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Area of Critical State Concern: Its Potential for Effective Legislation

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AREA OF CRITICAL STATE CONCERN: ITS POTENTIAL FOR EFFECTIVE REGULATION

In the past decade there has been a tremendous expansion in governmental recognition of ecological and environmental problems. The federal government has defined the causes of and proposed solutions to water pollution,[1] air pollution,[2] coastal area deterioration,[3] and natural resources use and control.[4] Florida has responded with a variety of legislation aimed at protecting the state environment.[5] Although the Florida legislation is designed to deal with the most important problem facing the state's environment during a period of continuing, steady growth, it fails to provide coordinated ecological effort in areas where the environment is extremely sensitive and where sound environmental policy is crucial to the health and safety of citizens on a regional and statewide scale.

The Florida Land and Water Management Act of 1972[6] (the Act) was passed to provide the initial step toward such essential, consistent statewide land-use planning and development.[7] The most innovative provision of the Act authorizes the designation by state authorities of particularly sensitive areas as Areas of Critical State Concern.[8] An apparent answer to stopgap, piecemeal planning, and land-use control, the section attempts to impose state pressure on local and regional bodies to plan and act in critically sensitive areas in a manner consistent with the statewide interest in balancing the needs of the people and the needs of the environment.

Such state control over local planning and the development and use of private property is unprecedented in Florida. Similar legislation has been in effect, however, in a limited way in several other states.[9] This commentary

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1. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251-1376 (Supp. 1972).

2. Clean Air Act, 42 U.S.C. §§1857(a)-(e) (1970); 40 C.F.R. §§50.1-.11 (1972).

3. Coastal Zone Management Act of 1972, 16 U.S.C. §§1451-64 (Supp. 1972).

4. Wilderness Act of 1964, 16 U.S.C. §§1131-36 (1970); Intergovernmental Cooperation Act of 1968, 42 U.S.C. §4231 (1970); National Environmental Policy Act of 1969, 42 U.S.C. §§4321-47 (1970).

5. *See, e.g.*, Florida Water Resources Act, FLA. STAT. §§373.012-.6161 (1973); Oil Spill Prevention and Pollution Control Act, FLA. STAT. §§376.011-.21 (1973); FLA. STAT. §§377.01-.40 (1973) (conservation of oil and gas resources); Florida Air and Water Pollution Control Act, FLA. STAT. §§403.011-.413 (1973), *as amended*, Fla. Laws 1973, chs. 73-46, -256, -327, -333, -360; Environmental Protection Act, FLA. STAT. §403.412 (1973); Florida Electrical Power Plant Siting Act, Fla. Laws 1973, ch. 73-33, *to be codified as* FLA. STAT. §§403.501-.99 (1973).

6. FLA. STAT. §§380.01-.99 (1973).

7. "Regulation and control of land use must be more coherently organized in the future if real progress is to be made in achieving a quality environment. Such greater organization is essential because the regulation of land use is the key to ensuring that development is in harmony with sound ecological principles and environmental guidelines." Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1080 (1970).

8. FLA. STAT. §380.05 (1973).

9. HAWAII REV. STAT. §§205-2 to -37 (Supp. 1973); ORE. REV. STAT. §§80.010-.020, 482.010-.990 (1973); VT. STAT. ANN. tit. 10, §§6001-91 (1973). Vermont's legislation allows the state to reject local zoning decisions that are inconsistent with the policies of the statute.

will examine the Area of Critical State Concern provision in light of analogous Florida law and the effects of similar legislation in other states, and evaluate several of the key provisions. The broad range of factors and considerations necessarily relevant to the individual challenge of taking without compensation is beyond the scope of this analysis.[10] Instead, the commentary will analyze the statutory and regulatory framework of the Environmental Land and Water Management Act of 1972 in order to predict the state's ability to deal in an effective way with crucial land-use problems while avoiding conflict with the developing law relevant to taking versus reasonable regulation.

SECTION 380.05: AREA OF CRITICAL STATE CONCERN

The Florida provision, based upon the American Law Institute's Model Land Development Code,[11] provides a three-step process for state participation in the control of growth and development of critical areas. The process involves input and decisionmaking at the state, regional, and municipal levels with opportunity for public participation at each level. The designation of an area includes a recommendation of a specific area by state or local agencies, proposed development regulations by the local agencies subject to approval by the state, and finally, implementation at the local level by existing governmental bodies.

Three types of areas may be designated as critical areas.[12] The designation of an area is, however, subject to several limitations. One is that no more than five per cent of the area of the state may be so designated or under any state control as a critical area at any one time.[13] The second limitation is that such designation must be mandated by a demonstrated need and must

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It establishes ten criteria that must be complied with and also sets up seven regional boards that must pass on all major proposals for development within the state. *See* Levy, *Vermont's New Approach to Land Development,* 59 A.B.A.J. 1158 (1973). Examples of critical area legislation are: Tahoe Regional Planning Agency, CAL. GOV'T CODE §§66800-01 (Supp. 1974); NEV. REV. STAT. §§277.190-.230 (1973); Hackensack Meadowlands Reclamation and Development, N.J. STAT. ANN. §§13:17-1 to -86 (Supp. 1973); Adirondack Park Agency, N.Y. Exec. Law §706 (McKinney 1971), plan adopted §348 (McKinney 1973). *See* Bosselman, *Statewide Land Use Regulations,* 8 REAL PROP., PROB. & TR. J. 515 (1973).

