

1975

Land Use Law in Virginia

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Land Use Law in Virginia, 9 U. Rich. L. Rev. 513 (1975).

Available at: <http://scholarship.richmond.edu/lawreview/vol9/iss3/5>

This Note is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

LAND USE LAW IN VIRGINIA

I. Introduction	517
II. Private Land Use Controls	521
A. A Preferred Method?	522
B. Private Agreements	523
1. Interaction with Public Controls	523
2. Analysis	528
C. Nuisance	530
1. Interaction with Public Controls	530
2. Analysis	532
D. Conclusion	533
III. Local Control Over Land Use	534
A. Local Planning	534
B. Zoning: The Statutory Framework	536
C. Zoning: Case Law	537
1. General Principles	537
2. Access to the Courts	539
3. Constructional Problems	540
4. Special Exceptions	542
5. Non-Conforming Uses	543
6. Variances	544
7. The Board of Zoning Appeals	545
8. Limitations on the Court's Power	546
9. Confiscatory Zoning	546
10. Improper Uses of the Zoning Power	547
D. Recent Developments	548
E. The Open-Space Land Act	551
F. Real Estate Taxes and Land Use	552
G. Conclusion	554
IV. Regional Land Use Planning	555
A. Development of VADA	556
B. The Planning District Commission	557
C. Problems with Comprehensive Planning	561
D. A-95 Review	564
E. Service Districts	566
F. Analysis and Conclusion	569
V. Wetlands	572
A. Standards, Policies and Guidelines	574
B. The Wetlands Zoning Ordinance	576
C. Review and Appeal	580
D. Analysis and Conclusion	580

VI.	State Activities Tangentially Affecting Land Use	582
A.	Building and Housing Codes	583
1.	Building Codes and the Virginia Uniform Statewide Building Code	583
2.	Housing Codes	584
B.	Department of Highways and Transportation	588
C.	State Corporation Commission	596
D.	Conclusion	602
VII.	State Agencies Directly Affecting Land Use	602
A.	Council on the Environment	602
1.	Environmental Impact Statements	604
2.	Conclusion	607
B.	State Water Control Board	608
1.	Effect of Federal Law	608
2.	State Statutory Provisions	610
3.	Exercise of Authority	611
4.	The Groundwater Act of 1973	614
5.	Conclusion	617
C.	State Air Pollution Control Board	617
1.	Sources of Air Pollution	620
2.	Permit Procedure	621
3.	Conclusion	622
D.	Soil and Water Conservation Commission	623
E.	Department of Conservation and Economic Development	624
F.	Virginia Outdoors Plan	624
1.	Virginia Historic Landmarks Commission	630
2.	Implementation of the Virginia Outdoors Plan	631
3.	Conclusion	632
G.	Marine Resources Commission	633
H.	Division of State Planning and Community Affairs	634
I.	Conclusion	637
VIII.	Initiatives by Other States	637
A.	Historical Perspective	637
B.	Alternative Approaches	639
1.	Statewide Comprehensive Land Use Control	639
2.	State Control According to Broad Definitional Criteria	642
3.	Statewide Planning	647
4.	Selective State Control According to Functional Criteria and Specific Geographical Areas	648
5.	State Control of Uncontrolled Areas	649

C.	Issues in Determining a State Land Use Program	650
1.	Declaration of Legislative Intent	651
2.	Requirement of a Land Use Plan	652
3.	Role of the State	653
4.	Role of Local Government	654
D.	Conclusion	655
IX.	Federal Taxation Affecting Land Use	655
A.	Tax Incentives for the Donation of Land	656
B.	Tax Incentives in Agricultural Land	661
1.	Soil and Water Conservation (Section 175)	661
2.	Expenditures by Farmers for Clearing Land (Section 182)	663
C.	Tax Incentives in Timberland	664
D.	Tax Incentives in Housing	665
E.	Conclusion	670
X.	Federal Environmental Authority Affecting Land Use	670
A.	The Clean Air Act	672
B.	Federal Water Pollution Control Act Amendments of 1972	680
1.	In General	680
2.	State Continuing Planning Process	682
3.	National Pollutant Discharge Elimination System (NPDES)	683
4.	Grants	684
5.	Areawide Waste Treatment Management Plans	685
C.	Other Legislation	688
1.	Solid Waste Disposal Act	688
2.	Noise Control Act	689
3.	Coastal Zone Management Act of 1972	691
D.	National Environmental Policy Act of 1969 (NEPA)	696
1.	Background	696
2.	Environmental Impact Statements	698
a.	Necessary Federal Involvement	698
b.	Adequacy	703
3.	Standing and Substantive Review	704
4.	NEPA as a Land Use Planning Device	708
E.	Conclusion	708
XI.	Prospective Federal Land Use Legislation	710
A.	Summary of the Major Provisions of the Land Use Policy and Planning Assistance Act	711
1.	Statewide Land Use Planning Process	712
2.	Statewide Land Use Program	713

3. Administration of the Act	714
4. The Federal Role	715
5. Other Considerations Embodied in the Act	716
6. The Issue of Crossover Sanctions	717
B. Opposition to S. 268 and H.R. 10294	718
C. Conclusion	720
XII. Conclusion	721
A. Considerations	721
B. Federal Involvement	722
C. Role of the State as a Policy Making Body	723
Land Use Appendix	725

I. INTRODUCTION*

In Virginia and throughout the United States, pressures have been building which are forcing the law of land use planning to a watershed in its development. In response, governments at all levels have been striving to find means of ensuring that the resulting change be in a direction that benefits the greatest number of their citizens. Likewise, the attorney practicing in this area of the law needs to recognize the possibility of fundamental changes, to understand the pressures precipitating an altered legal framework, and to appreciate the complex ramifications of his decisions involving questions of land use. Only through this process will he be able to structure legal advice that realistically represents the interests of his client and of society.

The pressures on the use of land within our state and nation can arbitrarily be categorized within five nebulous and overlapping areas. First, the populations of the United States and Virginia are increasing. Even if the birth rate were to stabilize immediately at Zero Population Growth (ZPG), the number of Americans and Virginians would continue to grow for another generation.¹ With such an increase comes the need for new housing, new structures of industry and commerce, new governmental services, and a commensurately accelerating demand on the available resources of land. Secondly, the economics of land use are changing. For example, land values have so appreciated and building costs so escalated that the single family detached dwelling is now priced beyond the reach of a majority of Americans. Meanwhile, the inner cities have generally decayed while the suburbs on a relative basis have prospered. From such pressures a demand has arisen that attractive, clean, affordable, and efficient housing be made available through a reduction of construction costs, the rehabilitation of existing substandard structures, and a restructuring of land use that frees property for residential development. At the same time, a shortage of capital confronts those private developers and govern-

* Introduction by David Stephen Cohn, Assistant Professor of Law, T. C. Williams School of Law, University of Richmond; A.B. University of Pennsylvania 1967; J.D. Harvard Law School 1971; special student Harvard Business School 1970-71; member of Pennsylvania and Virginia Bar. The Review would like to acknowledge the assistance of Professor Cohn in the preparation of this note.

Professor Cohn wishes to express his appreciation to the Faculty Research Committee of the University of Richmond for a grant that aided in the preparation of this note.

The student contributors are David B. Beach, Albert D. Bugg, Jr., Wayne R. Hairfield, Benjamin Lacy, Joseph R. Mayes, Burke F. McCahill, Daniel R. McGarry, John H. McLees, Jr., Dennis J. McLoughlin, Louis A. Mezzullo, Thomas P. Olivieri, Michael S. Shelton, Gayle D. Tarzwell, Thomas W. Williamson, Stephen M. Yost.

1. See Section XI, *infra*.

ments that attempt to meet these needs and necessitates their having to act with imagination and political savvy in order to locate sufficient sources of funds.

Thirdly and closely linked to the economic question are problems fostered by a radically altered energy situation. The fuels that have been vital to our past patterns of growth will henceforth be available only at increased cost or in possibly decreased quantities. This phenomenon will demand a more coordinated effort to develop real estate in a manner that reduces the need to rely on energy consuming elements of modern technology. For example, pressures will increase for a more efficient use of that land nearest to the centers of shopping and jobs, a reduction in the use of the automobile, and an increase in the reliance on the various forms of mass transit. Moreover, building codes may have to be amended to require designs of future structures that waste less energy. Recently implemented programs to develop new and less costly energy sources and to provide coal, oil, gas, and electricity at the lowest possible costs will have to be more actively pursued.

