisiana have coordinated with the federal program by having joint public notices and hearings. New Jersey uses federal standards for its state program and has assumed the section 404 permitting process. Michigan has also assumed the section 404 permitting process, with the EPA retaining enforcement rights if Michigan does not do so in an appropriate and timely manner. In Michigan all permits are submitted to the Michigan Department of Natural Resources, which forwards permits over which the Corps has potential jurisdiction to them. This streamlined single permit process involves nine state statutes and four federal programs.

After examining Michigan's experience, the article evaluates arguments in favor of and against state assumption of the permitting process and suggests joint review processes and information sharing when both federal and state permits are required. The article also considers coordination between state and local personnel with the advanced identification

process, categorizing, identifying, and mapping wetlands. The article looks at North Carolina's experience with the National Estuary Program, which emphasizes information sharing. The article concludes that states taking the lead role in protecting wetlands may address coordination gaps.

Martin J. LaLonde. Note: Allocating the Burden of Proof to Effectuate the Preservation and Federalism of the Coastal Zone Management Act. 92 Mich. L. Rev. 438 (November, 1993).

This note examines the purposes of the Coastal Zone Management Act (CZMA) of 1972 in order to suggest how the burden of proof should be allocated between federal agencies and states when they differ in matters covered by the Act. The CZMA encourages states to adopt coastal management programs (CMPs) to protect their portions of the coastal zone. These CMPs must be consistent with the federal guidelines set out in the CZMA. States receive federal funding to administer their CMPs and federal agencies' actions affecting coastal zones must be consistent with a state's CMP to the "maximum extent practicable."

When a federal agency action may affect a coastal zone, the agency must provide a written statement to the relevant state agency describing how the proposed action falls within the state's CMP. If the state disagrees and the federal agency decides to proceed anyway, the state may seek mediation with the Secretary of Commerce or bring suit in federal court.

The CZMA does not specify which party has the burden of proof if the state brings suit. The note examines numerous sources, including legislative history and conflicting court decisions and concludes that while no sources clearly indicate which party bears the burden of proof, the policy of the CZMA supports assigning the burden to the federal agency. The CZMA favors preservation over development and vests primary control of coastal zones with the states. The note suggests that to prevent the state from exercising excessive influence over federal activities, the state should bear the initial burden of producing evidence to show a legitimate dispute, but the federal agency should bear the burden of proving that its proposed activity complies with the state's CMP.

A. Dan Tarlock. Local Government Protection of Biodiversity: What is its Niche? 60 U. Chi. L. R. 555 (Spring, 1993).

This article discusses biodiversity, an approach to environmental regulation that considers whole ecosystems rather than isolated species, and has as its objective not insulating these systems from human contact, but monitoring and managing them to avoid making types of changes or impose rates of change that exceed the ability of life to respond to them. The article argues that local governments will have primary responsibility for protecting biodiversity because planning and regulating land and water development—both local government powers—best protect biodiversity. The article

notes that, with the exception of actions required or prohibited by the Endangered Species Act, local governments have quite a bit of flexibility in how they choose to protect biodiversity within their borders. The article recognizes that local governments' limited jurisdiction may limit their effectiveness.

Federal and state endangered species acts drive biodiversity protection. There is no explicit international law duty involved. These federal and state laws may require habitat protection on public and private land. Local governments can protect biodiversity as an extension of their police powers to promote the general welfare, though this power may be challenged as a taking of property and courts may be reluctant to allow actions to protect nature as opposed to people. Courts have allowed zoning for aesthetic purposes and open space preservation, as well as allowing zoning that prevents building in flood plains, on wetlands, and on "sensitive lands" such as steep slopes. All of these regulations may protect biodiversity but do not necessarily do so without being part of a comprehensive regional plan. Regional ecosystem protection plans also may help avoid many takings problems because their larger geographic scale allows regulators the flexibility to permit similar development elsewhere within the region.

Local governments seeking to protect biodiversity have adopted Habitat Conservation Plans under the Endangered Species Act. The first of these plans in the Coachella Valley in California resulted in a planned development that allowed for habitat for endangered butterfly and lizard species and restricted use to preserve open space. The primary objective of Habitat Conservation Plans was to facilitate single species preservation agreements between developers, local governments and the Fish and Wildlife Service, but due to the substantive standards in the Endangered Species Act, they are now used as levers to force regional planning and cooperative regulation. In California, Governor Wilson signed a memorandum between state and federal agencies creating a council to make the maintenance and enhancement of biodiversity a preeminent state and local planning goal. The legislature then passed an act allowing federal, state, and local governments to adopt Natural Community Conservation Plans, which serve a broader function than Habitat Conservation Plans. The program is politically attractive because it reconciles commodity uses of land and biodiversity protection, rather than devoting all undeveloped land to biodiversity protection.

Peter A. Buchsbaum. Federal Regulation of Land Use: Uncle Sam the Permit Man. 25 Urb. Lawyer 589 (Summer, 1993).

This article examines federal involvement in land use by discussing how the principal federal land-use statutes affect developers and municipalities. Wetlands regulation under the Clean Water Act, with its goal of discouraging development in wetlands, affects builders and municipalities extensively. There are two types of permits under the Act, general or nationwide permits, and individual permits. Nationwide permits are granted by rule when development fits certain criteria and developers comply with certain requirements, though developers usually get a jurisdictional determination from the Army

Corps of Engineers anyway. Individual permits, which are virtually impossible to obtain, may be granted only where there are no practical alternatives to the proposed development plan and may be vetoed by the Environmental Protection Agency. District managers may revoke nationwide permits when, for example, historic sites or endangered species are present. Nationwide permits also must be consistent with state coastal zone management plans under the Coastal Zone Management Act if a designated coastal zone is involved.

The definition of wetlands under the Clean Water Act dramatically affects how much land is affected, as do takings jurisprudence, and the scope of interstate commerce. The Clean Water Act also requires developers and municipalities to consider storm water discharges and municipal sewer treatment plans when planning new developments. Clean Air Act provisions, such as traffic and pollution reduction requirements can affect municipal planning and placement of new developments.

The Endangered Species Act can end a project if listed species or their habitats are affected by the proposed development. Likewise, a proposal may need to be reworked or abandoned if areas or structures deemed to have historical significance under the National Historic Preservation Act are affected. Broad, discretionary criteria as to when a site is historical and the unpredictability as to whether an endangered species will be sighted on specific land make it difficult for developers or municipalities to plan development with any certainty.

Craig Anthony (Tony) Arnold. *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*. 10 *Stan. Env'tl. L.J.* 1 (1991).

This article looks at the early history of the Endangered Species Act, when its land-use planning implications first became apparent. The author expresses concern about the intricacy and expense of the ESA's Habitat Conservation Plan process, especially since this process is in addition to local and state processes. The author suggests that a localized planning process resulting in HCP's for entire metropolitan regions would better balance the interests of the ESA and other metropolitan interests, such as economic development and affordable housing.

The article first details the provisions of the ESA that have land-use implications and examines how they can be enforced, then considers some of the early court decisions under the ESA and finally focuses on the HCP process. The article then discusses HCP's granted for San Bruno Mountain, the Coachella Valley, San Diego, Florida, and Austin. The author concludes that the ESA will continue to have a significant impact on land-use decisions and processes and in light of this reality, the community-based approaches in San Diego and Austin are preferable to the project-based ones elsewhere. Community-based approaches allow for more local control and facilitate the consideration of economic and other development interests as well as conservation interests. Regional

HCP planning also spreads the cost of the process over more entities, making planned development less expensive. The author argues that species preservation and development need not be antagonistic, and that regional planning can actually result in mutual benefits.

Land Use Planning

Peter Buchsbaum. *Neither Home Rule Nor State Mandate: A Third Way to Growth Management*. 52 *Land Use Law & Zoning Digest* 3 (No. 8, August, 2000).

In this article the author examines the results of the Land Use Infrastructure and the Environment, Final Report (LUIE report), which identifies defects in New Jersey's planning systems and proposed methods to address them. These methods emphasize cross-acceptance, the coordination and comparison of plans and programs to achieve consensus, rather than relying solely on local government initiatives or state mandates. The report suggests an incentive-based system of mutually supporting, integrated plans involving local, county, and state levels of government that would cover planning, investment, and regulation.

The LUIE report includes 90 suggestions for integrating planning. One suggestion is to focus public attention on state planning by giving the governor a veto over state planning commission actions. The goal of the suggestions is to integrate planning on all levels so that, for example, federal infrastructure planning comports with state plans and local plans follow the vision of the state plan as well. The goals also envision coordination between agencies at the same level of government and between public and private actors whose actions affect each other. Local planning is still key in this scheme, but the planning process would ensure that local planners pay attention to the plans of neighboring communities, the region, and the state when enacting local plans and zoning regulations.

The LUIE report envisions states providing investment incentives by giving localities with integrated plans priority for state infrastructure discretionary grants, loans, and debt guarantees. This investment strategy would continue at the state agency level by involving state agencies in collaborations to devise, revise, and amend their state plan. State planning is essential for concentrating growth in designated "centers" rather than allowing such centers to form randomly.

Finally, the LUIE report contains suggestions for coordinating regulations. Without coordination, developers have to go through fragmented, sequential application procedures at each level of government, and approvals do not vest, so the rules may change midstream anytime until the permit has been issued. The LUIE report suggested a three-stage application process, with a pre-application feasibility review, then a public hearing followed by unified preliminary approval with vesting as to land use, density of land use, and generalized site design, and finally the vesting of a detailed site design.