10. *See generally* Binder, *Taking Versus Reasonable Regulations: A Reappraisal in Light of Regional Planning and Wetlands,* 25 U. FLA. L. REV. 1 (1972); Olsen, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking,* 3 URBAN LAW. 440 (1971); Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971); Van Alystyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So. CAL. L. REV. 1 (1970).

11. ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, 1971).

12. FLA. STAT. §380.05(2) (1973) provides that the following areas may be designated as critical areas: "(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance. (b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment. (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan."

13. *Id.* §380.05(17).

include an explanation of the reasons for, and dangers and advantages of, control under the Act. The designation must also delineate the principles of development for the designated area.[14]

Recommendations of areas to be included may be submitted to the Administration Commission[15] by the Division of State Planning, by any regional planning agency, or by a local governmental unit.[16] The submission must be detailed[17] and must be preceded by notice to all local governments and regional planning commissions having jurisdiction within the proposed critical area.[18] The Administration Commission then has forty-five days to adopt, adopt with modification, or reject the recommendation.[19] When adopted, the rule will establish the boundaries and the specific principles for guiding development in the critical area.[20]

The affected regional planning agencies and local governments must, within six months, promulgate and submit for approval to the Division of State Planning detailed land development regulations for the area based upon the guidelines established in the designating rule.[21] If they fail to sub-

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14. *Id.* §380.05(1)(a).

15. The Administration Commission is composed of the Governor and the cabinet. *Id.* §380.031(1).

16. *Id.* §380.05(3).

17. ENVIRONMENTAL REGULATION AND LITIGATION §7.11 (Fla. Bar Continuing Legal Educ. 1973). The Division of State Planning advises that the nomination should include the following general subjects: (1) name of the nominating party, (2) size of the area being nominated, (3) legal description of the nominated area, (4) statement of the physical characteristics, (5) information on development pressures (trends, population figures, and related information), (6) specific reasons for state or regional concern, (7) specific dangers foreseen for the proposed area, (8) adequacy of local regulations, (9) recommended principles for guiding development in the proposed area, (10) advantages to be gained from the coordinated development within the area, (11) groups, individuals, planning agencies, or governmental bodies that support the designation of the proposed area as an area of critical state concern, (12) names and addresses of any agencies that have additional information concerning the proposed area, (13) reports, maps, or other planning information concerning the area, and (14) local government's posture as to the development pressures and designation of the area as an area of critical state concern. *Id.*

18. FLA. STAT. §380.05(4) (1973) requires, in addition to such notice to all affected local governments and regional planning agencies, any notice that is required by the Florida Administrative Procedure Act, FLA. STAT. ch. 120 (1973), for all administrative agency hearings.

19. FLA. STAT. §380.05(1)(b) (1973).

20. *Id. See, e.g.*, The Big Cypress Conservation Act of 1973, FLA. STAT. §380.055 (1973), which is legislative designation of the Big Cypress area as an area of Critical State Concern. The Act stipulates that certain administrative provisions of §380.05 would not be applicable and that the Division of State Planning has the exclusive right to formulate and submit for approval the land development regulations for the area. *Id.* §380.055(4)(b). The boundaries and development regulations adopted by the Administration Commission after lengthy hearings at the local communities within the designated area contain extensive detailed definitions and site alteration restrictions. The rule also delineates the relationship between the development regulations and the local existing regulations as to enforcement, variances, appeals, and amendments. Fla. Admin. Code ch. 22F-3 (1973).

21. FLA. STAT. §§380.05(5), (8) (1973).

mit adequate regulations, appropriate regulations are to be recommended by the Division of State Planning for consideration by the Administration Commission.[22] Prior to the adoption or rejection of submitted regulations, the Administration Commission must give notice and opportunity for hearing to the local governments and regional planning agencies affected.[23]

The land development regulations adopted by the Commission will be administered by the local government as if part of the local land development regulations.[24] If, however, the Division of State Planning determines that the local government is failing to administer them in a manner adequate to protect the state or regional interests, the division may institute judicial proceedings to compel the proper enforcement of the land development regulations.[25]

These land development regulations may be amended upon recommendation by the local agencies and approval by the state planning agency.[26] Within the area, the local agencies continue to have the authority to approve developments that conform to the established regulations following notice of such development to the state planning agency.[27]

These extensive provisions establish definitive responsibilities and set time limitations on the decision to designate, the approval or rejection of development regulations, and the approval or rejection of proposed development regulation amendments. They provide for the participation by the local and regional agencies at the crucial regulation-promulgating stage and at the implementation stage. The state, while having power to approve, reject, or modify local development regulations, merely acts throughout as an external stimulus and coordinator, attempting to ensure reasonable, rational growth policies that are consistent with statewide interests and concerns.