Fourth, pervading the population, economic, and energy questions are social pressures. The poor and the minorities, like the more affluent, want their share of the good life. They have sought, and may more aggressively seek in the future, the relatively good schools, parks, municipal services, open space, comfort, and safety of the suburbs. However, they are currently blocked in their efforts at upward mobility by certain tools of land use planning law, such as zoning and private restrictive covenants. Their frustration adds to this impetus for change.

Finally, the environmental movement nurtured the seed of an awareness in many that our planet of once seemingly boundless resources has inherent limitations which necessitate that all actions of its people be seen as interrelated and interdependent. Thus, there has been a growing recognition of a need to husband precious natural resources such as clean water, clean air, and critical areas such as mountainsides and wetlands in order to prevent a further deterioration of the current relationship between man and the environment.² When these ecological factors lead to demands that growth be slowed and land be preserved in a condition as close as possible to its natural state, they conflict directly with the four areas of pressure outlined above.

Considering the intricacy of the pressures and the problems, it is logical that the response of society should be complex. In fact, a hierarchy of institutions did develop above the citizen property owner in the United

2. See Sections VII, X, *infra*.

States with each of its levels assigned certain functions that are designed to alleviate the aforementioned problems. Yet, these levels of bureaucracy at times seem to have been created to work through overlapping regulations toward competing goals. An outline of the framework of this response with examples of actions taken at each level will demonstrate the need for a comprehensive reevaluation of this mechanism through which the law attempts to provide order in land use.

First, the individual owner of real property might feel that he alone can understand and serve both his personal interests and the interests of his land. Thereby he is in the optimum position to resolve the demands fostered by the aforementioned pressures.³ On the one hand, he has a sensitive economic interest in the use to which his land and that of his neighbors can be put. On the other hand, he has a social concern for the identity of his neighbors and for the manner in which land use in his neighborhood might affect his life style. While the private owner lacks the organization of a unit of government, he relies heavily on the existence of property rights guaranteed him by the Constitutions of the United States and Virginia and acts to promote his interests through private legal devices such as restrictive covenants and the formation of political pressure groups.

At the second level, local governments have traditionally maintained the deepest institutional involvement in land use law.⁴ They function closest to the people, are in a position to appreciate the unique characteristics of land within their jurisdictions, and arguably can best recognize, articulate, and serve local needs. By the year 1980, every county and city within Virginia will be required by state law to become involved in this process through the use of the standard governmental land use tools of comprehensive planning, subdivision control, and zoning.

Third, it has been argued that giving planning powers to localities creates an artificial division of responsibility in the land use area.⁵ In other words,

[t]he effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning.⁶

Cognizant of this factor, the Virginia General Assembly recently created

3. See Section II, *infra*.

4. See Section III, *infra*.

5. See Section IV, *infra*.

6. Borough of Cresshill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441, 446 (1954).

twenty-two Regional Planning District Commissions in the Commonwealth with the jurisdictions of each transcending the boundaries of local governments. These Commissions were charged with the duty of analyzing issues of regional importance such as housing and sewage, but they were given only advisory roles.

Fourth, the states are deeply involved in this response.⁷ For example, Virginia has established its own agencies for the regulation of water, air, highways, and other areas affecting land use within its borders, and has adopted comprehensive land use statutes such as the Virginia General Condemnation Act.⁸ In addition, the legislature has passed enabling acts granting to localities the above mentioned power to regulate land use. At the same time, the state is in a position to advocate a restructuring of local government in order to provide more effective control at a regional level or possibly to enact land use planning on a comprehensive, state-wide basis. However, its legislators have to date consciously refused to become involved to such a degree in these questions. While the state has a broader perspective than its localities from which to conduct a comprehensive evaluation of the desirability of further land use control, it has not defined the role through which it can most effectively function at the level between the local and national governments.

Fifth, the federal government stands at the pinnacle of this hierarchy in the sense that it is in a position to influence the land use planning decisions of the greatest number of Americans and to resolve conflicts among the several states.⁹ Recognizing this opportunity, Congress has enacted comprehensive acts that regulate, to the extent allowable by the United States Constitution, the cleanliness of water and air, the deep shaft mining of the earth, the drilling of oil on the continental shelf, and numerous other areas of concern to land use. The National Environmental Policy Act (NEPA) is currently the most comprehensive manifestation of this involvement. In the not too distant future, the possible passage of a Federal Land Use Planning Act may greatly increase the federal role in the resolution of these problems.

Lastly, the aforementioned interests that compete to provide solutions to these problems collide intermittently. At such points, the vehicle for conflict resolution becomes the courts before which the problems of the five pressures, the five levels of the hierarchy, and the framework of our case law, statutes, and constitutions meet with the plea that order and justice be found. However, when the judicial forum is reached, it can be argued

7. See Sections VI, VII, *infra*.

8. VA. CODE ANN. §§ 25-46.1 *et seq.* (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

9. See Sections X, XI, *infra*.

that the judges lack the time, expertise, resources, and power to review effectively the available alternatives and to structure appropriate remedies. If this is an accurate observation, then there is a need to relieve the judiciary of a great portion of this burden. Towards this objective, a two-fold effort should be undertaken. First, the problems of land use planning must be defined. Then the problems should be matched to that level of governmental involvement that can most efficiently and equitably structure and implement a solution. Such a system could minimize the possibility of conflicts between the individual and government, result in an enlightened balancing of the demands of the five pressures, and reduce society's need to seek assistance from the courts.

The practicing lawyer in Virginia has a crucial role to play in the development of this system. This note recognizes this role. While it does not attempt to provide the attorney with an exhaustive treatise on the law of land use planning, it does endeavor to outline for him the parameters within which he can expect to work and thereby bring a degree of order to a mass of materials. The note will first introduce him to the point to which this body of law has evolved in Virginia and review the process of its evolution. At the same time, it will review the voluminous cast of participants involved in land use at all levels of government and elaborate the role and procedures of each. Finally, it will give him a glimpse of those forces affecting the direction of land use law in Virginia, and a basis upon which he might anticipate the direction of its future maturation. To this goal of so educating the practicing attorney in Virginia this note is dedicated.

II. PRIVATE LAND USE CONTROLS

No discussion of land use controls would be complete without mention of those more traditional legal principles which allow a private landowner some control over future uses of his presently owned land, and the uses of the lands of others which affect his interests in land. These principles involve covenants, equitable servitudes, easements, licenses, and the cause of action in private nuisance.¹

The substantive law of private controls on land use is, for the most part, extensively discussed elsewhere.² The purpose of the following analysis is

1. Another private control, or perhaps a "quasi-private" control, exists in situations where a private individual is given a statutory cause of action or appeal based on zoning laws. See VA. CODE ANN. §§ 15.1-496, -497, and -503.2(c) (effective June 1, 1975); Brown, *Zoning Laws: The Private Citizen as an Enforcement Officer*, 9 U. RICH. L. REV. 483 (1975). See also Section III C2, 7, 8, *infra*.

2. See, e.g., Bohannon, *Airport Easements*, 54 VA. L. REV. 355 (1968); Newark, *The Bound-*

to illustrate the current viability of this body of law in terms of the interaction of private and public controls and the advantages and disadvantages of private controls.

A. A PREFERRED METHOD?

Based on an elementary knowledge of private controls, one might make certain tentative generalizations about their function, their virtues, and their vices. Public controls are instituted for the general well-being of the whole community.³ Private controls, typically instituted to serve only the well-being of the parties and their property, supplement public controls, especially local zoning,⁴ by providing ad hoc remedies for specific situations.

Private controls are consonant with our traditional concepts of private property ownership and the freedom of individuals to make reasonable agreements governing their property.⁵ Private controls are largely delineated by an existing body of precedent. Conceding the necessity of judicial enforcement, private controls are otherwise largely self-executing, requiring no new government agencies, no large tax expenditures, and relatively simple, if any, enabling legislation. Private controls can be tailored to meet the precise needs of the parties, their land, and their environment, avoiding the unnecessarily broad restrictions that may conceivably result from public controls. In all, private controls constitute a form of self-government of the most direct and most efficient type.