Regulations would be further streamlined by incorporating some developmental standards into integrated plans and consolidating permit programs.

Recognizing that even the best-coordinated plans will produce disputes, the LUIE report emphasizes the need for a dispute resolution system other than traditional litigation. The LUIE report suggests three alternatives: 1) assigning specially designated trial judges on a statewide basis to hear all aspects of land-use, environmental, and infrastructure disputes, 2) encouraging county presiding judges to develop expertise on their county's land use issues, or 3) establishing a voluntary mediation service with expertise in environmental and land-use matters.

Andrew P. Morriss and Roger E. Meiners. *The Destructive Role of Land Use Planning*. 14 Tul. Envtl. L. J. 95 (Winter, 2000).

This article posits that land-use planning is detrimental to the interests of private property owners and does not effectively protect the environment. The authors argue that land-use planning by governmental agencies at all levels is no different from other kinds of central planning, which have proved disastrous in recent years. The authors contend that planning results in confusing and frequently inconsistent rules about the development of land, which often change over the course of a planned project with the result that private land owners cannot predict how their proposals will be modified or even if they will be rejected outright at some point.

The article discusses the “bundle of sticks” of common law property rights and argues that regulatory planning results in “administrative property,” which the authors liken to feudal tenure. Administrative property holders have fewer rights and uncertainty exists as to the extent of these rights. The article then discusses the drawbacks of governmental planning as a political activity, subject to special interests and one-size-fits-all approaches. The authors argue that governmental environmental protection efforts, such as national parks, have been dismal failures and that there is no reason to believe that city planning efforts will be more effective at protecting the environment. Furthermore, they contend, current policies that, in hindsight, are found to be ill advised, will have less detrimental effect on the environment if practiced on a small scale between private entities, than if practiced on a grand scale according to governmental plan. Finally the authors laud the creativity and flexibility demonstrated by private environmental protection efforts, which make use of common law property law, and argue that it provides the best option for protecting the environment.

A. Dan Tarlock. *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part IV: Discussions on the State and Local Level: Chapter 7: Federalism: Contested Landscapes and Local Voice*. 3 Wash. U. J.L. & Pol'y 513 (2000).

This article addresses local communities' interest in curtailing growth in order to protect their traditional land use forms and culture. It is difficult to control growth through the

political process as growth is market-driven. Reflecting the centralizing rationality that has dominated land use law for years, state and federal law preempts many local regulatory attempts to control growth. Communities attempting to manage growth to strike a balance between maintenance of natural system functions and human use of those systems are seeking place-based protections for their cultural heritage. Some communities are achieving this by incorporating aspects of the community's culture and landscape into their development plans and regulations. For example, Jackson Hole, Wyoming has adopted an ordinance that strictly controls resort expansion and mandates inclusion of natural features and local cultural heritage in their design.

The article extensively examines water rights allocation in Western states, noting that state governments traditionally treat water law as their exclusive function, preempting all local attempts at control. The article notes that water transfers can drastically alter the landscape and character of the localities providing the water, without allowing them any voice in decisions. Localities are becoming more vocal in water issues, however, and resource management is evolving toward multi-stakeholder processes. New Mexico has recently changed its law to allow the public interest to be considered in water transfers, though this interest is not equivalent to a local veto. California has purposely not enacted statewide groundwater extraction regulations, so localities have a say in how much water, if any, they will export, without fear of preemption. New legislation in Arizona, Idaho, and California increases water planning duties on cities and lessens the duty of localities to provide water service to residents. This prevents growing areas from approving new development while deferring the issue of establishing an adequate water supply for that development and allows communities that wish to restrict growth the option of refusing to provide water service to areas outside the boundaries the community has established.

Peter A. Buchsbaum. Model Acts: Integrating Federal Permitting with Local Land-Use Planning and Regulation. Vol. 2 Growing Smart Working Papers. (American Planning Association 1998), at page 185.

This paper proposes two model federal acts to facilitate land-use planning coordination at federal, state, and local levels. The first, "The Cooperative Federalism Act" would allow for delegation of certain federally mandated programs to states, and further sub-delegation to the local level under certain conditions. Federal oversight of the programs would continue under this act, and federal standards would not be relaxed. The second model act, "The Federal Joint Public Hearing and Coordinated Land-Use Decision Act" proposes that all federal, state, and local agencies having a role in the approval and permitting involved with a land-use decision would hold a single joint public hearing on the proposal, while still retaining individual decision-making authority.

Shelley Ross Saxer. Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development. 30 Ind. L. Rev. 659 (1997).

In this article the author examines several approaches (litigation, annexation, intergovernmental contracting, state or regional planning) to allocating the benefits and burdens of commercial development among neighboring suburbs. The author notes the practical and political limitations of each of the approaches and concludes that while integrated state and regional planning may be the ideal method, it is probably politically unattainable because the concept of local autonomy is so deeply ingrained.

The author proposes a hybrid solution to the problem of externalities caused by suburban commercial development while preserving local autonomy. In the author's proposal, each municipality would have a legal right not to be substantially impacted by the land use decisions of an adjacent community. Rather than relying on litigation to enforce this right, adjacent municipalities would engage in cooperative planning at the beginning of the process to determine potential areas of conflict between local plans. State legislation would be necessary to facilitate contracting between municipalities to ensure that local plans that had been agreed upon would not be altered or amended without consultation between affected localities. Environmental Impact Statements would be used as a vehicle for jointly assessing and distributing benefits and burdens of proposed commercial developments. Alternative dispute resolution methods, particularly arbitration, would be mandated for resolving any conflicts.

Peter A. Buchsbaum. Reforming the Federal, State, and Local Land Use Regulation Connection. Vol. 1 Growing Smart Working Papers. (American Planning Association 1996), at page 27.

This paper lays out the following problems caused by lack of coordination of land use planning: 1) unpredictability as to the regulatory reach of such federal initiatives as wetlands protection, historic preservation, and endangered species protection and 2) lack of coordination between federal program administrators and local development review entities and between federal programs themselves. There is also no conflict resolution mechanism other than the federal judiciary, which is ill suited to the task. The paper suggests the following solutions: 1) define the resource to be protected by federal programs so that developers will know in advance whether their project will be affected, 2) delegate limited authority to states to administrate the programs, 3) pass a cooperative federalism act to unify development review procedures at the federal, state, and local levels. The federal government would set forth standards and delegate administration to states, which could sub-delegate to the local level so long as federal standards were promoted, allowing developers a one-stop review process. Ideally local governments would work together to create regional resource protection plans complying with federal and state standards. Finally, the paper argues the need for a conflict resolution mechanism other than the federal courts, and suggests the Department of Housing and

Urban Development could play the role of referee in mediating differences at the application stage of development.

Jayne E. Daly. A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land-Use Legislation. 28 *Urb. Law.* 7 (Winter, 1996).

This article traces the legislative history of proposed national land-use bills from 1970-1974. During this period Senator Henry M. Jackson promoted his vision of integrated, coordinated, comprehensive land-use planning through a series of Senate bills, none of which ultimately were passed. The author argues that the legislation that has been passed has been crisis-driven rather than planning-based and has been contradictory as well as ineffective at protecting the environment. The author contends that the inefficiency of these regulations causes business and industry unnecessary expense. What is needed, the author argues, is a national framework for land-use decision-making like the one proposed by Senator Jackson's National Land Use Planning Act in the 1970s.

The various bills the article examines propose state plans drawn up in conformity with federal guidelines, though they vary as to how much these plans would cover. The original bill envisioned comprehensive plans at the state level, while one the Nixon administration backed required state plans only for areas of critical environmental concern, key facilities, land use or development with regional benefits, or large developments and left everything else to local governments. The National Land Use Planning Act was envisioned as a flexible tool, like NEPA, to aid states in thinking about and planning for future needs without mandating results. The author believes a national framework for cooperative, coordinated, comprehensive land-use planning is still needed to protect the environment while balancing the needs of economic growth.

James H. Wickersham. Note: The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes. 18 *Harv. Envtl. L. Rev.* 489 (Summer, 1994).

This note examines state growth management statutes, which have been adopted by nine states in an effort to reconcile environmental protection and economic development goals. The note compares Euclidian zoning to statutes embodying the Model Land Development Code (MLDC) and Planning Consistency models of growth management. The note concludes that the Planning Consistency model is the most effective in achieving the above goals. It is also the only model that is integrated at local, regional, and state levels.

The note explains the structure of each of the three types of land use statutes. Euclidian zoning is done by municipalities, which divide their land into residential, commercial, and industrial zones. Further subdivisions within these zones, such as single family or multiple family residential are also common. Euclidian zoning does not require comprehensive planning. Comprehensive planning requires gathering data, forecasting

future trends, and defining public goals and policies. Comprehensive planning encourages coordination by different government levels in large projects, environmental protection, and in steering private development, and provides a check against arbitrary regulatory actions. Euclidian zoning facilitates sprawl as each independent municipality's zoning creates a "commercial node" connected to other nodes by a network of highways. Euclidian zoning also is not an effective scheme for meeting environmental protection goals.