PRESENT FLORIDA APPROACH TO LAND-USE RESTRICTIONS

The threshold problem with the Area of Critical State Concern provision is the extent and degree to which state-level control and regulation is imposed on the use and development of private property. The Florida constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner."[28] This language, similar to that found in the United States Constitution[29] and most state constitutions, becomes particularly relevant in this context.[30] While it is commonly recognized that the state may exercise a degree of regulation of private proper-

22. *Id.* §380.05(8).
23. *Id.*
24. *Id.*
25. *Id.* §380.05(9).
26. *Id.* §§380.05(10), (11).
27. *See id.* §§380.05(13), (16).
28. FLA. CONST. art. X, §6(b) (formerly FLA. CONST. Decl. of Rights §12 (1885)).
29. U.S. CONST. amend. V.
30. *See* Binder, *supra* note 10.

ty under its inherent police powers,[31] property uses may be so restricted that the regulation becomes a taking without compensation.[32]

The great number of courts that have examined the taking versus regulation question generally have utilized a case-by-case evaluation of the facts, adopting no general or guiding rationale for future application.[33] One prominent commentator, after examining eighty-nine Supreme Court cases over a span of thirty years, described the doctrine in this area as a "crazy quilt."[34] Florida courts have followed this case-by-case approach in evaluating zoning ordinances, zoning ordinance exceptions, and variances that restrict property use.[35]

The Florida supreme court recently reaffirmed that the basic constitutional right of an owner to make legitimate use of his property may not be curtailed by unreasonable restrictions under the guise of the police power.[36] The question has traditionally been directed toward determining what are unreasonable restrictions. The Florida courts consistently have required that the restrictions be kept within the limits necessary for the protection of public health, safety, morals, or general welfare or they will be recognized as unlawful taking.[37] This language has, however, become nothing more than strong rhetoric. It has been used both to justify the courts' upholding of the restrictions and to explain findings that the restrictions are unreasonable. The courts have failed to provide the framework necessary to guide legislators and administrators in distinguishing reasonable regulations from compensable takings. Prior to the passage in 1973 of the Municipal Home Rule Powers Act,[38] municipalities were required to rely upon and comply with the statute that granted them zoning power.[39] The restrictions that they imposed were

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31. *E.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). *See also* Binder, *supra* note 10, at 47.

32. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

33. Binder, *supra* note 10, at 2.

34. Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

35. *See, e.g.*, City of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950); Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406 (1940); City of Punta Gorda v. Morningstar, 110 So. 2d 449 (2d D.C.A. Fla. 1959); Bessemer Properties, Inc. v. Miami Shores Village, 110 So. 2d 87 (3d D.C.A. Fla. 1959).

36. Burritt v. Harris, 172 So. 2d 820 (Fla. 1965).

37. *E.g.*, Miami Beach v. 8701 Collins Ave., Inc., 77 So. 2d 428 (Fla. 1954); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Town of Belleair v. Moran, 244 So. 2d 532 (2d D.C.A. Fla. 1971).

38. Fla. Laws 1973, ch. 73-129 (repealing, among others, Fla. Stat. §§176.01-.24 (1971), which was the standard municipal zoning powers statute). Subsequent to the passage of the Municipal Home Rule Powers Act, except for the permissive planning statute, FLA. STAT. §§163.160-.315 (1973), there is no general law in the Florida statutes telling a local government how it ought to do its planning and implement its adopted plans in the form of zoning and building restrictions. FLORIDA ENVIRONMENTAL LAND MANAGEMENT STUDY COMM'N, ENVIRONMENTAL LAND MANAGEMENT, FINAL REPORT TO GOVERNOR AND LEGISLATURE 20 (1973).

39. Fla. Laws 1939, ch. 19,539, §§1-13. *See also* Comment, *Municipal Powers in Florida: By Constitutional Right or Legislative Grace?*, 25 U. FLA. L. REV. 597 (1973).

required to be for the purpose of promoting health, safety, morals, or general welfare, and to be in accordance with a comprehensive plan.[40] These broad, general guidelines have been accepted as providing adequate standards for the courts to examine the validity and constitutionality of zoning actions of municipalities.[41] The restrictions on private property must be within limits necessary to achieve these objectives or they will be recognized as an unlawful taking. This legislative language, while accepted and repeated by the courts, seems to provide inadequate standards for the promulgation and application of the comprehensive restrictions in the critical areas.