Private controls also have vices. Although instituted for the benefit of all or some of the parties, they may be detrimental to the community at large, and they are sometimes difficult to terminate once their usefulness has passed. Most of all, private controls are limited by the ability of the parties to enforce them. A limited knowledge of land use principles and

aries of Nuisance, 65 L.Q. Rev. 480 (1949); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966); Spies, *Annual Survey of Developments in the Virginia Law of Property, 1967-68*, 54 VA. L. REV. 1244, 1255-59 (1968); Note, *Private Land Use Restrictions in Virginia*, 49 VA. L. REV. 1047 (1963); Note, *Annual Survey of Developments in the Virginia Law of Torts, 1971-72*, 58 VA. L. REV. 1349, 1358-59 (1972).

3. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Young v. Commonwealth*, 101 Va. 853, 45 S.E. 327 (1903); VA. CONST. art. I, § 3, and art. XI, § 1. See also VA. CODE ANN. § 15.1-489 (effective June 1, 1975).

4. See *Deitrick v. Leadbetter*, 175 Va. 170, 175, 8 S.E.2d 276, 278 (1940).

5. The early zoning ordinances aroused much public resentment. 1 YOKLEY, *ZONING LAW AND PRACTICE* § 13 (2d ed. 1953). To whatever extent the employment of private controls can obviate the necessity for new and exotic forms of public controls, further bitterness of this sort may possibly be avoided.

environmental needs may result in inadequate control provisions; while limited funds and investigative resources, as well as the difficulties of litigation, may result in undependable enforcement.

B. PRIVATE AGREEMENTS

Private land use controls instituted by agreement of the parties include covenants,⁶ easements, licenses, and profits. Although there are differences in the substantive law and the specific uses of these several devices, their general roles in the overall framework of land use control are similar because their general objectives are the same. These devices serve to preserve or increase the value or the utility of privately owned lands to the owner.

1. *Interaction with Public Controls*

For various reasons, an aspiring developer of a tract of privately owned land may believe that it is in his own economic interest to develop the land in such a way that it will retain its value and attractiveness indefinitely.⁷ If the tract is large enough, the owner will have to plan a balanced community in order to preserve the value of the land. Business and industry must be included so there will be convenient sources of employment. Residence complexes for people of various ages and economic levels are necessary to promote adequate division of labor among the local population. Schools and recreation facilities must be provided. Comprehensive controls on all land uses are essential in order to protect the environment and attractiveness of the community. All these are necessary simply because no large, inhabited area can prosper for an extended period of time without them. It becomes apparent that the developer's objectives in constructing a plan of private controls for his development become, to some extent, the same as those of the local government in imposing zoning and other land use restrictions. In such a case, to what extent could private controls supplant public controls?

Since 1963 such a development, Reston, has been under construction on a 6750 acre tract in Fairfax County, Virginia. The purported objectives of

6. Hereinafter, "covenants" should be understood to encompass covenants running with the land at law and covenants enforceable in equity, *i.e.*, equitable servitudes, unless the context indicates otherwise.

7. For example, he may feel that land subject to far-sighted use controls and environmental safeguards is the most appealing on the current market; he may wish to retain title to portions of the developed land or expect that he will be marketing the land for many years, and wish to protect his investment; or he may wish to establish a reputation for excellence in planning to assure the success of future similar developments.

the developers in planning this community include, in general terms, the requirements stated above.⁸

The envisioned development of Reston would not have fit into the existing zoning ordinances, so Residential Planned Community (RPC) zoning⁹ was adopted in June 1962 by the Fairfax County Board of Supervisors. The purpose of this zoning "is to permit a greater amount of flexibility to a developer of large communities by removing many of the restrictions of conventional zoning."¹⁰ The ordinance tacitly recognizes that, if the developed area is large enough¹¹ and if the developer's objectives include long-term preservation of property values for varied uses, the developer's objectives may become largely those of the county in imposing zoning restrictions.¹²

The developer must submit comprehensive plans for his proposed community to the Board of Supervisors. "The plans for such planned communities, when approved, shall constitute a part of the comprehensive plan of the County"¹³

8. A Brief History of Reston, Virginia 9-10 (July, 1973) (promotional pamphlet published by Gulf Reston Inc.).

9. FAIRFAX COUNTY, VA., CODE § 30-2.2.2 (1965).

10. *Id.* § 30-2.2.2 A.

11. The minimum size development which qualifies for RPC zoning is 750 contiguous acres. *Id.*

12. This flexibility is intended to provide an opportunity and incentive to the developer to strive for excellence in physical, social, and economic planning. To be granted this zoning the developer will demonstrate throughout the period of development in all of his planning, design and development the achievement of the following objectives: (1) the reservation of adequate permanent common open space for the use of all residents, (2) the location of buildings to take maximum advantage of the natural and man-made environment, (3) a variety of types of housing to achieve a balanced community, (4) the separation of pedestrian and vehicular traffic, (5) the provision of cultural, educational, medical, and recreational facilities for all segments of the community, and, (6) an orderly and creative arrangement of all land uses with respect to each other and to the entire community, including residential, commercial, industrial, and governmental, school sites, parks, playgrounds, recreational areas, parking areas, and other open spaces, (7) the provision of dwellings within the means of families of low and moderate income. *Id.*

13. *Id.* The prescribed process for submission and approval of plans is very similar to that recently adopted in VA. CODE ANN. §§ 15.1-473, -475 (effective June 1, 1975). The RPC district concept differs from the concept of special use permits in that it allows the developer, with the approval of the county, to in effect write his own zoning ordinance rather than merely allowing him an exception to existing zoning. The distinction is arguably quantitative rather than qualitative. See also Section IIIC5, *infra*. The RPC district is basically the same as one type of Planned Unit Development (PUD) District. See R. BABCOCK, D. McBRIDE, & J. KRASNOWIECKI, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT 86-94 (Urban Land Institute Technical Bulletin 52, 1965); F. SO, D. MOSENA, & F. BANGS, PLANNED UNIT

The RPC district permits mixed residential and commercial uses, and provides for three types of commercial complexes in order of increasing variety of permitted uses: the planned convenience center, the village center, and the town center. It also provides for a convention center/conference center, in which hotels, cultural and educational facilities, and various commercial activities are permitted. The sizes and locations of all these centers are to be designated by the developer on the submitted plans. Elaborate regulations requiring the integration of low and moderate income housing into the community are included.

The RPC district imposes an overall population density maximum throughout the district of thirteen persons per acre. Residential uses are divided into low (maximum 3.8 persons per acre), medium (maximum 14 persons per acre), and high (maximum 60 persons per acre) density areas. Few mechanical restrictions are imposed on residential structures. Open spaces in the community must be established by "adequate covenants running with the land, conveyances or dedications,"¹⁴ and an organization must be established by covenants running with the land for maintenance and ownership of open spaces. Ways of access between single family dwellings and public streets may be over land owned by an association of homeowners.

The Reston community is bisected by a 1300 acre belt of land reserved for the use of industry and government agencies, and zoned under conventional industrial zoning. The remainder of Reston is zoned as an RPC district. Directly north of the industrial belt is the convention center/conference center. North and south of the central belt are interspersions of high, medium, and low density residential areas, open spaces, and lakes and ponds. Throughout these areas, placed with regard for terrain and traffic patterns, are the village centers, convenience centers, schools, and major recreational facilities. As permitted by the RPC district ordinance, residential and commercial uses are closely integrated in the village and convenience centers, so as not to leave these areas deserted after normal business hours.

The industrial area is subject to a Declaration of Protective Covenants and Restrictions,¹⁵ which establishes an architectural review board to rule

DEVELOPMENT ORDINANCES 9-10 (Planning Advisory Service Report No. 291, May 1973). For discussion of a PUD district based on exceptions to existing zoning, see So, *et al*, *id.* at 10.

14. *Id.*

15. Recorded in Deed Book 2562, p.34, in the Clerk's Office of Fairfax County. Regardless of whether the Reston covenants would be held to run with the land, notice of their existence is surely sufficient to enforce them in equity, if they are reasonable and the intention behind them is clear. See generally *Minner v. Lynchburg*, 204 Va. 180, 129 S.E.2d 673 (1963); *Renn*

on proposed new structures, structural additions, changes in use of existing structures, and proposed signs and exterior lighting. The covenants inure to the benefit of the developer, the property owners, and lessees during tenancies in excess of five years.