The MLDC model addresses some of the problems caused by Euclidian zoning's municipal limitations by requiring a state or regional agency to approve major development projects and development in areas with critical resources. Vermont's 1970 Land Use and Development Act followed the MLDC model by establishing nine regional Environmental District Commissions (EDCs) with the power to deny permits if they found proposed projects detrimental to public health, safety, or welfare. Vermont's process was not integrated; once developers obtained an EDC permit, they would still have to apply for and receive all other required state and local approvals. Florida's 1972 Environmental Land and Water Management Act also followed the MLDC model, but avoided duplication of permits and hearings. Under the Florida act, a developer for a qualifying project filed an application with the local government, which held a public hearing. The regional planning agency evaluated the regional impact of the project, considering natural resources, economy, public services and housing availability and issues a report. The municipality then rendered its decision as to whether or not the project might go forward. If the state planning agency disagreed with the approval, it could appeal to the Florida Land and Water Adjudicatory Commission.

The Planning Consistency model has an even more comprehensive approach. The Oregon State Land Use Act of 1973, a planning consistency statute, provides for the creation of a commission with the power to adopt statewide land-use planning goals. Each municipality is required to prepare a comprehensive land-use plan that complies with these statewide goals. Municipalities also must implement regulations that comply with both their local plans and the state goals. The commission can review and approve both plans and regulations. All land-use appeals are sent to a specialized state board. By the mid-1980s nine states, including Florida and Vermont, had adopted statutes providing for local planning consistent with statewide goals. Five of these set up specialized appeals processes to hear disputes, four set up less comprehensive programs and one employs mandatory mediation. These statutes have been far more effective in achieving environmental protection and economic development goals than statutes based on other models.

David L. Callies. *The Quiet Revolution Revisited: A Quarter Century of Progress*. 26 *Urb. Law*. 197 (Spring, 1994).

This article traces the progress of state assumption of land-use regulation from the early 1970s to the mid- 1990s. The author summarizes the experience of several states that have undertaken some form of land-use planning, some integrated, some not.

Hawaii embodies its broad policy goals in a state plan to which state agencies must conform their actions. Counties and localities are not required to conform their plans to the state plan, but must consider statewide objectives and policies as set out in the state plan.

Vermont established twelve planning goals and a set of incentives for localities if their plans are confirmed to be consistent with the statewide goals.

The funding for Maine's planning program was cut in 1991, but localities choosing to engage in comprehensive planning must follow the standards set out in the original statute.

Florida adopted an integrated system with a statewide comprehensive plan, eleven regional plans that must be consistent with the state plan, and local plans and regulations consistent with state and regional plans. The system also provides for state financial sanctions against local governments that fail to adopt consistent plans.

Georgia's program is also integrated, with regional entities charged with preparing regional plans in conformity with state standards and reviewing local plans and regulations for consistency with state and regional plans. State grants and other funding may be withheld from localities that fail to produce conforming comprehensive plans.

In Oregon a state commission adopts nineteen statewide goals to which local plans must conform in order to gain "acknowledgement." If local plans fail to attain acknowledgement, the state goals become the basis for land-use decisions. Oregon also established a special administrative court to hear and decide most land-use disputes.

New Jersey adopted a state plan in 1989 establishing goals, but the only way of implementing them until 1992 was cross-acceptance, the comparison of plans among governmental levels. After 1992 a certification process was put in place for the state to certify that local plans conform to state goals.

Washington requires all counties with urban growth problems to prepare comprehensive plans with certain mandated elements. These elements must be consistent with each other, and each county plan must be consistent with the plans of cities and towns sharing a common border or regional problem.

Rhode Island has established ten state goals as well as regional goals with which local comprehensive plans must be consistent. After adoption of a comprehensive plan, all state agency decisions must be in conformity with the plan.

Finally, Maryland requires local government plans to include a number of elements and embody a number of statewide “visions.”

Sprawl

William W. Buzbee. *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*. 35 *Wake Forest L. Rev.* 509 (Fall 2000).

This article examines the usefulness of the “comparative institutional analysis” framework for evaluating the causes of and options for ameliorating urban sprawl. Sprawl is defined in the article as “dispersed, low-density, metropolitan area form, where the metropolitan area’s growth occurs principally on the urban periphery and encompasses a multiplicity of local governments.” Comparative institutional analysis is defined as “a mode of public policy analysis that examines institutional choice as a central and necessary component of public policy prescription.” Understanding the historical context of an issue is very important to this method of analysis, which focuses on what institutions handle certain types of tasks best.

Federalism’s tiered federal, state, and local governments plus powerful administrative agencies add a layer of complexity to the analysis framework. The analysis emphasizes goal choice and then institutional choice to meet those goals. It recognizes that different stakeholders will have different goals. In the context of sprawl, stakeholders benefiting from it, such as local government officials, real estate developers, and the construction industry will have different goals from citizens affected by sprawl, so they will choose different institutional actors to meet their goals.

Local governments constitutionally and traditionally have primary governmental responsibility for land use decisions. State and federal governments have played a dominant role in financing and building the roads that make sprawl possible. The federal government has led the way in establishing environmental law frameworks, though state and local governments also have enacted environmental legislation. Green space preservation has been largely a federal, and sometimes a state enterprise. The result of this dispersal of powers is that some level of government subsidizes many costs of automobile use in sprawling metropolitan areas.

In the sprawl context there is a pervasive problem of jurisdictional mismatch. For example, while local governments usually control zoning, by definition sprawl is a regional problem, extending beyond the boundaries of a single municipality. The article suggests convincing local governments or state legislatures to modify zoning and planning laws and advocating for federal and state conditional grants for anti-sprawl

measures. The article notes that local governments, given their goals, may be resistant, and suggests that concerned citizens could move to a more anti-sprawl-friendly municipality, or lobby at the state level to change the state's zoning enabling legislation. Federal initiatives also can be significant for helping to remedy sprawl, e.g. transportation funding and grants to redevelop urban brownfields, but due to the substantial political and monetary resources required to enact federal anti-sprawl measures as well as the traditional allocation of land use authority to local governments, federal (and state) monetary incentives to private or other non-governmental organizations seeking to remedy sprawl conditions are probably more effective.

The article also examines the creation of the Georgia Regional Transportation Authority (GRTA) in response to sprawl-related clean air problems around Atlanta, which resulted in a federal transportation funding cut-off instigated by the Environmental Protection Agency. GRTA officials are appointed by the governor and have the authority to trump or deny Georgia Department of Transportation projects. The Georgia example shows how federal administrative and state executive initiatives can help to ameliorate a regional sprawl situation.

The article concludes that the "comparative institutional analysis" provides few clear answers regarding correcting sprawl, but its emphasis on historical context and acknowledgement of the layers of governmental actors help to avoid overly simplistic answers to a complex problem.

David W. Owens. Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina. 35 Wake Forest L. Rev. 671 (Fall, 2000).

This article examines the authority local governments have to implement programs to deal with growth-related issues in North Carolina. North Carolina has not adopted state-level legislation mandating specific actions by local governments to control growth. Local governments in North Carolina have only those powers expressly granted to them by the state. Therefore the scope of local governments' authority depends on the construction of the enabling legislation on which the locality bases its actions. From 1872 to 1971 "Dillon's Rule" required that ambiguous grants of authority to localities were to be strictly construed against localities. In 1971 the General Assembly reversed this, determining that grants of state power to cities should be broadly construed.

State statutes explicitly grant localities authority to enact many smart growth measures such as mixed use and denser zoning, open space requirements, infrastructure standards for subdivisions, and limitations on service provision outside municipal limits. Other measures may fairly be implied from explicit grants. New legislation would be required, however, to mandate plan coordination, implement regional fair share housing programs, or tie state funding to local smart growth actions.

Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*. 26 *Fordham Urb. L. J.* 69 (November, 1998).

This article examines comprehensive federal land-use legislation, proposed in the early 1970s, that was not enacted. The article then considers the land-use effects of the patchwork of federal legislation that has been passed since then. The article concludes that while federal legislation has had some positive effects, because there has been no coordination between various acts, the net effect on land use has mostly been negative. The author argues that federal land use legislation is needed because state and local governments are unable to coordinate some larger projects and local politics may encourage land use policies that benefit one locality while burdening surrounding areas. The article further argues that the federal government is in the best position to establish a workable land-use policy because of its ability to gather data on population, market, and employment trends.

The article notes that population movement since World War II has resulted in the expansion of the suburbs, the decline of most larger cities, and loss of farmland. This urban sprawl has adverse economic, quality of life, and environmental effects.

Federal legislation has affected land use across the country, and not always for the better. Federal highway funding has encouraged and enabled suburban growth. Tax benefits such as deductible mortgage interest, gains from home sales being treated as capital gains, and no tax on gains from the sale of a primary residence if the proceeds are used to buy another primary residence within two years encourage home ownership. When the effects of these tax benefits are considered in conjunction with housing programs operated by the Federal Housing Administration and Veteran's Administration, federal housing legislation's contribution to urban sprawl becomes clear. Mortgage insurance programs operated by the FHA and VA require the house to sit on a relatively large lot in a low-density setting; in other words, it is much easier to qualify for FHA or VA assistance to purchase a suburban home than an urban one. Federal funding for housing for the urban poor has not counteracted this but has ghettoized the poor in inner cities. The effects of these programs have been to undermine other federal legislation aimed at urban renewal, such as block grants and enterprise and empowerment zones, by encouraging more affluent (and usually white) city residents to purchase homes in the suburbs, while poorer (and frequently minority) residents are provided with low-income housing in inner cities, undermining the cities' residential tax base. The benefits of urban renewal programs therefore have mostly accrued to businesses, not individuals.

Local governments' decentralized character and the lack of coordination between them has limited the effectiveness of urban renewal programs. Also hampering the effectiveness of these programs, most of which require coordination with local comprehensive plans, has been the failure of many state and local governments to adopt comprehensive plans.