In challenges to zoning actions, conflicting precepts create the need for the application by the courts of a balancing test.[42] Zoning boards are similar to other administrative agencies with reference to the validity of their established rules,[43] and therefore zoning ordinances are presumed to be valid if within the statutory guidelines.[44] Since the presumption rests with the ordinance, the individual challenging the regulation has the burden of demonstrating that it is either unreasonable or arbitrary.[45] Balanced against this presumption in favor of the agency, the courts have held that because the regulations impose restrictions on the use of private property, all doubts shall be resolved in favor of the constitutional interdiction against the taking of private property.[46] The effect is to balance the need for zoning restrictions to protect the public interest against the rights of an individual to enjoy the

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40. Municipalities were allowed to regulate and restrict the height, number of stories, and size of buildings; the percentage of lot that may be occupied; the size of yards; the density of population; and the location and use of buildings, structures, and land and water for trade, industry, residence, or other purposes. Among the various purposes that the municipal zoning regulations could be promulgated to achieve were: to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to provide adequate light and air; to prevent the overcrowding of land; and to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

41. *E.g.*, State *ex rel.* S. A. Lynch Corp. v. Danner, 159 Fla. 874, 33 So. 2d 45 (1948); Town of Belleair v. Moran, 244 So. 2d 532 (2d D.C.A. Fla. 1971).

42. Binder, *supra* note 10, at 45.

43. City of Miami Beach v. Lachman, 71 So. 2d 148 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1954).

44. Parking Facilities, Inc. v. City of Miami Beach, 88 So. 2d 141 (Fla. 1956). The validity of zoning, as well as other municipal ordinances, is tested by the "fairly debatable" doctrine. If a power granted to a municipality is valid constitutionally and if the ordinance is fairly debatably within the proper exercise of that power, then it is valid. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Parking Facilities, Inc. v. City of Miami Beach, 88 So. 2d 141 (Fla. 1956); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941). "[A zoning] ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1954). "When the regulation is 'fairly debatable' then the courts are not empowered to interfere." City of Miami v. Schutte, 262 So. 2d 14, 16 (3d D.C.A. Fla. 1972).

45. City of St. Petersburg v. Aiken, 217 So. 2d 315 (Fla. 1968); Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406 (1940); Watson v. Mayflower Property, Inc., 223 So. 2d 368 (4th D.C.A. Fla. 1969), *writ discharged*, 233 So. 2d 390 (Fla. 1970).

46. Alford v. Finch, 155 So. 2d 790 (Fla. 1963).

free, unrestricted use of his private property. If the ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding the only uses to which it is reasonably adapted, an attack upon the validity of the regulation will be sustained.[47]

Another suggested test relevant in determining the validity of a use restriction is the reduction-in-value test.[48] The Florida courts, while recognizing its usefulness, have been unwilling to rely on it alone.[49] A reduction in the value of property caused by a zoning ordinance is not, of itself, enough to render the ordinance confiscatory.[50]

Thus, the practice in Florida has been to conduct an ad hoc examination of the degree of restriction through a consideration of three factors: (1) the purpose to be served by the restriction and whether it is within the zone of reasonableness under the enabling statute and the constitution, (2) the uses that remain lawful under the restriction and whether they ensure some benefit to the owner, and (3) any reduction in value caused by the restriction. While this type of examination has been adequate to deal with municipal zoning of property, it does not establish a satisfactory precedent to be utilized in applying the more restrictive regulations authorized under the Critical State Concern provisions of the Environmental Land and Water Management Act. More specific, detailed guidelines and standards are necessary to determine the validity of the restrictions that may be imposed upon the critical areas.

LAND-USE RESTRICTIONS IN OTHER STATES

No other state has enacted comprehensive statewide land-use legislation similar to the Florida Environmental Land and Water Management Act.[51] Two types of regulations, however, are sufficiently analogous to the Florida law to warrant discussion of the judicial reaction to them in other states. The first are "wetlands" regulations. Several states and municipalities have passed legislation restricting the development of wetlands.[52] While the reported

47. Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901 (Fla. 1954); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364, 366 (1st D.C.A. Fla. 1971).

48. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

49. City of Miami v. Rosen, 151 Fla. 677, 10 So. 2d 307 (1942); Metropolitan Dade County v. Greenlee, 224 So. 2d 781 (3d D.C.A. Fla. 1969).

50. City of Clearwater v. College Properties, Inc., 239 So. 2d 515 (2d D.C.A. Fla. 1970); Waring v. Peterson, 137 So. 2d 268 (2d D.C.A. Fla. 1962). A district court of appeal recently found a reduction from $200,000 to $60,000 insufficient to sustain an attack on an ordinance. Neubauer v. Town of Surfside, 181 So. 2d 707 (3d D.C.A. Fla. 1966). *But see* City of Miami Beach v. First Trust Co., 45 So. 2d 681 (Fla. 1950).

51. Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103, 135.

52. *E.g.*, San Francisco Bay Conservation & Development Comm'n, CAL. GOV'T CODE §§666**-61 (1966); Wetlands Act, 12 MAINE REV. STAT. ANN. §§4701-09 (1973); Code of Public Local Laws of Charles County, Law of Md. 1971, ch. 792; Navigable Water Protection Law, WIS. STAT. ANN. §144.26 (1965); Shoreland Zoning, WIS. STAT. ANN. §59.971 (Supp. 1973);

cases have provided no definitive line of reasoning or consistent response, several relevant factors emerge.