Land use throughout the remainder of Reston is controlled by an elaborate system of general covenants,¹⁶ which is set out in the Deed of Dedication of Section One, Reston,¹⁷ and the Deed of Dedication of Section Two, Reston.¹⁸ In addition, these deeds contain special covenants which apply only to residential property.¹⁹ As in the industrial area, proposed changes in use of buildings or structural additions must be approved by an architectural board of review (ABR). The covenants inure to the benefit of the Reston Home Owners Association (RHOA), a non-stock corporation of which the developer and all property owners are members. RHOA owns and maintains the open space land as directed by the RPC district ordinance, owns and maintains the major recreational facilities, and maintains a covenants committee, which exists to assure compliance with the covenants and with ABR decisions.

Many of the residential complexes in Reston consist of townhouses built in the "cluster" pattern. For each cluster a non-stock corporation known as a "cluster association" exists, comprised of the developer and all property owners in that cluster. As permitted by the RPC district ordinance, the cluster association owns and maintains common lands within the cluster, such as walkways, parking spaces, access to public roads, and small playgrounds. It also maintains liability insurance covering the cluster lands and informally aids RHOA in enforcement of the covenants.²⁰

v. Whitehurst, 181 Va. 360, 25 S.E.2d 276 (1940); Springer v. Gaddy, 172 Va. 533, 2 S.E.2d 355 (1939); Cheatham v. Taylor, 148 Va. 26, 138 S.E.2d 595 (1927).

16. The general covenants deal with external maintenance and appearances, prohibition of subdividing, utility easements, slope control, preservation of open space, and a covenant against noxious or offensive activities which sounds very much like a public nuisance ordinance. See text accompanying notes 47-50 *infra*.

17. Recorded in Deed Book 2431, p.319, in the Clerk's Office of Fairfax County. This covers all of Reston north of the industrial belt.

18. Recorded in Deed Book 2499, p.339, in the Clerk's Office of Fairfax County. This covers all of Reston south of the industrial belt.

19. The residential covenants restrict use in the applicable areas to residential purposes, forbid keeping of animals other than household pets not kept for commercial purposes, and impose additional use restrictions directed toward maintenance of external appearances.

20. The Reston cluster associations have qualified for exemption from federal income taxes as "communities" under the Internal Revenue Code Rulings. This ruling defines a "community" as "a geographical unit bearing a reasonably recognizable relationship to an area ordinarily identified as a governmental subdivision or a unit or district thereof." MERTENS LAW OF FED. INCOME TAXATION, [1974 transfer binder] RULINGS 126 at 127-28.

In Reston, private agreements perform not only functions which are typically performed by private agreements elsewhere,²¹ but also functions which typically are performed by either private agreements or public restrictions²² as well as functions which are typically performed only by public controls.²³ It is this extensive performance of public functions by private agreements that makes Reston an important case study in the use of private agreement restrictions.²⁴

There are, of course, limitations on the possible uses of private agreements to control land use. Although motivated by the same considerations that prompted the development of Reston, the developer cannot fully anticipate the effect of his development on the community at large, nor is this his primary concern. His primary concern is with the land and residents within his community, not those without.²⁵ Recognition of these facts is embodied in the RPC district ordinance's provision for county review of proposed development plans. Furthermore, private agreements are enforced only through lawsuits brought by private parties (*i. e.*, the developer and the residents). Such suits will naturally be brought only for private benefit. The interests of the general public are protected only when they coincide with the interests of the developer or residents of the development. In other cases, protection of the community at large is left to public authorities.

21. *E.g.*, providing ways of access to public roads, restricting uses and external modifications of residential property, and easements for maintenance of underground utilities.

22. *E.g.*, set back requirements, prohibition of subdivision of property, maximum lot coverage, or building height restrictions.

23. *E.g.*, control over population density, abatement of public nuisances, maintenance of open spaces, control over the integration of residential and commercial uses, and designation of the locations where the categories of permitted uses established by the RPC district ordinance shall apply.

24. Also noteworthy is the example of Houston, Texas, where there is no zoning. The zoning function in Houston is performed entirely by private covenants. However, by statute (TEX. REV. STAT. ANN. art. 974a-1,2 (1969)), the city is empowered to enforce the private covenants. The covenants are thus made more effective because they have the financial, investigative, and litigative resources of the city behind them. See Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71, 77-79 (1970). Even if one is satisfied that private controls have adequately supplanted zoning in Houston, this does not mean that public land use controls are not necessary, since local zoning is only one of a number of public land use controls which are, or perhaps should be, effective over a given area. Public controls other than zoning are currently in effect in Houston. *Id.* at 72-75.

25. The same faults can be found with land use controls at all but the highest levels, *e.g.*, county government protects only the interests of the county, etc. See Section IV, *infra*. Carried to a logical but extreme conclusion, this argument would support the institution of federal, continental, or even world-wide controls of land use and the environment. The major question is, at what level, if any, does the argument lose its cogency?

2. Analysis

The essence of private agreement controls is the parties' dominion over their own property. This is evident from cases requiring strict adherence to the parties' intentions in interpreting covenants²⁶ and defining rights created by implication²⁷ or prescription.²⁸ However, in communities such as Reston, where both the developer and neighbors exert considerable influence over the homeowner's use of his land, resentment of private controls may be as great or greater than resentment of public controls.²⁹ Because the homeowner has agreed to abide by the covenants, in law the controls are self-imposed. In practice, however, the homeowner may not appreciate the meaning and pervasiveness of the controls until it is too late. In such a case, it makes little difference to him that these controls are enforced by private agreement instead of governmental action.

Private agreements seldom require new governmental agencies, tax expenditures, or enabling legislation.³⁰ On the other hand, elaborate private agreements to control land use may involve expenses to the parties in addition to property taxes.³¹

As noted above, one possible vice of private agreement controls is that they may be entered into for the benefit of the parties or some of the parties, to the detriment of surrounding properties or the community at large. The *raison d'être* of private agreements is to benefit private parties and not the community as a whole. The abuse of private controls takes two possible forms: a detrimental effect of the agreements on the community at large, and an inequitable distribution of benefit from the agreements

26. See, e.g., *Carpenter v. Camp Mfg. Co.*, 112 Va. 300, 71 S.E. 559 (1911).

27. See, e.g., *St. Clair v. Edgewood Water Works Co.*, 151 Va. 274, 144 S.E. 452 (1928); *Smith v. Virginia Iron, Coal & Coke Co.*, 143 Va. 159, 129 S.E. 274 (1925).

28. See, e.g., *Robertson v. Robertson*, 214 Va. 76, 197 S.E.2d 183 (1973); *Rives v. Gooch*, 157 Va. 661, 162 S.E. 184 (1932).

29. One example is the case of a current Reston homeowner who maintains a flagpole in open and knowing violation of a decision of the architectural board of review. Interview with Mr. Robert M. Perce, Jr., attorney for Gulf Oil Real Estate Development Co. Inc., Jan. 3, 1975. Another example was *Baker v. Magness*, Chancery No. 31217 (Circuit Court of Fairfax County, June 22, 1970). This was a derivative action brought by members of Reston Second Homeowners Association (later consolidated into RHOA) in an unsuccessful attempt to curtail the power of the developer to control the association.

30. Even the RPC district ordinance is a relatively simple legal structure, leaving much in the way of detailed controls to the developer.

31. Reston homeowners pay county property taxes. They also pay membership charges to RHOA and to their cluster association. These charges, when due, become a lien on the property. Deeds of Dedication of Sections One and Two, Reston (hereinafter cited as *Deeds*) *supra* notes 17 and 18, at art. II, para. 8, 9. Residents thus pay three tax-type assessments, rather than one, for services which are essentially of a local governmental nature.

among the parties thereto. As the Reston example illustrates, private agreements may perform many of the traditional functions of public controls if the developer demonstrates an intention not to abuse private controls in either of these ways.