Federal legislation on agriculture, the environment and natural resources has affected land use directly by encouraging some uses and prohibiting others. Because each piece of legislation is tailored to its own purpose, however, the comprehensive effects are not always positive. For example, federal farmland preservation legislation does not address the environmental and land-use planning concerns that farm runoff presents. Environmental laws aimed at ensuring that contaminated sites are cleaned up before being redeveloped focus so much on establishing liability for the cleanup costs that owners abandon the sites and developers refuse to buy them, fearing the costs involved. As a result, even non-contaminated “brownfields” remain unproductive, and the frequently unsightly, abandoned sites adversely affect the urban neighborhoods in which they are located. State agencies also have become involved with enforcing these environmental laws, resulting in the same negative effects on brownfields as federal enforcement.

Finally, the article considers federal legislation specifically aimed at land use planning. The Coastal Zone Management Act encourages states to take the lead in management of coastal areas and coordinate use with federal agencies and private users. A-95 review requires applications for federal grants to be reviewed by a state, regional or metropolitan clearinghouse to identify the relationship between the proposed plan and regional comprehensive plans. Lack of comprehensive plans and clearinghouses has limited the effectiveness of this process. Federal housing acts have sought to aid local planning efforts by tying federal housing funds to a showing that the funds would be used for projects compatible with local comprehensive plans. After 1977, HUD was instructed to withhold comprehensive planning funds from local agencies not engaged in comprehensive planning. Federal transportation legislation has also recently begun to require planning at the state level in order to qualify for federal funds, and to allow states to use the funds for transportation systems other than highways, although few states have done this.

The article concludes that the patchwork of federal legislation that affects land use has had an overall detrimental effect on cities and that a comprehensive federal land-use law is needed to remedy this situation.

James Poradek. Note: Putting the Use Back in Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws. 81 Minn. L. Rev. 1343 (May, 1997).

This note provides a brief history of land-use regulation in the United States, and then focuses on two case studies, Minnesota and Oregon, to show how anti-sprawl initiatives in each either have or have not been effective. The note argues that the difference between effective sprawl control in the Portland, Oregon area and ineffective control in the Minneapolis-St. Paul, Minnesota area is that the Oregon initiative includes a private right of action to enforce the regional land-use scheme.

The 1926 Department of Commerce promulgation of the “Standard State Zoning Enabling Act,” provided the model for almost every state’s zoning enabling legislation, which in turn delegated zoning powers to local governments. Following World War II, the vast migration of people and industry to the suburbs and suburban zoning’s emphasis on low-density development and wide separation of uses encouraged sprawling development. The negative effects of this sort of development on the environment, taxes, and infrastructure became apparent in the 1960s and 1970s, leading to comprehensive planning initiatives by local governments. These plans’ efficacy was limited, however, by the jurisdictional limitations of the localities themselves. This led eventually to the “Quiet Revolution” of the 1970s and 1980s when many states enacted statutes shifting comprehensive land-use planning from local governments to state or regional entities.

Two such entities were created in Oregon and Minnesota. In Oregon, the same year the planning statute was enacted, the Oregon Supreme Court handed down *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1973)(en banc), holding that comprehensive plans supercede zoning criteria and that zoning decisions are quasi-judicial in nature and therefore not entitled to presumptive validity. The result of *Fasano* is that a local entity must justify its land-use decision against its comprehensive plan and any party, including concerned citizens, who participated in the local proceeding may appeal an adverse decision.

In Minnesota, the state legislature created a Metropolitan Council to establish requirements and procedures to facilitate local planning for orderly development and to assist local governmental units in preparing plans and controls. The Council was to devise “metropolitan system plans,” then local governments were to adopt comprehensive plans within the framework established by the metropolitan system plan. After the Council approved the comprehensive plan each municipality was to enact zoning consistent with the comprehensive plan. Minnesota’s framework has been largely ineffective, however, because the Council has chosen to interpret its powers very conservatively and has become heavily influenced by special interests, particularly the real estate development industry.

As a result of the above plans, over a five-year period in the 1980s the growth boundary around Portland expanded by 2,515 acres compared to an expansion of over 18,000 acres in the Twin Cities area. The note attributes this difference to deficiencies in the Minnesota scheme, notably ambiguous legislative language that permitted the Council to interpret its role narrowly, special interests’ influence over the Council, and especially the lack of a private right of action to force the Council to do otherwise. The note suggests that such a private right of action could be expressly added, or implied from the statutory language.

Richard Briffault. Symposium: Surveying Land and Borders: The Local Government Boundary Problem in Metropolitan Areas. 48 *Stan. L. Rev.* 1115 (May, 1996).

This article argues that the local government system fails to address regional problems in metropolitan areas. Decision-making by large numbers of small municipalities within metropolitan areas results in parochial and shortsighted policies that benefit some municipalities at the expense of others and, even if temporarily beneficial to some, tend to adversely affect the metropolitan region as a whole.

Most major metropolitan areas are comprised of over 100 small municipal governments, each of which has the power to tax, to enact zoning and other land-use regulations, and to provide services for its residents. All of these powers can be exercised without regard to their effects on other municipalities or the region as a whole. Local politics sometimes allow for regional entities to be set up to provide certain regional systems or services, such as mass transit or waste disposal, but there is a great deal of resistance to creating regional governments with the same sorts of powers as local governments.

The article examines two proposals for dealing with the local/metropolitan governance issue. Public choice theory advocates argue that self-interested local action, either competition between localities or voluntary interlocal agreements, will result in the best result for the metropolitan area as a whole. The article concludes, however, that these agreements are unlikely to address problems like exclusionary land use practices or the immunity of a local tax base from the revenue needs of other localities. Political decentralization supporters, on the other hand, propose cross-border voting and mandated negotiations between localities in order to preserve municipal governments' power while reducing the importance of the boundaries between governments. The article argues, however, that these suggestions would still weaken local governments' power, would not effectively deal with many regional problems, and would have other undesirable effects such as suburban voters having a disproportionate voice in the politics of the urban core to the detriment of the people living there.

The article concludes that the best way to address regional issues is with regional metropolitan governments, which would not completely replace local governments, but would assume control over matters of regional significance. These governments would be elected by all the people of the metropolitan area and would encompass the entire territory of the metropolitan area. They would need to have the power to determine land use questions of regional scope, to collect and distribute revenues to equalize regional service provision and fiscal capacity, and to provide physical infrastructure for the entire region. Finally, they would need to be able to displace local land use decisions that have regional significance. The author concludes that while this method of governance would best serve metropolitan areas' needs, it is unlikely to be enacted due to strong attachments to local governments.

Supplement to Bibliography

Environmental, Donald C. Baur and William Robert Irvin, editors. *Endangered Species Act: Law Policy and Perspectives* (American Bar Association, Section of Environment, Energy and Resources 2002).

This book contains a compendium of 27 articles about the Endangered Species Act, running from its historical background to its likely future. The articles cover such topics as extent of federal jurisdiction over “takings” of endangered species, the status and an analysis of habitat conservation plans, the impact of the Endangered Species Act on the rights of private property owners, and the use of citizen suits to enforce the prohibitions in the act against disturbance of species habitat which could cause harm to particular animals. There is also a discussion of the relationship between the Endangered Species Act and other legal requirements such as Indian rights and state endangered species acts.

From the standpoint of permit coordination, the most relevant portions of the book concern §10 of the Endangered Species Act with respect to habitat conservation plans. The book devotes some four chapters to that specific subject. The article by John Kostyack, chapter 17, “Tipping the Balance” suggests six requirements for improvement of HCP’s:

- Set performance standards consistent with species.
- Monitor HCP’s for effectiveness.
- Delineate responsibilities for adaptive management.
- Limit duration of assurances (i.e., set a time limit on the no surprises clauses which currently run to between 50 and 100 years).
- Enhance citizen (and agency) enforcement.
- Ensure public participation.

Two other chapters which contain an evaluation of §10, Ryan Schuler and Bell, “ESA Compliance Options: Section 10 and other Tools” and Donovan, “HCP’s-Important Tools for Conserving Habitat and Species”, suggest that these plans provide important benefits to species on non-federal lands and minimize impact on vulnerable species while at the same time providing necessary regulatory certainty.

White House Office of Environmental Policy, “Protecting American’s Wetlands: A Fair, Flexible and Effective Approach” (August 24, 1993).

Written during the first year of the Clinton Administration, this paper proposed a “comprehensive package of improvements to the federal wetlands program that reflects a new broad-based consensus among federal agencies”. The paper cited lack of consistency among federal agencies, and a divisive debate over wetlands in concluding that “wetlands

policy has become one of the most controversial environmental issues facing the federal government". The paper suggests five principles for reform.

- No overall net loss of remaining wetlands.
- Regulatory programs must be efficient, fair, flexible and predictable, without unnecessary impacts on private property and the regulated public.
- Non-regulating programs, such as advance planning, should be encouraged.
- Critically, partnership with state tribal and local governments should be expanded.
- Wetlands policy should be based on best scientific information available.

In conjunction with the planning item, the Administration stated that states and localities should engage in watershed planning and suggested that advance planning, through the identification, mapping and preliminary assessment of relative wetlands functions within a planning area would provide greater predictability and certainty to property owners, developers and local governments. At the same time, such advance planning could be incorporated by local governments in their own land use planning. The paper also advocated programmatic general permits deferring to local regulatory programs implementing approved watershed plans.