One factor to be considered is whether under the restrictions there are any alternative, reasonable, economically beneficial uses to which the land can be dedicated. In *State v. Johnson*[53] the application of a Maine statute designed to protect the state's wetland area as a valuable resource was declared to be an unconstitutional exercise of police power.[54] Since the state wetlands restrictions were similar to those present in most municipal zoning disputes, the court examined not only the mere existence of the restrictions but the degree of the burden placed upon the land. The regulation in question absolutely banned any development of the wetlands, and the court determined that the land without fill had no commercial value whatever. The only legitimate use allowed under the restriction was a public use—preservation of the natural resources; the restriction was therefore unreasonable and unconstitutional.[55] The court applied the traditional balancing test and found that the compensation received by the landowners by sharing in the benefits that the restriction was intended to secure was so disproportionate to their deprivation of reasonable use that such exercise of the state's police power was unreasonable.[56]

A similar wetlands regulation was also found to be an unreasonable exercise of police power in *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*.[57] The New Jersey court held that the township ordinance, which greatly restricted use of swampland and had for its prime objective the retention of land substantially in its natural state—essentially for public purposes of floodwater detention and wildlife sanctuary—was an unconstitutional taking of land for public purposes without just compensation.[58] Once again, there was no alternative use allowed except the public use, and the purposes sought to be furthered by the township were inadequate to overcome the presumption of unreasonableness. Several other decisions reflected a similar response.[59]

A number of states, however, have not followed this line of decisions.[60] A recent decision relying on the state's power to protect its natural resources

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Marinette County, Wis., Shoreland Zoning Ordinance No. 24 (1967).

53. 265 A.2d 711 (Me. 1970).

54. The court held that an owner is deprived of the essential attribute of his property if its value is destroyed; if its common, necessary, or profitable use is restricted or interrupted; if the owner is hampered in the application of his property to the purposes of trade; or if conditions are imposed upon the right to hold or use the property that seriously impair its value. *Id.* at 715.

55. *Id.* at 716.

56. *Id.*

57. 40 N.J. 539, 193 A.2d 232 (1963).

58. *Id.* at 554-55, 193 A.2d at 241.

59. Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Dooley v. Town Planning & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965).

60. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Steel Hill Dev., Inc. v. Town

and environment was *Just v. Marinette County*.[61] In an analysis that recognized the state's interest in preserving the existing condition of the land, the Wisconsin court held that it was not an unreasonable exercise of police power to limit the use of private property to activities and development consistent with its natural state in order to prevent harm to public rights. The alteration of wetlands and swamps in a manner that upset the natural state was held not to be a legitimate use of land protected from police power regulation.[62] The court recognized the need for and the validity of environmentally sensitive zoning. When the physical characteristics that make the land unusually sensitive from an ecological or environmental point of view are present, the environmental impact must be considered in the decision on how or even whether the land is to be developed.[63]

Recent legislation in several states has accepted the premise that specific, critical areas require a great degree of state interest and control.[64] This is the second type of regulation analogous to the Florida legislation — critical area legislation. One such area was designated concurrently by the California and Nevada Legislatures, which recognized that both state control and, as the area involved parts of neighboring states, bi-state coordination and control were required.[65] Single communities often cannot effectively evaluate the regional impact of many of their decisions, and the planning and development of such an area may require state and perhaps multi-state action.[66]

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of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Izaak Walton League of America v. St. Clair, 353 F. Supp. 698 (D. Minn. 1973); Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972); Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973). An earlier case in Washington-which was affirmed per curiam by the United States Supreme Court, ruled that a state act requiring reforestation of land by lumber companies is a valid exercise of police powers because the state is not required by the Constitution to sit idly by while its natural resources are depleted. State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906, *aff'd per curiam*, 338 U.S. 863 (1949).

61. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

62. *Id.* at 17, 201 N.W.2d at 768. "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."

63. Winters, *Environmentally Sensitive Land Use Regulation in California*, 10 SAN DIEGO L. REV. 693, 696 (1973). "[T]housands of individual decisions, which standing alone are not necessarily significant, will gradually erode the remaining particularly sensitive land." *Id.* at 698.

64. See critical area legislation, *supra* note 9.

65. Tahoe Regional Planning Agency, CAL. GOV'T CODE §§66800-01 (Supp. 1974); NEV. REV. STAT. §§277.190-.230 (1973). The bi-state pact was congressionally approved by Act of Dec. 16, 1969, Pub. L. No. 91-148, 83 Stat. 360.

66. This fact was recognized by the California courts when they found the act constitutional and determined that the compact was enacted to serve regional, not merely local, purposes. People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971). "One of the reasons for the establishment of the agency was the inability of the myriad of local entities to cope with the problem of preserving the Tahoe Basin." *Id.* at 501, 487 P.2d at 1206, 96 Cal. Rptr. at 566.

Both New York[67] and New Jersey[68] have enacted legislation designed to impose regional control over critical areas of those states. The New Jersey restrictions have thus far met with a favorable response in the courts.[69] The regulations were presumed to be valid and reasonable, thus imposing the burden of overcoming the presumption upon the challenger.[70] The protective acts, which have been upheld by the courts, have the common element of control as opposed to absolute restriction. They provide comprehensive planning followed by managed development. The traditional balancing test, with a presumption of the reasonableness of the regulation, will be applied where there exists a possibility of alternative use or of changing conditions and subsequent modified restrictions.