Certainly Reston, with its objectives, *inter alia*, of maintaining a balanced population and controlling environmental pollution, does not seem to be detrimental to the surrounding communities. Although some privately planned communities have benefited the developer to the abject neglect of the residents,³² at present there is no apparent reason to believe this will be the case in Reston. Some Reston residents have felt that too much control is in the hands of the developer, to the detriment of the residents. In *Baker v. Magness*,³³ the court held that the actions of the developer's representatives were in substantial compliance with the articles of incorporation, the by-laws of the Home Owners' Association and the Deed of Dedication. If the private controls in Reston are not adequately beneficial to the residents, the result may be a future adjudication that they are unreasonable and therefore unenforceable. In any event, it would certainly be reflected in the future saleability of Reston homes. The abuse of private agreement controls is curbed, in theory at least, by rules that restrictive covenants be strictly construed against enforcement,³⁴ that restrictions must be reasonable and not against the public interest,³⁵ and that a plaintiff's interest in enforcement must be substantial in order to justify enforcement in equity.³⁶

Once instituted, private agreements may outlive their usefulness. Restrictions imposed in deeds of fee-qualified estates are troublesome to terminate, due to the difficulties of finding the owner of the reversion and obtaining a grant of his interest.³⁷ Equitable servitudes are also quite difficult to terminate because of the large number of potential plaintiffs involved. Although in order to meet the requirement of reasonableness, an automatic termination date is often included in the instruments creating such agreements,³⁸ termination before that date can prove very difficult.³⁹

32. See, e.g., STONE, CLARENCE DARROW FOR THE DEFENSE 39-42 (1941).

33. See note 29 *supra*.

34. *State-Planters Bank v. Standard Cary Corp.*, 208 Va. 298, 156 S.E.2d 778 (1967).

35. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 86 S.E.2d 128 (1955).

36. *McCue v. Ralston*, 50 Va. (9 Gratt.) 430 (1852) (dealing with an easement).

37. Interview with Mr. Fred A. Crowder, of Christian, Barton, Epps, Brent, & Chappell, Richmond, Virginia, February 3, 1975.

38. See, e.g., *Booker v. Old Dominion Land Co.*, 188 Va. 143, 146, 49 S.E.2d 314, 316 (1948); *Deeds, supra* notes 17 and 18, at art. IV, para. 4; *Reston Center for Industry and Government Declaration of Protective Covenants and Restrictions, supra* note 15, at art. III, para. 3.

39. "No hard and fast rule can be laid down as to when changed conditions have defeated

This may be necessary in order to make such restrictions binding, and whether it is thought to be a vice or a virtue depends on whether one is seeking to enforce or to violate such a restriction.

In summary, private agreements constitute a viable tool for small scale land use control for the ordinary landowner, and have provided an alternative to detailed public controls for a new Virginia community. By their very nature, however, private agreements operate in a piecemeal fashion. The interests they protect are primarily those of the parties. They can provide neither long range, large scale planning, nor controls modern environmental protection may require.

C. NUISANCE

When a private landowner seeks to impose use controls over land which is not his, and cannot accomplish his purpose by an agreement with the owner of the land sought to be restricted as to use, he may have a remedy in private nuisance. Both public and private land use controls are subsumed under the generic term "nuisance." Nuisance "extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property."⁴⁰ "Nuisances are of two kinds—public or common nuisances, which affect people generally, and private nuisances which may be defined as anything done to the hurt of the lands, tenements, or hereditaments of another."⁴¹

Public nuisance is a crime, and can be remedied at the instance of the state, by indictment, injunction or both.⁴² Cities and towns in Virginia are authorized by statute⁴³ to assume the power to abate public nuisances. Although this power need not be assumed, if it is, its exercise is mandatory.⁴⁴ It is exercised by local ordinances that typically do not define public nuisance, leaving such definition to the common law.

1. *Interaction with Public Controls*

Private action for nuisance supplements rather than supplants the func-

the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement." *Booker v. Old Dominion Land Co.*, 188 Va. 143, 148, 49 S.E.2d 314, 317 (1948), *quoting* *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S.W.2d 545, 553 (1931).

40. *Bragg v. Ives*, 149 Va. 482, 497, 140 S.E. 646, 660 (1927), *quoting* 20 R.C.L. 380.

41. *White v. Town of Culpeper*, 172 Va. 630, 636, 1 S.E.2d 269, 272 (1939), *quoting* 2 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 8 (5th ed. 1911).

42. *Mugler v. Kansas*, 123 U.S. 623, 672-73 (1887).

43. VA. CODE ANN. § 15.1-14 (Cum. Supp. 1974).

44. *Edwards v. Town of Pocahontas*, 47 F. 268 (W.D. Va. 1891).

tion of the public power to abate nuisance, providing an ad hoc remedy for the wronged individual when public action provides no remedy or is unavailable for other reasons. A public nuisance can also be a private nuisance if it causes damage peculiar in nature or degree from that suffered by the public at large to the plaintiff's interest in land. To have a cause of action in private nuisance, the plaintiff's interest must be of a more particular nature than the "interest" which everyone has in the use of public streets, parks, and other public areas.⁴⁵

A clear analogy exists between the respective objectives of public and private nuisance and those of zoning and private land use agreements. The objective of public nuisance abatement, like that of zoning, is the protection of the public welfare,⁴⁶ whereas the objective of the private cause of action in nuisance, like that of a private land use agreement, is the preservation of the value and enjoyment of private property interests.⁴⁷

In a large scale private development, can private controls supplant public nuisance abatement power to any appreciable extent? The commercial and residential property in Reston is subject, *inter alia*, to the following covenant:

No noxious or offensive activity shall be carried on upon any portion of the property, nor shall anything be done thereon that may be or become a nuisance or annoyance to the neighborhood. No exterior lighting shall be directed outside the boundaries of a lot or other parcel of the property.⁴⁸

The Supreme Court of Virginia in *Stokely v. Owens*⁴⁹ indicated that such a covenant would be enforced only against either a nuisance per se or against activities which the plaintiff has proved constitute a nuisance or annoyance in fact.⁵⁰ Apparently enforcement would be on a covenant

45. *Bowe v. Scott*, 113 Va. 499, 75 S.E. 123 (1912).

46. A public nuisance conviction is a judicial determination that a certain present or pending activity or use of land at a certain place is against the public interest. A zoning restriction is a legislative determination, either retroactive or prospective, that certain uses of land within a given area are against the public interest. See Note, 17 VA. L. REV. 202 (1930).

47. The analogy here, of course, is not exact. Private land use agreements, unlike private nuisance litigation, may also be used to enhance the value of property.

48. *Deeds*, *supra* notes 17 and 18, at art. I, para. 5.

49. 189 Va. 248, 52 S.E.2d 164 (1949).

50. The result is that, if other covenants do not specifically forbid non-residential development, such uses will be allowed unless they are shown to constitute a nuisance. In *Stokely*, the plaintiffs sought an injunction against a frozen custard establishment contained in an addition to the defendants' home, on the basis of a similar "anti-nuisance" covenant combined with one which prohibited erection of any structures except "detached single family dwellings . . . and appurtenant outbuildings . . ." With the issue of the residential nature of the structural addition itself not before it, the Supreme Court of Virginia held that the

theory, and not on the theory of private abatement of a public nuisance⁵¹ or of private nuisance. Enforcement as a covenant and not as a private action in nuisance arguably makes the definition of "nuisance" herein that of a public nuisance rather than a private nuisance, particularly in view of the alternative phrase, "or annoyance to the neighborhood."

It thus appears that, if applied on a large scale, private controls can, to a certain extent, serve the same function as the public nuisance power, while the private action in nuisance supplements the public power.

2. Analysis

Since any lawful business, if it interferes with the plaintiff's interest in land, constitutes a nuisance, private nuisance would seem to be a useful legal tool for environmentalists, and is unquestionably a major concern for anyone who contemplates a new use of property or the financing of such a project.⁵² It is important to note, however, that land uses authorized by the Commonwealth will only constitute a private nuisance if unreasonably or negligently carried on⁵³ and that remedies against activities useful to the public may be limited.⁵⁴

Private nuisance, although it limits uses to which private property may be put, is entirely consonant with our most traditional private property concepts, because integral to those concepts is the reservation that "[e]veryone must so use his own property as not to injure another's."⁵⁵ Conceding the necessity of judicial enforcement, private nuisance is otherwise self executing, being a private tort action and no function of government.⁵⁶ If wisely applied by the courts, nuisance doctrine avoids unnecessarily broad restrictions on land use, because a real interference with the

effect of the two covenants together was to permit only "dwellings . . . etc.," but to allow commercial uses therein unless such uses were shown to be nuisances per se or nuisances in fact. *Id.* at 256, 52 S.E.2d at 169. Since other Reston covenants control uses as well as the nature of permissible structures, presumably the Reston anti-nuisance covenant will be relied on only when an objectionable use is not covered in any other covenant.