Long Branch Case Study

Background—Redevelopment in Long Branch, New Jersey

In 1995, the City of Long Branch, New Jersey, a formerly opulent beach resort, determined to embark upon an ambitious redevelopment process. Known as a place frequented by presidents in the 19th Century—the county park within the city limits is named Seven Presidents Park in honor of presidents who summered in Long Branch during that era—the City had come upon harder times like many in New Jersey. The world of the beach depicted by Winslow Homer an elegant painting had long since eroded. The City’s pier, centerpiece of its heyday, was in ruins, destroyed by a recent fire. Amusements on the boardwalk had failed one by one. And yet the City had promise. A waterfront hotel conference center erected in the 1980’s had the potential to be a focal point for new activity. A newly constructed promenade provided an esthetically pleasing mile long border along the Atlantic Ocean. The Army Corps of Engineers was promising to restore 150 feet of beach so the sea would no longer crash directly against the promenade, and there would be a place for swimmers.²⁸

Most importantly, the City had decided to undertake a redevelopment plan conceived by the Thompson Design Group of Cambridge, MA. The waterfront plan proposed by Thompson moved the City away from its traditional beachfront recreational orientation. Rather, Thompson proposed a mixture of uses—residential, retail, office—together with a revived pier. According to this plan, the beachfront would become an all year living and working space, not merely a seasonal destination. The mixed use theme drew on the experience with other Thompson designed efforts, such as Quincy Market in Boston, the Chicago Navy Pier, and the Inner Harbor in Baltimore.

The Need for Permit Coordination

However, as quickly as the plan was conceived, the City realized that it could not be implemented without the active consent and cooperation of the New Jersey Department of Environmental Protection. Under the New Jersey Coastal Area Facilities Review Act²⁹, known as CAFRA, the state broadly regulates all significant development in a large area which encompasses the entirety of the City of Long Branch. The state’s land

28 The author of this case study represented the City of Long Branch during the process of formulating the area-wide coastal zone permit described in it. For further information about the permit or the process that lead up to it, the author may be contacted. The author also drafted the Memorandum of Agreement with DEP referred to further on in the case study. Other contacts are Carl Turner, Director of Planning, City of Long Branch, and Pratap Talwar, principal for Thompson Design Group.

29 N.J.S.A. 13:19-1, et seq.

use review is entirely independent of that conducted by the municipality. Thus, a development project would have to satisfy both jurisdictions before construction could begin. Further, given the intense, detailed regulatory strictures contained in their regulations, the coastal permitting authorities in the Department of Environmental Protection had requirements and goals that might or might not be consistent with City objectives. Further, in implementing these goals, CAFRA reviewers had considerable discretion which they had exercised over the years to impose design changes, as well as to carry out purely environmental policies.

Thus, achievement of the City's objectives had to be squared with state environmental goals. All the local enthusiasm for redevelopment, and the high minded Thompson plans, would not suffice if the kind of construction envisioned in these plans and could not pass DEP coastal review.

Further underscoring the need for coordination was the scope of the Thompson plans. They covered 150 acres of the waterfront. Under the plans, the waterfront was divided into five sectors, each of which had a separate design theme. One sector was built around the hotel related facility. The key central sector, the so-called Pier Village, was designed for mixed use of apartments and commercial space, together with some office space. Along the north and south from the hotel and Pier Village areas were areas designated as Beachfront North and Beachfront South, in which there would be mixed recreational and residential uses with some commercial space.

A fifth sector, Broadway-Gateway, was designated for commercial uses such as supermarkets, along a wide highway, Route 36, that had separated the beachfront from the rest of the City; it was proposed for redesigning into a boulevard. Open space, parking and densities within these five sectors were projected on a sector basis, not on individual lots. The sector concept ran head on into the coastal review which was done on an individual development by development basis. Nothing in the coastal regulations provided for reviewing sectors as a whole. Rather such requirements such as parking, building setbacks, view corridors and the like were looked at piece by piece, for each individual proposed development.

Faced with this dilemma, the City administrative and planning staff, the Thompson Group and outside redevelopment counsel, decided to approach the state to see whether the City's design vision could be coordinated with the coastal review process.

The City initially asked the State Planning Commission staff for assistance. New Jersey's State Planning Commission had been established in 1985³⁰. It had the primary task of developing a state plan, to be called the New Jersey State Development and Redevelopment Plan ("SDRP"), which would promote what became known in the 1990's as smart growth. Part of this concept was reviving New Jersey's cities; hence the term

30 State Planning Act, N.J.S.A. 52:27D-196, et seq.

Redevelopment in the name of the plan. In making this request for assistance, the City first determined to apply for status as a center under the SDRP. Under the first plan, adopted in 1992, called Communities of Place, centers were the key organizing principle. The state planners hoped that designated centers would become the focal points for mixed use growth and would revitalize urban areas and reduce the pressure on New Jersey's remaining rural regions. Long Branch, with its design vision, seemed ideally positioned to undertake the role of a center.

Within a few months in 1995, center designation was achieved by resolution of the State Planning Commission. The Long Branch staff then asked for the assistance of State Planning Commission staff in coordinating its vision with the requirements of the coastal regulations. These meetings commenced in mid to late 1995³¹. At first, the City suggested that the state's coastal review authority be delegated to the City. It also sought to show that the design elements in its plan satisfied the essentials of the CAFRA review process so that environmental as well as urban planning goals would be met by the design standards that the City had developed.

Soon, the coordination effort became a major focus of City activity. The design guidelines being developed by the City to implement the plan were submitted to the coastal review agency to see if they matched the Coastal Area Facility Review Act ("CAFRA")³² environmental standards. The City postponed adopting these design guidelines in ordinance form while the coastal reviewers were parsing them. In addition, the City had hoped to put in its Request For Proposals from redevelopers a statement that the city standards would be controlling and that there would not be a CAFRA second guessing of City development approvals. Of course, such statements could not be made until the requirements of CAFRA were met.

At first, those efforts seemed almost destined to fail. CAFRA staff, long used to reviewing project by project, was reluctant to engage in advanced review of an entire sector or group of development sectors. Further, some conflicts over standards did emerge. Most notably, CAFRA required two off-street parking spaces per dwelling unit. The City felt that such an amount of off-street parking was a waste of precious near beach space that was best devoted to other uses. It felt that in a city, parking would best be provided by the public facilities or on the street. It believed that the two space per off-street space per unit criteria, while perhaps sensible as to greenfields developments and more interior areas of the coastal zone, made no sense when applied to a coastal city with its limited space.

31 The author was a participant in these meetings. Relevant correspondence is on file with the author.

32 N.J.S.A. 13:19-1, et seq., The Regulations are found at N.J. Admin. Code 7:7.

There were also questions concerning drainage standards. The City's proposed design guidelines did not address them. CAFRA in contrast required adherence to certain drainage requirements.

In addition, the City design guidelines contradicted a key design requirement that CAFRA had been imposing for years. The results of this may be noticed in Atlantic City in particular, which is also governed by CAFRA. The coastal review agency had insisted that large buildings be perpendicular to the ocean. Such configuration was designed to provide spaces between buildings for view corridors. The purpose was to prevent a wall of buildings from blocking waterfront views. In contrast, the developing Long Branch guidelines provided substantial side yard building setbacks. View corridors could be maintained through these setbacks. However, the proposed Long Branch guidelines did not require the perpendicular orientation favored by the state.

The two sides disagreed over issues concerning the types of structures which could be built in the sand areas. CAFRA wanted that area kept free. The City, stressing that this was an urban beach, felt that certain types of facilities, such as sales and beach equipment kiosks, made sense for a city beach.

Aside from these substantive differences, the coastal reviewers questioned the very concept of a delegation. It was not clear to them under the statute that they indeed could delegate their power to a locality outright. As it turns out, a case later came along which suggested that such power could not be delegated completely.

These differences at first appeared to stymie any likelihood of permit coordination. In fact, CAFRA staff wrote a letter which specifically stated that the City should expect projects to continue to be reviewed on a case-by-case basis. At some point, however, around the beginning of 1996, the agency's attitude changed. Throughout 1996, the agency and the City worked on substantive approaches to cooperation. The drainage issue was resolved when the City simply agreed to abide by coastal area regulations regarding drainage.

Resolution of the parking issue was more complex. CAFRA had resisted the notion of using on-street parking since it wanted some spaces available to daily beach goers. Beach access was and had been a prime consideration for the coastal agency and its staff.

The Sector Permit Approach

Eventually a three-fold solution emerged. First, the City would require one off-street space for each residential unit in the redevelopment area. Second, it would be allowed to use one space per unit on streets or in public parking facilities to provide the additional unit of parking. Third, to insure that there was enough parking for both residents and beach goers, the City promised to maintain a certain level of free parking spaces through the use of a parking authority. This latter requirement involved itself a unique form of

collaboration. The City not only agreed to institute a parking authority to satisfy CAFRA, but it also agreed that the purpose of the parking authority would be implementation of the Thompson redevelopment plans, and specifically maintenance of the parking spaces required in those plans.

Resolution of the high rise building orientation issue rested on a similar comparison of objectives. The City agreed to maintain sufficient side yard setbacks to satisfy the CAFRA goal of insuring that the ocean front would not be walled off from the rest of the city. In return, CAFRA agreed to waive the requirement that each building have a perpendicular orientation since the goal of that requirement was being met through the wider side yard setbacks.