CRUCIAL PROVISIONS

There are two factors prominent in most of the decisions upholding restrictions on land use: the existence of an alternative, reasonable use and the development of a comprehensive plan to which the restrictions must conform. The plans and regulations that allow some alternative use of the property, even if very limited,[71] or which are absolute and total, but only for a limited period,[72] have been considered reasonable and proper exercises of the police power. Where, however, the plan imposes absolute restrictions for indefinite periods,[73] or so greatly restricts the land that it cannot be practically used for any reasonable purpose, or only permits uses to which the property is not

67. Adirondack Park Agency, N.Y. EXEC. LAW §706 (McKinney 1971), *plan adopted,* N.Y. EXEC. LAW §§800-19 (McKinney 1973). The New York legislation called for the preparation of a comprehensive plan for land-use in the park, much of which is privately owned.

68. Hackensack Meadowlands Development Comm'n, N.J. STAT. ANN. §§13:17-1 *et seq.* (1968). The New Jersey statute mandates the preparation of a comprehensive plan followed by the exercising of land-use control over all development in the Meadowlands based upon the plan.

69. Meadowlands Regional Dev. Agency v. State, 63 N.J. 35, 304 A.2d 545, *appeal dismissed,* 94 S. Ct. 343 (1973); Meadowland Regional Dev. Agency v. Hackensack Meadowlands Dev. Comm'n, 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972); East Rutherford Indus. Park, Inc. v. State, 119 N.J. Super. 352, 291 A.2d 588 (App. Div. 1972).

70. Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Dev. Comm'n, 120 N.J. Super. 118, 293 A.2d 426 (App. Div. 1972).

71. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973); Just v. Marinette County, 57 Wis. 2d 7, 201 N.W.2d 761 (1972).

72. Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1st Dist. 1970); City of New Berlin v. Stein, 58 Wis. 2d 417, 206 N.W.2d 207 (1973).

73. Charles v. Diamond, 42 App. Div. 2d 232, 345 N.Y.S.2d 764 (4th Dep't 1973). While this case did not involve a land-use restriction the effect of the temporary injunction on sewer hookups had an identical result. The New York court held that where the injunction had been in effect for seven years due to the failure of the city to upgrade its sewage treatment facility, the instant problem was general to the public and not caused by the nature of the plaintiff's land, and it was impermissible to single out one to bear a heavy financial burden because of general community conditions.

adapted or that are economically infeasible,[74] the regulating agency has been held to a much higher burden of demonstrating the need for the severe restrictions.

This judicially imposed requirement has made apparent the need for a truly comprehensive, detailed plan.[75] A New York court found that such a plan, to be effective, must include the insights and learning of the philosopher, city planner, economist, sociologist, public health expert, and all other professions concerned with urban problems.[76] Other courts have begun to require the gathering and analysis of facts, as well as projections on existing land uses and reasonably foreseeable needs based upon population, economics, living and transportation patterns, and all other factors that may affect an area's development.[77] The courts are abandoning the presumption of validity and shifting the burden of proof to the regulating agency in any case where local or regional restrictions are not based upon an effective system of regional, comprehensive planning.[78]

Crucial Factors and the Area of Critical State Concern

Florida's Area of Critical State Concern provision appears to possess the attributes of those ordinances and regulations that the courts have held valid. The purpose of the Act is not to ban absolutely growth or development but rather to establish a sound plan for a controlled, rational rate of development and land usage within a well defined area determined to be of a sensitive nature.[79] Certain uses, not inconsistent with the objectives of the Act, are exempt from its coverage.[80] Detailed provisions exist both for the approval

74. Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Dooley v. Town Planning & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

75. The original zoning enabling acts passed during the 1930's by most states carried the requirement that such zoning be in accordance with a comprehensive plan. The courts, however, required only that the zoning ordinance itself be geographically comprehensive. Thus, it must deal with all of the land under the agency's control. *See generally* Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

76. Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

77. *E.g.,* Grant v. Washington Township, 1 Ohio App. 2d 84, 203 N.E.2d 859 (1963); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Ore. 1973). *See* Vestal & Reid, *Toward Rational Land Use Planning: An Interdisciplinary Approach,* 1 FLA. ST. L. REV. 266 (1973).

78. *E.g.,* Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971); Vickers v. Township Comm'n, 37 N.J. 232, 181 A.2d 129 (1962); National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1966). *See also* Bosselman, *Can the Town of Ramapo Pass a Law To Bind the Rights of the Whole World?,* 1 FLA. ST. L. REV. 234 (1973). Courts believe they must require more than mock obedience to the mandate to follow such a plan where greater and greater restrictions are being placed upon the use of privately owned land. Udell v. Haas, 21 N.Y.2d 463, 469-70, 235 N.E.2d 897, 901-02, 288 N.Y.S.2d 888, 893-94 (1968).

79. *See* FLA. STAT. §§380.021, .05(1)(a) (1973).