51. For the limits of private authority to abate public nuisances in Virginia, see *Smart v. Commonwealth*, 68 Va. (27 Gratt.) 950 (1876).

52. Crowder, *supra* note 37.

53. *Virginia Beach v. Virginia Beach Steel Fishing Pier Inc.*, 212 Va. 425, 184 S.E.2d 749 (1971).

54. "An injunction will not issue on every case of nuisance or continuing trespass, for in determining the relief to be granted, the chancellor must consider the interests of the parties and of the public." *Seventeen Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 79, 205 S.E.2d 648, 653 (1974).

55. *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928).

56. Public nuisance is also a relatively simple type of control, involving usually only simple statutes enforced by an already existing agency, the public prosecutor.

plaintiff's interest must be shown,⁵⁷ and because of the restraint shown by the courts in granting injunctive relief when dealing with activities of value to the community.⁵⁸ A permanent injunction issuing from nuisance litigation may outlive its usefulness, but it can then be modified or vacated upon a proper showing,⁵⁹ and in any case the limited effects of *res judicata* make this disadvantage a minimal one. A great disadvantage of nuisance as a private control is its limited availability to the impecunious plaintiff with a good cause of action. It is not known how many plaintiffs wronged by a nuisance are deterred by the possible expenses of litigation although the number may be high. Arguably, the cost of litigation is less an obstacle to the party contemplating establishment of a private land use control agreement. The costs of establishing controls by agreement will be limited, and the mere existence of such agreements will likely accomplish the objective without the necessity of judicial enforcement; on the other hand, costs of litigation are more difficult to measure in advance. The expenses of private nuisance litigation are particularly problematic because the peculiar damage requirement limits the number of plaintiffs who may join in an action.⁶⁰ Private nuisance is obviously severely limited, in comparison to public nuisance and other public controls, by the relative lack of investigative resources of the potential plaintiff.

Private nuisance and private controls in general are piecemeal remedies by nature, and are limited by the abilities of the parties to use them. In comparison to other private controls, nuisance would seem to be a flexible but expensive device.

D. CONCLUSION

Far from being antiquated, private controls of land use provide economical answers to the small scale needs of the modern landowner. For those in a position to use them, they may provide a powerful weapon in the cause of environmental protection. Private controls afford a challenging opportunity to the large scale developer and the future residents of his community for social improvement and environmental protection through private enterprise and small scale local self-government. Concededly, to protect the interests of a wider portion of the population, and to institute large scale coordinated planning, public controls are necessary. The Reston

57. *Bragg v. Ives*, 149 Va. 482, 140 S.E. 656 (1927).

58. See note 53 *supra* and accompanying text.

59. *Edlis Inc. v. Miller*, 132 W. Va. 147, 51 S.E.2d 132 (1948).

60. See *Prosser, supra* note 2, at 1001-02, 1010. Some thought might be given to legislation which would authorize the awarding of costs and reasonable attorney's fees, in addition to damages and equitable remedies, to the successful plaintiff in private nuisance.

example provides a challenge for lawmakers imaginatively to integrate private controls into the overall land use plan.

III. LOCAL CONTROL OVER LAND USE

The local governing bodies in Virginia possess a substantial amount of statutory control over land use development. The following is a brief survey of the role of the counties and municipalities in land use control including the areas of zoning, planning, subdivision control, local property taxation, and land acquisition for open-space use. Emphasis will be placed on the powers over land use granted to the local governing bodies by the General Assembly of Virginia and the interpretation and limitations imposed on those powers by the Supreme Court of Virginia.

A. LOCAL PLANNING

The primary responsibility for regulating land use rests with the local county boards of supervisors and municipal councils. The principal powers are granted to these legislative bodies under Title 15.1 of the Virginia Code of 1950, Chapter 11, "Planning, Subdivision of Land and Zoning." The first section expresses the legislative intent behind the measures that follow:

This chapter is intended to encourage local governments to improve public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surrounding for family life; and that the growth of the community be consonant with the efficient and economical use of public funds.¹

The statutory provisions establish the framework; it is up to the local governing bodies to implement these provisions with detailed ordinances. The local ordinances will vary greatly from locality to locality.

The local governing bodies are directed to create a planning commission to act in an advisory capacity in accomplishing these goals.² The duties of the planning commission include the preparation of a comprehensive plan for the purpose of:

[G]uiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and proba-

1. VA. CODE ANN. § 15.1-427 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975).

2. *Id.* § 15.1-427.1 (effective June 1, 1975). The Virginia General Assembly in 1975 made the creation of a local planning commission mandatory by July 1, 1976.

ble future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants.³

Among the items that comprise the comprehensive plan are: (1) the designation of areas for various types of public and private development; (2) the designation of a system of community service facilities; (3) the designation of transportation facilities; and, (4) the designation of historical areas and areas for urban renewal or other treatment.⁴ Before making recommendations to the governing body, the planning commission must hold a public hearing with notice provided by advertisement in a local newspaper having general circulation and the meeting must be held not less than six days nor more than twenty-one days after the notice has been published for two successive weeks.⁵

The comprehensive plan may be implemented by the following tools: (1) an official map, which sets out the present and proposed public streets, waterways and public areas;⁶ (2) a capital improvements program, revised annually;⁷ (3) a subdivision control ordinance;⁸ and, (4) a zoning ordinance and zoning districts map.⁹ The comprehensive plan must be reviewed every five years by the planning commission for possible amendment.¹⁰

The governing body of every county or municipality must adopt an ordinance to ensure the orderly subdivision of land and its development.¹¹ The Code permits each locality to determine its own definition of subdivision if it desires, thereby establishing the coverage of its own subdivision ordinance.¹² Otherwise, the definition in the statute would control.¹³

3. *Id.* § 15.1-446.1 (effective June 1, 1975). The 1975 General Assembly made the adoption of a comprehensive plan mandatory by July 1, 1980.

4. *Id.*

5. *Id.* § 15.1-431 (Cum. Supp. 1974), *as amended*, (effective June 1, 1975). The 1975 amendments changed the period from not less than twelve days nor more than twenty-eight days.

6. *Id.* §§ 15.1-458 to -463 (Repl. Vol. 1973).

7. *Id.* § 15.1-464 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975).

8. *Id.* §§ 15.1-465 to -485 (Repl. Vol. 1973), *as amended*, § 15.1-478 (Cum. Supp. 1974), *as amended*, §§ 15.1-465 to -482.1 (effective June 1, 1975).

9. *Id.* § 15.1-447(2)(d) (Repl. Vol. 1973), *as amended*, (effective June 1, 1975). The 1975 amendment eliminated detailed plans of specific projects included on the official map as a method of implementation of the comprehensive plan.

10. *Id.* § 15.1-454.

11. *Id.* § 15.1-465. The 1975 amendment to this section made the adoption of a subdivision ordinance mandatory by July 1, 1977.

12. *See Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 131 S.E.2d 290 (1963), where the court stated, concerning the predecessor to the present statute:

The legislature, in enacting the Virginia Land Subdivision Act, delegated to each locality a portion of the police power of the state, to be exercised by it in determining what subdivisions would be controlled, and how they should be regulated. The legislature left much to the discretion of the locality in making such determination, relying upon the local governing body's knowledge of local conditions and the needs of its individual community. *Id.* at 383, 131 S.E.2d at 292.