Finally, the issue of temporary structures on the beach ended up being resolved through simple horse-trading. The City and the coastal review personnel worked out a compromise on the square footage and number of temporary facilities that could occupy the beachfront during the summer months.

Having reached a substantive consensus on the policies, the state still had to decide the institutional arrangement for accommodating the City's design plans. As noted above, simple delegation had been ruled out as not being authorized by the coastal statute, the Coastal Area Facilities Review Act. On the other hand, a continuation of case-by-case review would fly in the face of the extensive efforts made by the City and the state to coordinate design and environmental policies for the beachfront sector. To resolve this dilemma the state proposed a regulation, which established a special sector permit for the Long Branch redevelopment area. The state had previously adopted special permits for areas of particular environmental sensitivity, such as beachfront and bay areas. It had never previously adopted an area wide permit, however, to accommodate development objectives in an urban area.

The Long Branch Redevelopment Sector Permit was proposed by regulations in August 1997. The proposal³³, added a new section N.J.A.C. 7:7-7.5 (since renumbered N.J.A.C. 7:7-7.4³⁴) to the New Jersey Administrative Code purely for the Long Branch Redevelopment Sector Permit. The proposal had a number of parts. First, it defined the geographical boundaries of the redevelopment area, in terms that the City had used in establishing the area in need of redevelopment under the state Local Redevelopment and Housing Law.³⁵

Next, the proposed regulation provided that the standards contained in the Long Branch redevelopment guidelines ordinance would apply as the CAFRA standards in the

³³ 29 N.J. Reg. 3920 (9/15/97).

³⁴ The description of the permit is drawn from the text of this regulation.

³⁵ N.J.S.A. 40A:12A-1, et seq.

redevelopment area covered by the sector permit. Third, the regulation provided for the alternative parking scheme mentioned above and indicated that it would be supplemented by a Memorandum of Agreement that would provide for the administration of parking by said Parking Authority. Fourth, the regulations specifically incorporated changes in the coastal high-rise rule, to waive the perpendicular criterion for buildings in the Long Branch Redevelopment Zone.

Fifth, the permit defined when it was available. It would only be available for projects that met the design guidelines. Any deviation from those guidelines would have to be specifically approved by the Department. Further, the permit would only be available to projects that were before the Borough Planning Board, and not those which required a use variance from the Board of Adjustment. This specification was desired by both the City, which wanted to head off use variances in the redevelopment zone that would interfere with implementation of the design guidelines, and the state which was willing to trust the design guidelines, but not deviations which might be approved by a Board of Adjustment. (Under New Jersey law, as in many states, planning board or planning commission implements the uses provided by ordinance; a zoning board or zoning board of adjustment allows variations in those uses).

Finally, the regulations provided procedures by which the CAFRA would be advised of applications. Applications for development in the zone would be submitted to CAFRA before the Planning Board acted on them. CAFRA would have the opportunity to see that they conformed to the design guidelines. In this way, CAFRA staff could protect against the City's not carrying through on its promises to develop in accordance with the guidelines.

After approval, the application would also be submitted to CAFRA. It would have 45 days to comment. The terms and conditions of the approval would be sent along with the approved plans. Again, this gave the opportunity in the CAFRA staff to review and object in case the City had approved deviations from the design guidelines.

The regulation also provided for review by the City of capital projects and other projects that plans for such projects were to be submitted to CAFRA 30 days before they went out to bid. In this way, the coastal reviewers would be able to insure that public activity, such as new streets or public buildings, were consistent with the design guidelines. In this sense, it should be noted, the City agreed to in effect surrender its normal immunity from its zoning regulations in order to satisfy the terms of the sector permit by assuring CAFRA that even public projects would not deviate from the design guidelines.

Following proposal of the regulations, a public hearing took place. While it is not usual to have public hearings on regulations, this departure justified them. At the public hearing on October 6, 1997, there was some concern expressed by coastal preservation advocates about the prospect of giving so much authority to the City. The response of Richard Kropp, who at that point headed the land use review elements of the N.J. CAFRA was interesting. He stated that the coastal advocates had long requested that the state do

advance planning rather than project-by-project reaction. He defended the regulation as being exactly such an example of advance planning.

On February 17, 1998, the final regulation was approved and published substantially as proposed.³⁶ Also approved in concept but signed on March 24, 1998 was a Memorandum of Agreement (“MOA”) that threshed out some of the details regarding application and public project review.³⁷ The MOA contained the requirement to maintain a parking authority that would implement the redevelopment plan and the number and type of structures that might be allowed on the beach. New Jersey thus had its first coastal sector permit.

What Happened Afterward

Despite the initial resistance from the CAFRA and other officials in the Department of Environmental Protection, of which CAFRA is a part, the state began touting the Long Branch Sector Permit as an example of how things should be done, how regulation could be modernized. In her 1998 State of the State Message, Governor Whitman mentioned the sector permit, although not by name, as an example of the type of new regulation which would facilitate urban revitalization. The back up material for her speech specifically mentioned Long Branch as an example of how things should be done in the future. Thus, when CAFRA’s regulations were proposed to be revamped in 1999, they specifically envisioned additional sector permits which would be approved following a lengthy consultation process like the one Long Branch had undergone with CAFRA. These new regulations were just sustained by the Appellate Division of the New Jersey Superior Court on May 31, 2002.³⁸

The sector permit is scheduled to be incorporated into the state’s federally approved coastal management plan developed under the Federal Coastal Zone Management Act, administered by the Office of Coastal Zone Management in the National Oceanographic and Atmospheric Administration.³⁹ It was fascinating, at a meeting between the state and federal coastal personnel, to see how the New Jersey reviewers who had been so skeptical about the sector permit became its chief advocates in discussions with the federal

36 30 N.J. Reg. 645 (2/17/98).

37 On file with the author, the City and the NJ Dept. of Environmental Protection (“DEP”), Land Use Regulation Program.

38 See Note 13, below for a further discussion of this important opinion.

39 16 U.S.C. §145(c) is the federal Act. Current status information is from conversation with Ruth Ehinger, New Jersey Department of Environmental Affairs, Office of Policy, Planning and Science, November 15, 2002 and an email from Ms. Ehinger dated 12/17/02. Ms. Ehinger was the supervising NJDEP official involved with approval of the Long Branch permit. The author attended the meeting described in the text.

government. Clearly at the gubernatorial level, the commissioner level and the staff level, the sector permit was regarded as a regulatory breakthrough that was worth promoting and emulating.

Implementation—Projects in Long Branch

Since 1998, four projects have been run through the coastal review process in accordance with the new regulations. The first one involving a beachfront area, was submitted at about the time the regulations were under consideration and moving towards adoption. The experience with this one did not demonstrate any great change in CAFRA's underlying regulatory philosophy. While most of the project was comfortably approved by CAFRA, there emerged a great deal of debate between the developer and CAFRA over the design of a gazebo. This was just the sort of issue which the sector permit had been developed to avoid. However, the matter eventually became moot when Berlant, the developer, decided not to proceed with its plans and to instead sell its property to the City.

The second project, a beach club, also demonstrated weaknesses in the permit. The project included a number of cabanas to be constructed on the dry sand. CAFRA objected because these were not within the intent of the Memorandum of Understanding regulating structures on the beach. They also could conceivably interfere with the passage of people back and forth along the beach. CAFRA also challenged the City's claim that it owned the beachfront on which the structures were to be placed.

In response, the cabanas were pulled back to be adjacent to the existing promenade, on lands that were clearly within the City right-of-way. This itself did not satisfy CAFRA, which kept on asking for further information about the project. Eventually, however, the project opened in the year 2000. The process was somewhat less than satisfactory. Perhaps because this particular project involved something at the core of CAFRA's concern, namely free passage along the beachfront, its review ended up almost ignoring the spirit of the sector permit by requiring great detail about the plans for the beachfront.

The third project, submitted by the Applied Group, a city-designated redeveloper, pursuant to the permit involved a major proposal for 310 housing units in the Beachfront North sector. This was the first substantial redevelopment project proposal being reviewed by Long Branch Planning Board. A problem arose on the City's end. Because the City's planning staff were concerned that the plans were not complete enough to send to CAFRA, they delayed sending them before the matter had been heard by the Planning Board. This did not squarely comply with the regulations which required submission at least 45 days prior to planning board consideration to see if CAFRA had any objection to the plans as proposed.

When the project was approved by the City and the plans were later submitted to the coastal reviewers, they strongly objected on the grounds the City had not given them the contemplated two shots at review, and was forcing them to act within a limited time

frame on the set of approved plans they never previously seen. In response, the City called in its design consultants who sat down with the state and headed off the difficulty by demonstrating that the plans did comply with the design guidelines and the terms of Long Branch coastal permit. This consultation involved a labor intensive effort between the City, the developer and the coastal area reviewers. In this sense, for this third project, the goal of the coastal permit was not achieved. That goal had been a swift checkoff with little need for intensive CAFRA supervision. Clearly when the CAFRA personnel felt the permit terms had not been met, it could not limit itself to the less intensive review that the redevelopment area permit envisioned. Nonetheless, it did approve the project on March 15, 2001 with some less interaction and difficulty than would have been the case had the project proceeded through the normal coastal review process including notice and public hearings.

The handling of the fourth development under the permit, also by the Applied Group, suggests that the redevelopment permit has matured. The City made sure that these plans for the Pier Village Sector were submitted to CAFRA in advance of the public hearings to be held by the City planning board. Once approval was granted from the City, the plans as approved, together with the approval resolutions, were then duly forwarded to CAFRA. This project involved 410 housing units, and 100,000 feet of commercial space.