80. The Act provides that the following uses or operations will not be included within the restrictions of the development regulations: (1) work by a highway or road agency or railroad company within the boundaries of the right-of-way; (2) work by any utility upon

of individual developments[81] and for modifications and changes to the development regulations after the initial regulations have been established.[82] These regulations are to be administered at the local level with the local agencies having the authority to approve any project allowed under the established development regulations.[83]

A factor present here that does not exist when a municipality exercises its traditional zoning powers is the required state approval of the development regulations. This alone should not be fatal to the Act, since the zoning power is originally vested in the state with the municipalities exercising only delegated power.[84] The Municipal Home Rule Powers Act,[85] while repealing the general municipal zoning enabling act, does not alter the fact that the police power rests with the state; a municipality may zone subject only to the state's exercising such power and superseding the local zoning regulations.[86]

Because the purpose of the Act is to impose upon a sensitive area a greater degree of control in the form of necessary restrictions on development and growth, it is the type of situation where courts are requiring a truly comprehensive plan.[87] The Florida courts have spoken only in the language of the now repealed zoning enabling act,[88] and required nothing more than that the ordinance be "fairly debatable."[89] Presumably, they too will begin to require that the restrictions imposed under the critical area criteria be based upon nothing less than has been required in other jurisdictions — a comprehensive plan utilizing all available data on a wide range of factors and considerations.

Section 380.05 requires that each rule designating an area as a critical area must specify the boundaries, the reasons why the area is critical to the state or region, the dangers that would result from uncontrolled or inadequate development, the advantages that would be achieved from the coordinated development, and, finally, the specific principles for guiding the development of the area.[90] It further provides that the final development regulations adopted

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certain listed projects; (3) work for the maintenance, renewal, improvement, or alteration of any structure, if the work affects only the interior or the color of the structure or the decoration of the exterior of the structure; (4) the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling; (5) the use of any land for agricultural purposes; (6) a change within a class specified in an ordinance or rule; (7) a change in ownership; and (8) the creation or termination of certain rights in land. FLA. STAT. §380.04(3) (1973).

81. FLA. STAT. §380.05(16) (1973).

82. *Id.* §§380.05(10), (11).

83. *Id.* at §380.05(8).

84. *See* Weinberg, *Regional Land-Use Control: Prerequisite for Rational Planning*, 46 N.Y.U.L. REV. 786, 790 (1971).

85. Fla. Laws 1973, ch. 73-129.

86. FLA. CONST. art. VIII, §2(b) provides: "Municipalities . . . may exercise any power for municipal purposes except as otherwise provided by law."

87. See text accompanying note 76 *supra.*

88. Town of Belleair v. Moran, 244 So. 2d 532 (2d D.C.A. Fla. 1971).

89. See note 44 *supra.*

90. FLA. STAT. §380.05(1)(a) (1973).

for the area must comply with the principles specified in the designating rule for that specific area.[91] There is, however, no requirement in the Act that the controlling initial specifications included in the designating rule comply with any comprehensive plan. The concurrent passage of the Florida Comprehensive Planning Act, which contemplates a detailed study and the formulation of such a plan, would nevertheless indicate that its use is anticipated.[92] The courts have not required that such use be statutorily mandated but only that it be actually used and complied with. The Florida Environmental Land and Water Management Act may satisfy the more stringent requirements only by actual use of and compliance with some form of comprehensive planning.

PROBLEM AREAS

Although the critical area provision generally follows the detailed American Law Institute Model Land Development Code, the Florida Legislature burdened the Act with two provisions that may eliminate much of the Act's potential effectiveness. The first provides that between the time the rule designating an area to be of critical state concern is adopted and the time the final land development regulations are formulated and approved, any local agency within the proposed critical area may authorize any development consistent with the existing local regulations.[93] The final regulations are necessarily detailed, and the Act allows extensive periods of time for the regional planning commissions and local agencies to formulate and present their recommendations to the state for approval.[94] Time exists for the vesting of development rights that could effectively destroy designated critical areas,[95] leaving the final regulations totally ineffective as protective devices.

A number of courts have approved as a reasonable exercise of police power the imposition of a total freeze on development in an area.[96] The freeze must

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91. FLA. STAT. §380.05(6) (1973).

92. State Comprehensive Planning Act, FLA. STAT. §§23.011-.019 (1973), provides for the formulation of a state comprehensive plan that, once adopted by the legislature and Governor, will become effective as state policy. Nothing in either the State Comprehensive Planning Act or the Florida Environmental Land and Water Management Act of 1972 requires compliance with the plan as adopted in the formulation of the controlling specifications for a critical area.

93. FLA. STAT. §380.05(14) (1973).

94. The Act provides that up to twelve months may elapse between the adoption of the rule designating an area as a critical area and the adoption of the land development regulations before the designation for that area must automatically terminate. FLA. STAT. §380.05(12) (1973).

95. FLA. STAT. §380.05(15) (1973) contains a "grandfather clause" that protects the interests of any developer who has vested his interests within the designated area. This seems to codify the doctrine of equitable estoppel establishing two essential elements that must be present. First, the developer must have a valid authorization or permit and, second, he must have acted in good faith to his detriment in relying upon the permit so that the imposition of critical area restrictions would impose a hardship upon him. ENVIRONMENTAL REGULATION AND LITIGATION §7.67 (Fla. Bar Continuing Legal Educ. 1973). *See, e.g.*, Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963).