13. VA. CODE ANN. § 15.1-430(1) (effective June 1, 1975) defines subdivision as follows:

B. ZONING: THE STATUTORY FRAMEWORK

The most frequently used power over land use granted to the local governing bodies is zoning. The governing body may divide the territory under its jurisdiction or any substantial portion thereof into districts and in each district it may "regulate, restrict, permit, prohibit, and determine" (a) uses, (b) structural dimensions, (c) the amount of land, water and air space to be occupied, and (d) the use of natural resources.¹⁴ Such regulation must be uniformly applied within each district, but may vary from one district to another.¹⁵ Zoning ordinances "shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of [Title 15.1, Chapter 11]."¹⁶ The Code enumerates seven specific purposes for which zoning ordinances may be enacted, embracing public safety; the reduction of traffic congestion; the improvement of the community; the development of adequate health, recreation and transportation facilities; the preservation of historic areas; and the encouragement of economic development to provide desirable employment and to enlarge the tax base.¹⁷

Zoning ordinances and districts must be drawn in line with the following considerations: the present use and character of the property; the existing land use plan; the suitability of the property for various uses; the trends of future growth; the present and future requirements of the community for transportation, housing, schools, parks, recreation areas and other public services; conservation of natural resources and property values; the preservation of flood plains; and the encouragement of the most appropriate use of the land.¹⁸ The ordinance may include "reasonable regulation and provisions" for (a) variations in or exceptions to the general regulations; (b) temporary ordinances for annexed areas; (c) granting of special exceptions and use permits; (d) the administration and enforcement of the

[T]he division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided.

14. *Id.* § 15.1-486.

15. *Id.* § 15.1-488 (Repl. Vol. 1973); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959), decided under the predecessor to the present statute.

16. VA. CODE ANN. § 15.1-489 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975). See note 1 *supra* and accompanying text.

17. *Id.*

18. *Id.* § 15.1-490 (Cum. Supp. 1974).

ordinance; (e) the imposition of penalties;¹⁹ (f) the collection of fees to cover administrative costs; (g) amendments to the regulation or zoning district maps;²⁰ (h) the submission and approval of a plan of development prior to the issuance of building permits to assure compliance with zoning regulations.²¹ The ordinance may also provide that property owners reveal any interests that a member of the planning commission or governing body may have in the property under consideration.²²

The governing body must refer ordinances or amendments to the planning commission for its recommendation.²³ Both the planning commission and the governing body must hold public hearings before acting on ordinances or amendments.²⁴ The public hearings enable local residents to voice their opinions concerning measures that will affect the use and enjoyment of their property.

C. ZONING: CASE LAW

1. *General Principles*

The exercise of the zoning power by the local governing bodies has led to clashes between the property owners whose use of land is thereby affected and the local governments, as well as between residents of zoning districts who desire to maintain the status quo and the local governing bodies that have refused to restrict development or have permitted amendments in order to allow development. The clashes have led to litigation in the courts of Virginia, and a body of case law has developed in the zoning area defining the scope of the zoning power as well as interpreting its statutory framework. The following is an analysis of the present state of this decisional law in Virginia, interposing applicable statutory provisions where pertinent.

19. *Id.* § 15.1-491(a)-(e) (Repl. Vol. 1973), *as amended*, (effective June 1, 1975). "Any such violation shall be a misdemeanor punishable by a fine of not less than ten dollars nor more than one thousand dollars." *Id.* § 15.1-491(e). The 1975 amendment increased the maximum from two hundred fifty dollars.

20. *Id.* § 15.1-491(f)-(g). "Any such amendment may be initiated by resolution of the governing body, or by motion of the local commission, or by petition of any property owner addressed to the governing body . . ." *Id.* § 15.1-491(g).

21. *Id.* § 15.1-491(h).

22. *Id.* § 15.1-491. This provision insures that the members of the governing body and the planning commission will be held accountable for decisions that may be based on personal profit motives.

23. *Id.* § 15.1-493 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975).

24. *Id.*

Zoning ordinances are legislative enactments and are valid exercises of the police power delegated to the local governments by the General Assembly of Virginia.²⁵ The rationale that supports zoning regulations holds that every property owner must "use and enjoy his own as not to interfere with the general welfare of the community in which he lives."²⁶ As an exercise of the police power, such ordinances will not be struck down by the courts unless they conflict with the provisions of the state and federal Constitutions.²⁷ Such a conflict must be plain and clear.²⁸ Therefore, the actions of the local governing bodies are usually presumed valid, and the burden of proving otherwise rests with those who challenge the validity of the zoning ordinance.²⁹ However, as will be shown, the presumption in favor of the actions of the local officials may not be present at all times, particularly where those actions are closely akin to administrative decisions.³⁰

Zoning should be designed to protect the present character of an area by preventing the incursion of prejudicial uses. Zoning should also provide for the future development of an area in a manner consistent with the present use of land in that area.³¹ Zoning ordinances should promote the furtherance of the public health, safety or general welfare of the community.³² The decisions of locally elected officials, based on their peculiar knowledge of the area, are given great deference by the courts.³³ Furthermore, federal courts are apt to abstain from premature rulings on such legislation when the plaintiff has failed to exhaust his remedies under state

25. *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937), *appeal dismissed*, 302 U.S. 658 (1937), *rehearing denied*, 302 U.S. 781 (1938); *Nusbaum v. City of Norfolk*, 151 Va. 801, 145 S.E. 257 (1928); *Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926), *cert. granted*, 273 U.S. 687 (1927), *aff'd*, 274 U.S. 603 (1927).

26. *Wood v. City of Richmond*, 148 Va. 400, 407, 138 S.E. 560, 562 (1927), *quoting from*, *Bowman v. Virginia State Entomologist*, 128 Va. 351, 362, 105 S.E. 141, 145 (1920). The court went on to state that zoning laws were regulations, and as such did not constitute a taking.

27. *See, e.g.*, *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925).

28. *Id.*

29. *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

30. *See* notes 107 to 130 *infra* and accompanying text.

31. *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

32. *See, e.g.*, *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971); *City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 291 (1939), where the court found a restriction on using floodlights at a service station was not related to the public health, safety or general welfare and therefore was invalid.

33. *National Maritime Union of America v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961).

law.³⁴ Zoning ordinances are usually either exclusive, that is, they designate certain uses as prohibited in a particular district, or inclusive, that is, they specify certain permissible uses and exclude all others.³⁵ Both types of zoning ordinances have been upheld as valid in Virginia.³⁶

2. Access to the Courts

A property owner dissatisfied with the application of a particular zoning ordinance to his property has no statutory right of appeal from the decision of the city council or board of supervisors.³⁷ As a legislative act, the ordinance or refusal to rezone is presumed valid, and the court will not ordinarily alter the judgment of elected officials.³⁸ However, there are at least eight ways that zoning controversies reach the courts in Virginia. First, a property owner may seek an injunction preventing the enforcement of the zoning ordinance as to his property.³⁹ Second, he may obtain a writ of mandamus ordering an official to issue a requested permit.⁴⁰ Third, he may seek a declaratory judgment at law to have a particular ordinance declared unconstitutional.⁴¹ Fourth, the most frequently used method of obtaining a judicial review of zoning decisions is to sue on the equity side for a declaratory judgment and injunctive relief from the zoning ordinance.⁴²

34. *Fralin and Waldron, Inc. v. City of Martinsville*, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd*, 493 F.2d 481 (4th Cir. 1974).

35. *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968).

36. *Fairfax County v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947), where a provision in a zoning ordinance that excluded junk yards from residential areas was held valid.

37. Prichard, *The Fundamentals of Zoning Law*, 46 VA. L. REV. 362 (1960) [hereinafter cited as Prichard]. This concise but thorough article, published in 1960, is the most recent comprehensive exposition of Virginia zoning law.

38. *Id.*

39. *City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296 (1939); *Standard Oil Co. v. City of Charlottesville*, 42 F.2d 88 (4th Cir. 1930). For the Virginia statutes concerning injunctions, see VA. CODE ANN. §§ 8-610 to -626 (Repl. Vol. 1957). See also Prichard, *supra* note 37, at 363.

40. *Planning Comm'n v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971). For the applicable statutes concerning mandamus proceedings, see VA. CODE ANN. §§ 8-704 to -714 (Repl. Vol. 1957), as amended, § 8-711.1 (Cum. Supp. 1974). See also Prichard, *supra* note 37, at 363.

41. *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Board of County Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958). For the applicable statutes on declaratory judgments in Virginia, see VA. CODE ANN. §§ 8-578 to -585 (Repl. Vol. 1957), as amended, § 8-581.1 (Cum. Supp. 1974). See also Prichard, *supra* note 37, at 363.

42. See, e.g., *Board of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972). See also Prichard, *supra* note 37, at 363. Such a procedure enables the plaintiff to enforce his rights in the same suit, once the act is declared illegal. See VA. CODE ANN. §§ 8-581 to -583 (Repl. Vol. 1957), as amended, § 8-581.1 (Cum. Supp. 1974), which require the plaintiff to petition the court for further relief if he desires an injunction.