Normally, a project of this size involving some 20 acres, commercial space and over 400 housing units, would have received enormous detailed scrutiny under CAFRA, there would have been public hearings, numerous prehearing meetings, exchanges of completeness letters and responses to the completeness letters, requests for further information and responses thereto, etc. After a long process, CAFRA would have issued detailed findings of fact and conclusions for granting the permit. Instead, CAFRA issued a simple letter—two pages—on February 20, 2002 which stated that the terms of the sector permit had been met and that notice of the same would be published in the DEP Register.⁴⁰ A enormous amount of effort and possible second guessing of the City's development plans was avoided. The groundbreaking which took place less than two months later, on April 15, 2002, was attended by Governor McGreevey, Commissioner Levin and other state officials. The developer has informally estimated a six months time savings was achieved by the sector permit for this vital redevelopment project. With this project, the permit appears to have achieved its objective as a device for coordinating state and local design and environmental objectives.

Contribution to Success of Redevelopment

By 1997, when the City had gotten far enough along in its planning to issue Requests for Proposals to developers, it did include the prospective sector permit as part of the incentives being offered by the City to redevelopment. The City actually delayed the

40 On file with the author, the City and the NJDEP.

issuance of the RFP's for the redevelopers until it had a reasonable assurance, by virtue of an exchange of correspondence, that the sector permit was on its way to approval by the assistant Commissioner who supervised CAFRA in the Department of Environmental Protection.

Relieving developers of the burden of dual reviews has been a factor in negotiations with the developers which led to the two project proposals by the Applied Group referenced above. Since the City was just embarking in an effort to interest development it needed every incentive possible to attract private sector interest. Quieting the CAFRA issue took one central critical obstacle to success off the table. The City has thus been able to provide an incentive which no suburban municipality in the CAFRA zone can match. Given the recent tightening of CAFRA regulations, and the increasing resistance in many suburbs to development, this incentive can make a big difference to developers.

On the other side of the coin, however, is the fact that Long Branch sector permit has not been replicated. Atlantic City, which has undergone the most redevelopment, has so long dealt with individual CAFRA permits for casino hotels, for example, that it has not felt a need to obtain a sector permit. This was the case even though the same attorney, namely the author of this piece, served as redevelopment counsel for both Long Branch and Atlantic City.

Further, Long Branch's mayor has estimated the City paid \$600,000 for planning, legal and other consulting work in order to develop the design guidelines and negotiate them with CAFRA. No other city in the state has proven willing to engage in this kind of advance planning. Moreover, even with the advance planning, the time period from conception of the potential joint permit and its implementation covered two years. At several points during the time frame it appeared that the process was stalled. For these reasons, the Long Branch permit has not been replicated, even though the recently sustained 1999 CAFRA regulations invite replication.⁴¹

Nonetheless, as suggested by the fourth application in particular, the joint area wide permit process has great promise. It can lead to the integration of state and local goals. There can be devices, such as post application review, which eliminate the multiple levels of review now required for most land use permits in environmental sensitive areas while ensuring that the relevant state wide environmental criteria are met. The addition of public projects to the mix is also noteworthy.

41 In *The matter of Protest of Coastal Permit Program*, 354 N.J. Super. 293 (N.J. App. Div. 2002). The Court rejected a challenge to the general concept of areawide sector permits. This is an unusually important case with respect to this project since it is one of the few judicial decisions that evaluates the concept of joint, coordinated permitting.

In sum, the City surrendered its immunity from zoning for City projects, and negotiated the content of its zoning requirements with CAFRA, in order to facilitate statewide approvals. This approach demonstrates a somewhat new concept of home rule. The concept involves the surrender of some formal autonomy at the local level in exchange for recognition of local objectives by state or regional authorities. This concept, and its implementation through a sector permit is certainly replicable.

Conclusion

While sector permit has not produced a revolution, it is a useful step. It suggests one approach, namely an area wide permit, which can be used by state and local land use agencies to maximize efficiency, promote local redevelopment or other goals, and maintain the environment. It is a step that can be followed elsewhere in New Jersey and indeed across the country. There is no reason why coastal and local regulations have to be duplicative; state and local entities can and should achieve consensus on land use and environmental objectives and jointly implement them through shared regulations.

Cape Cod Case Study

The Cape Cod Commission was created in 1990⁴² by an act of the Massachusetts Legislature. The creation of the Commission was also endorsed by 76% of the voters in a referendum in November, 1998 and an additional countywide ballot in March, 1990. The votes occurred in response to a building boom that peaked in 1985. The boom demonstrated the weakness of growth management controls across the Cape Cod region and spurred calls for better planning to protect the Cape.⁴³

Under the statute, the Commission consists of 19 members. Fifteen of these members are selected by the 15 local governments in Barnstable County that make up the Cape Cod Commission's jurisdictional area. The other four members represent the County Commissioners, minorities, and native Americans and the Governor's office.

The Commission was given three major functions.⁴⁴ First, it was to establish and maintain a regional policy plan for the area. Second, the Commission had to designate districts of critical planning concerns (DCPC's). In these districts, municipalities may adopt specific regulations for enhanced protection for the environment with promotion of agriculture, aquaculture or downtown revitalization. As of 2000, four such districts had been established in West Falmouth, Bourne, Sandwich and Harwich, Massachusetts.⁴⁵

Third, and most relevant for the purposes of this case study, the Commission is authorized to review Developments of Regional Impact (DRI's). The statute envisions that towns will be required to refer developments meeting specific threshold sizes to the Cape Cod Commission (CCC) for review. In addition, municipalities may request a CCC review of smaller projects. The threshold for mandatory review of projects currently include subdivisions of 30 acres or more, developments of 30 or more residential units and ten or more business or industrial lots. Likewise, commercial development or change of use for buildings greater than 10,000 square feet are included as well as mixed use projects with greater than 20,000 square feet, and projects with greater than 40,000 square feet of commercial space. Major changes in or demolition of state or nationally recognized historic structures as well a variety of other infrastructure projects such as transportation facilities and road construction are also subject to DRI review.⁴⁶

42 Chap. 716, Acts of 1989.

43 Cape Cod Commission "A Decade of Planning 2000", Annual Report at 1-2 (2000).

44 Cape Cod Commission, Regional Policy Plan (1996) at 2.

45 Decade of Regional Planning, above, at 4.

46 Cape Cod Commission, A Guide to the Review Process for Developments of Regional Significance (2001) and Code of CCC Regulations Chapter A, §3. The DRI idea first appeared in the American Law Institutes Model Land Development Code, and was the

Between 1990 and 2000, approximately 170 DRI projects or 17 per year when through the complete Commission review process. Of these 140 were approved.⁴⁷ To be approved, the benefit of the project to Cape Cod must outweigh its detriment. It must also be consistent with the regional plan as well as local plans and zoning as well as consistent with special regulations in a DCPC, if applicable.

During the CCC review process, the municipal review of the project is suspended. In making the determination, such issues as water quality, traffic flow, historic character, open space, affordable housing and economic development are all considered.

Aside from Cape Cod Commission review, Massachusetts also has the Massachusetts Environmental Policy Act (“MEPA”), a state NEPA statute.⁴⁸ Under this statute, the Massachusetts Secretary of Environmental Affairs has the authority to require environmental impact reviews of certain development projects requiring financial assistance from the state or requiring state permits. The MEPA statute is modeled on the federal National Environmental Policy Act.⁴⁹ Like the federal statute, MEPA requires an initial determination as to whether state government projects, or private entities requiring state permits will have a significant environmental impact. These initial reviews examine the extent of environmental impact and what kind of environmental resources could be affected. Based on that determination, the Secretary will determine if an Environmental Impact Report (“EIR”) is needed and if so, the scope of the problems it will address. Although the process leads to a report, rather than an actual permit decision, it involves much of the same analysis of environmental factors that goes into determining whether the Commission should approve a development.

The kind of large projects which require MEPA review will also require review by the Cape Cod Commission as Developments of Regional Impact. As a result, during the Commission’s first year of operation, it established a joint review process with the Executive Office of Environmental Affairs for projects subject to review under the Massachusetts Environmental Policy Act and the Cape Cod Commission Act. This process helps to coordinate review of such projects among local, regional, and state

creative idea of Fred Bosselman, then a leading land use attorney. See Mandelker, Fred Bosselman’s Legacy to Land Use Reform, 17 J. Land Use & Envtl. L. 11 (2001). Florida is the only state in which the DRI concept was incorporated in statewide land use legislation.

47 A Decade of Regional Planning, at 13.

48 G.P.L. Ch. 30 §§61-62H.(MEPA).

49 42 U.S.C. §4321.

authorities.⁵⁰ In addition, the Commission prepares Memoranda of Understanding with numerous towns to coordinate regional, local reviews.

It is this coordinated review process that is of interest from the standpoint of permit coordination.⁵¹

The review process is the option of an applicant. It is based on a Memorandum of Understanding that was signed November 25, 1991 between the CCC and the Massachusetts Secretary of Environmental Affairs. That Memorandum, a copy of which is attached, specifically recognized that there was “extensive overlap” of the statutory responsibilities of the Commission and the Secretary of Environmental Affairs with respect to the development of Cape Cod. The Memorandum also recognized specifically that the review process of the two entities were overlapping. It notes that the Cape Cod Commission Act actually provided that every project meeting the separate threshold for an environmental impact report was automatically deemed a DRI and thus subject to review by both agencies.