96. Charles v. Diamond, 42 App. Div. 2d 232, 345 N.Y.S.2d 764 (4th Dep't 1973); City

be for a finite period of time and have a reasonable purpose. An amendment to the critical area sections to provide for a maximum one-year freeze on development to enable the state and regional agencies to formulate an effective land-use regulation based upon a comprehensive plan would meet the requirements imposed by the courts and ensure that the eventual regulations would not be totally ineffective.

The second provision weakening the Act is a five per cent cap on the amount of land that can be classified as a critical area or can remain under some state control at any one time.[97] The State of Florida has an immense and valuable zone of coastal and inland wetlands. It comprises an area estimated at between 24.7 per cent and 34.02 per cent of the total area of the state.[98] Because of the sensitive nature and extreme value of this area to the state's health and welfare, the wetlands constitute some of the most critical land in the state. The five per cent cap, however, allows only a fraction of this critical wetland to be regulated under the provisions of the Act.[99]

Two solutions are possible. First, an exception to the cap could be provided for the wetlands. The difficulty with this solution is that the exact boundaries of wetlands are difficult to determine. The better solution would be the total elimination of the five per cent cap. This would free the Act from the strictures of the limitation and enable the state planning agency to consider and include every area of critical concern.

CONCLUSION

Florida has recognized the tremendous problems inherent in the burgeoning growth of the state and the concurrent attempt to provide a safe, healthful, well-balanced environment. It has also recognized that a well-balanced environment, protected from a rampant, uncoordinated growth, is critical not only to the health of its citizens but to the health of its economy. Although the municipalities may zone according to a thorough plan that considers the effects of various factors, the problems now confronting the state cannot be solved by any single municipality.[100] The Area of Critical State Concern legislation is an effort to place control of those areas determined to be the most sensitive in state and regional planning agencies.

The two most important concerns of courts reviewing restrictions similar

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of New Berlin v. Stein, 58 Wis. 2d 417, 206 N.W.2d 207 (1973). *Accord*, ALI MODEL LAND DEVELOPMENT CODE §7-702, (Tent. Draft No. 3, 1971).

97. The Florida Senate did, however, defeat a proposed amendment that would have lowered the cap from the existing 5% to 2%. FLA. S. JOUR., regular session, 1972, at 645.

98. FLORIDA ENVIRONMENTAL LAND MANAGEMENT STUDY COMM'N, ENVIRONMENTAL LAND MANAGEMENT, FINAL REPORT TO GOVERNOR AND LEGISLATURE (1973).

99. The limitations imposed by the 5% cap have been recognized to a certain extent. The legislature exempted the Big Cypress Area of Critical State Concern from inclusion in the cap in the creating legislation. Fla. Laws 1973, ch. 73-131, *to be codified as* FLA. STAT. §380.055(2)(b).

100. Golden v. Planning Bd., 30 N.Y.2d 359, 376, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 150 (1972). *See also* Weinberg, *supra* note 84, at 787.

to those most likely to be imposed upon a critical area are provided for in the Act. The first, reasonable alternative uses, is dealt with by excluding from control or restriction certain listed classes of use and development that are consistent with the purposes of the Act. Provisions also exist for the approval of development by the local agency if it is within the established development regulations. And procedures are established for appeal by affected parties and for amendment and modification as changing conditions require.

The second dispositive area, compliance with a rational comprehensive plan, is at least impliedly provided for in the Act. Even though not required by either the Act or the Comprehensive Planning Act, the promulgation of such a plan and its use in the establishment of the development regulations and subsequent amendments would seem to be one of the most crucial considerations of the implementing agencies. Without the use of such a plan, the restrictions imposed would be impossible to justify and would be an unreasonable exercise of the police power.

The enacted legislation is adequate only as the initial step. It provides for effective state level control to insure consistency and compliance with the state land development plan, while allowing the local agencies to be directly responsible for the administration of the regulations in their own areas.[101]

The weaknesses of the Act may, however, negate much of its potential effect. The lack of an interim freeze on development for a limited period while the final development regulations are being prepared and approved may allow individual locales to vest inconsistent interests, knowing the impending regulations will greatly restrict such development. And, with the acknowledged sensitivity and critical nature of the wetlands, which comprise a significant percentage of the state's lands, the present five per cent cap prevents utilization of the effective provisions of section 380.05 for their much needed regulation and protection.

The Florida Environmental Land and Water Management Act and specifically its Areas of Critical State Concern clause can serve as the initial step in total effective land-use planning. Amendment of the Act to cure its two weaknesses and forceful application of the Act's strengths can provide an specifically its Areas of Critical State Concern clause can serve as the initial and safe environment.

TIM E. SLEETH

101. The restrictions and control imposed under the Act apply only to a critical area. The majority of the land-use decisions will continue to be made at the local level. *See generally* Bosselman, *supra* note 9, at 518.