The essence of the joint review process is a single form followed by a single public notice and a consolidated hearing on environmental issues.⁵² As with Long Branch, therefore, instead of two review processes taking place, only one does. The notice by the CCC-MEPA is joint one. The public hearing is held by a subcommittee of the Cape Cod Commission and by MEPA officials in the Secretary of Environmental Affairs’ office. Both the subcommittee and the MEPA officials conduct the hearing.

Following the hearing, the DRI subcommittee of the Cape Cod Commission makes its comments to the MEPA unit within the office of the Secretary of Environmental Affairs. The Commission may determine that no environmental impact report is needed. If it determines that one is needed, it will file comments with MEPA officials on the draft report prepared by the applicant if it is a private project or the public agency proposing the project, if it is public. Later there will be comments on the final report. The Secretary of Environmental Affairs will then issue a decision on the final impact report. The

50 Cape Cod Commission Regional Policy Plan (1996). See §12(i) of the Cape Cod Commission Act which provides that a project requiring an EIR under MEPA automatically also qualifies as a DRI.

51 We note that there are other models for integration of state land use regulations with state environmental policy acts. See, for example, Mandelker, *Growing Smart Legislative Guidebook*, (American Planning Association 2002) Ch. 12 at 12-10 to 12-12. Mandelker suggests joint planning focusing on environmental issues as a technique for integrating land use planning statutes and state environmental policy acts. He then focuses on joint planning, rather than on joint project review. We note that the CCC has implemented the latter while Long Branch has had elements of both.

52 The description of the process is drawn from the Memorandum of Understanding.

Commission then holds a final public hearing on the substantive approval of the DRI project within 45 days of the Secretary of Environmental Affairs certification of the final environmental impact report. Additional Commission hearings are possible under the Memorandum of Understanding.

Thus, in contrast with Long Branch, there is a dual decision making process. In Cape Cod, the Secretary first issues a decision on the environmental impact statement but then the Commission issues a separate decision on approval of the project. In the Long Branch model, the City issues a single decision which will only be subject to call-up by the state coastal authorities if the decision is found not to be consistent with city's own guidelines that had previously be approved by the state.

The process does not incorporate local decisions. In fact, local review is suspended while this process is ongoing. The locality is still free to accept or reject the application following the MEPA and CCC reviews. Thus, this model is an intrastate agency coordination model.

Nonetheless, it is an attractive option. Significantly, the Commission's brochure on developments of regional impact specifically calls out the opportunity to request a joint review process with the state and the Cape Cod Commission. Thus, the agency and applicants clearly regard this as a significant opportunity for applicants. In addition, the Commission's Year 2000 report mentions the law that requires completion of a DRI review within 7 months from date from referral from the locality. On average, such reviews have taken place between 4 and 5 months.⁵³ Further, while according to Margo Fenn, Executive Director of the Cape Cod Commission, the MEPA review process is not usually subjected to a great deal of public scrutiny, marrying that process to the Cape Cod Commission review process actually enhances public input into environmental review.⁵⁴ Thus, public hearing coordination does not simply serve the developer's interest in efficiency; it also ensures that somewhat obscure state review processes become more subject to public scrutiny. From an environmental standpoint, that outcome must be regarded as favorable.

In fact, the Commission regards this program as actually having worked very well.⁵⁵ There are hearings at which the public has the opportunity to comment on the scope of environmental review as well as on the subsequent environmental impact statements. These environmental reviews tend to be ignored by the public when done separately. Also, the process ensures that both citizens and the CCC itself have the opportunity to put

53 Cape Cod Commission, *A Decade of Regional Planning*, at 14.

54 Telephone interview with Margo Fenn, Executive Director of the Commission, October 2000.

55 Interview with Margo Fenn, November 7, 2002; and interview of October, 2000.

their concerns about the project on the record early, well before the DRI review by the Commission is finalized.

Although the Commission does not keep records on the number of projects undergoing joint review, they occur on the larger projects. Examples are major supermarkets, such as Stop & Shop and Shaws, large big box uses, major mixed use projects such as the Mashpee Commons project and golf courses because of their water impacts. Coastal revetments and dredging are also included. Thus it has been these kinds of projects of public concern, and significant potential environmental impact, which have received this joint review designed to elicit public comment and response.

In fact, a review of several of the decisions of the Cape Cod Commission bears out Ms. Fenn's observations concerning public participation in the joint review process. The June 21, 2001 Stop & Stop decision⁵⁶ involved a proposal to redevelop and expand the existing Cotuit Landing shopping center on Route 28 in Marstons Mills. The project included a new 71,552 square foot Stop & Shop supermarket. The report of the Commission's decision contains an unusually complete description of the procedural history. Noteworthy is the fact that there were two public hearings conducted by the Cape Cod Commission on the draft environmental impact report concerning this project. 23 people spoke at the first one, on June 16, 1999, and 40 at the second one on November 16, 1999. In addition, there were 33 witnesses at the January 3, 2001 public hearing on the final environmental impact statement.⁵⁷

This is an unusual turnout for hearings on an environmental impact statement. Usually, the public only becomes actively involved when the substance of the project is being considered. Further, it appears that the environmental hearings did result in a quicker resolution of the substantive issues concerning the project. The Commission conducted only one substantive hearing on the project itself, in March 15, 2001 and was able to conclude its deliberations three months after that hearing. This example, of a major shopping center, suggests that the combination of substantive land use review and environmental review does result in greater and earlier public attention to the environmental issues involved in the development of a project, before the project is formally considered by the land use agency.

Another shopping center case concerned the Cape Cod Mall, which is quite a bit larger. It consisted of 571,274 square feet of retail space and 3,096 parking spaces in Hyannis, MA. This case suggests the same observation as to expanded public participation. The project involved the expansion and renovation of the Mall to accommodate an additional 8.1 acres and an additional 250,000 square feet.⁵⁸ In this case, there was actually a

56 Project #JR99013.

57 Project #JR99013, June 21, 2001 Decision, at pages 14 to 18.

58 Project No. TR96025, decided January 29, 1998.

December 18, 1996 public hearing on the scoping process, i.e. on the extent or scope of issues to be included in the draft environmental impact report. The account of the hearing suggests that it was well attended, which is again unusual for a hearing conducted at such an early stage in a process.⁵⁹

The Commission then proceeded with a hearing on the Draft Environmental Impact Report and the merits of the project itself in tandem on June 18, 1997. It followed with a December 3, 1997 hearing on both the Final Environmental Impact Report and the project. The decision was rendered after several deliberative meetings on January 29, 1998, or only 7 weeks following the final hearing.⁶⁰ This project was eventually approved on the basis of being a redevelopment of an existing site in a targeted growth area. However, as with the Cotuit Landing case, there is a strong suggestion from the record of decision that the early integration of environmental concerns with the substantive project approval criteria encouraged public input at the opening stages of the decision making process and resulted in a greater ability to resolve development issues when the project plans were finalized. Thus, the Cotuit and Hyannis cases support the view that the joint hearing process focuses public attention to environmental issues and facilitates the resolution of these issues.

Recognizing that the 1991 Memorandum of Understanding for the joint process covers only interactions between two very specific state agencies, and does not involve local government, the Commission has additionally entered into agreements with local governments. These so-called scoping agreements, such as one signed between the Cape Cod Commission and the Town of Orleans,⁶¹ resemble the Memorandum of Understanding between MEPA and the CCC. The agreement recites the overlap between the Commission and the municipal agency with respect to development projects and the need to minimize duplication of presentation, evaluation, and resolution in the process. As a result, the Commission agrees to appoint a project manager for each DRI in Orleans as well as other communities which have signed similar agreements. The town appoints a liaison officer.

The project manager and the local liaison then set up a scoping session to identify the regional issues in the DRI. This session is designed to minimize duplication and to establish a time table for both regional and local permit applications.

Both the Commission and the locality agree to inform each other of public hearings concerning the proposed development. The town agrees to coordinate the schedule of its municipal agencies with the date, time and place of DRI hearings if a quorum of the municipal agency attends such a hearing.

59 Project TR96025, 1/29/98 Decision at page 10.

60 See 1/29/98 Decision, at 10-11.

61 Text available from the CCC.

Finally, the Commission and the town agree concerning certain discretionary referrals, those as mentioned above, which the CCC may but need not accept for DRI review; in return the town agrees to coordinate local individual and municipal agency comments on such discretionary reviews.

The scope of this Memorandum of Agreement with the local government is more limited than the agreement between the CCC and MEPA. It does not provide for joint hearings. It does, however, provide for a flow of information between the local authorities and the CCC. It suggests a common scope of review between the two levels of government. It does establish a type of coordination between the Commission and local authorities that is too often absent in the review of projects by different levels of government.

The CCC clearly considers this coordinated local scoping process to be important. In response to a question in its brochure “How Can an Applicant Keep Costs Down?”, it responds that the “Commission may be able to coordinate local review and DRI review through a joint scoping process, saving time and money.”

Thus, the Commission has supplemented its joint application and coordinated hearing process with the state, by involving localities in a joint review process. It has publicly stated that both processes save time and money and are an important factor in preserving both the environment and assuring developer certainty.

Conclusion

The process as described above, the prominence it is given in the Commission’s publicly distributed brochures and evaluations by the Commission’s Executive Director, all lead to the conclusion that the Commission’s joint hearing process provides certainty and enhanced sensitivity to environmental concerns. It also enhances public input. It appears to fulfill all three of the major criteria by which planning coordination schemes should be judged.