Fifth, a property owner may appeal under section 15.1-497 of the Virginia Code from decisions of the board of zoning appeals.⁴³

Sixth, a citizen of the district may be entitled to bring suit seeking to enjoin a local governing body from granting a use permit, variance, or zoning amendment to a property owner.⁴⁴ There must be an actual controversy, and the party must be an aggrieved party in the sense that he has some interest that is going to be affected by the decision of the local officials.⁴⁵ The courts refrain from giving advisory opinions where there appears to be no real adverse claim involved.⁴⁶

The seventh and eighth ways that litigation arises in zoning matters occur when the local governing body seeks to prevent property owners from violating the local zoning ordinances. The local government can prosecute the property owner for violation of the ordinance.⁴⁷ The burden of proof concerning the application of the zoning ordinance shifts in criminal cases to the local officials because they must prove beyond a reasonable doubt that the defendant has violated the ordinance.⁴⁸ The local government can also seek enforcement of its zoning code through an injunction, and injunctive relief will be granted, although not expressly provided for in the local ordinance, because of the provisions in sections 15.1-491 and -499 of the Virginia Code.⁴⁹

3. *Constructional Problems*

Zoning ordinances often present problems in discerning the proper meaning that should be given to their provisions. The provisions will be interpreted with the legislative intent in mind, according to the customary meaning of the language used, and in the context of the overall structure of the zoning code.⁵⁰ The views of the local legislative and administrative

43. VA. CODE ANN. § 15.1-497 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975), discussed *infra* at notes 91 to 95 and accompanying text.

44. *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967).

45. See *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294, 302-06 (1967).

46. *City of Fairfax v. Shanklin*, 205 Va. 227, 135 S.E.2d 773 (1964). "The plaintiff's case, revealed in its true nature, is but a wholesale, broadside assault upon the city's zoning ordinance, bereft of a single real complaint of injury or threatened injury." *Id.* at 230, 135 S.E.2d at 776.

47. VA. CODE ANN. § 15.1-491(e) (Repl. Vol. 1973), *as amended*, (effective June 1, 1975), discussed *supra* note 22. See *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968).

48. See *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968); *Washington & Old Dominion R.R. v. City of Alexandria*, 191 Va. 194, 60 S.E.2d 40 (1950).

49. *McNair v. Clatterbuck*, 212 Va. 532, 186 S.E.2d 45 (1972); VA. CODE ANN. §§ 15.1-491 and -499 (Repl. Vol. 1973), *as amended*, § 15.1-491 (effective June 1, 1975).

50. *Mooreland v. Young*, 197 Va. 771, 91 S.E.2d 438 (1956); *Vinton-Roanoke Water Co. v.*

officials concerning the meaning and application of zoning provisions are factors that are considered by the courts in resolving interpretation problems.⁵¹ Clarity of meaning becomes more important in criminal prosecutions where the burden of proof shifts to the local governing body; a conviction will be overturned when the law is ambiguous.⁵²

Zoning ordinances that delegate some discretionary authority to administrative officials are not invalid as long as definable standards provide guidelines sufficient to enable the administrator to act in a nondiscriminatory manner, that is, not arbitrarily or capriciously.⁵³ An administrator may have the authority to make decisions based on findings of fact when the proper criteria for reaching a decision are included in the ordinance.⁵⁴ An ordinance regulating the use of land must apply equally to all property within a reasonably broad area and should be readily understandable to the average citizen.⁵⁵ While citizen participation is considered desirable at some stages of the land use planning process, for instance at hearings held by the planning commission prior to the adoption of a comprehensive plan, local property owners cannot be given the sole power to regulate the use of land in their area as private citizens because of the possibility that they would use such power capriciously.⁵⁶

Powers exercised by local municipalities and counties must be granted by legislation enacted by the General Assembly.⁵⁷ When a local governing body fails to follow the statutory procedures in adopting a zoning ordinance and attempts to regulate land use under some other power, the court will closely scrutinize the reasonableness of the ordinance.⁵⁸ The courts will

City of Roanoke, 110 Va. 661, 66 S.E. 835 (1910).

51. Belle-Haven Citizens Ass'n v. Schumann, 201 Va. 36, 109 S.E.2d 139 (1959).

52. Caldwell v. Commonwealth, 198 Va. 454, 94 S.E.2d 537 (1956); Carroll v. Arlington County, 186 Va. 575, 44 S.E.2d 6 (1947).

53. Andrews v. Board of Supervisors, 200 Va. 637, 107 S.E.2d 445 (1959); Gorieb v. Fox, 145 Va. 554, 134 S.E. 914 (1926), *cert. granted*, 273 U.S. 687 (1927), *aff'd*, 274 U.S. 603 (1927).

54. Ours Properties Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).

55. See note 15 *supra* and accompanying text.

56. See Eubank v. City of Richmond, 226 U.S. 137 (1912). In this case a zoning ordinance was declared unconstitutional by the United States Supreme Court because the ordinance gave two-thirds of the abutting property owners the power to establish a building set-back line on their side of the street. See Section II B, *supra*.

57. National Realty Corp. v. City of Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968).

58. Standard Oil Co. v. City of Charlottesville, 42 F.2d 88 (4th Cir. 1930). The court stated:

In this case steps had been taken toward the zoning of the city, but there had been no report by the zoning commission; and, in the absence of such report, the council had no power to pass a zoning ordinance. It certainly had no power to pass a substitute for a zoning ordinance in face of the express provision of the statute governing the

allow the local governing body to enact temporary ordinances pending adoption of a comprehensive zoning code.⁵⁹ Municipalities can be granted the power to regulate land use in adjacent areas by express authority from the state legislature.⁶⁰ A local governing body cannot violate the zoning ordinance of another county or city by using land located therein in a prohibited manner.⁶¹

4. *Special Exceptions*

Zoning ordinances customarily provide for special exceptions or special use permits allowing certain enumerated uses in a zoning district otherwise prohibited by the applicable provisions of the zoning code.⁶² Special exceptions, usually granted by the local governing body, impose conditions on the property owner.⁶³ The courts recognize the need for deferring to the judgment of the locally elected officials when they make decisions on applications for use permits, although such a power is more administrative than legislative.⁶⁴ It would be impossible for an ordinance to deal with every conceivable situation that might arise in the future; therefore, the power to regulate certain uses is often reserved to the local officials to be exercised on a case by case basis.⁶⁵ This procedure adds flexibility to the local zoning code. The power to approve special exceptions will be upheld by the courts unless exercised in an arbitrary or capricious manner.⁶⁶ In acting on requests for special exceptions, the city council or board of supervisors acts administratively, and the ordinance granting this authority must provide a standard or rule of guidance.⁶⁷ The grant of a special exception cannot

matter. (Citations omitted). *Id.* at 90.

59. *Downham v. City Council*, 58 F.2d 784 (4th Cir. 1932).

60. *Murray v. City of Roanoke*, 192 Va. 321, 64 S.E.2d 804 (1951). See VA. CODE ANN. § 15.1-467 (Repl. Vol. 1973), as amended, (effective June 1, 1975), providing for application of municipal subdivision regulations beyond the corporate limits of the municipality.

61. See *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958), holding that, although Richmond had the right to establish a jail beyond its corporate limits, such a power did not authorize Richmond to build a jail in an area where prohibited by the zoning ordinance of Henrico County.

62. VA. CODE ANN. §§ 15.1-430(i) and 15.1-491(c) (Repl. Vol. 1973).

63. *Id.*

64. See *National Maritime Union of America v. City of Norfolk*, 202 Va. 672, 119 S.E.2d 307 (1961).

65. *Id.* The court in *National Maritime Union of America v. City of Norfolk* upheld the validity of a zoning ordinance requiring a special use permit for the establishment of union hiring halls.

66. *Id.*

67. *City of Winchester v. Glover*, 199 Va. 70, 97 S.E.2d 661 (1957).

be coupled with an unconstitutional restriction on the use of the applicant's property.⁶⁸

Once a person has complied with the necessary provisions of a zoning ordinance pursuant to obtaining approval of a site plan and the issuance of a building permit, the local body cannot subsequently amend the zoning ordinance so as to prohibit the requested use.⁶⁹ The applicant can require the approval of the plan and the issuance of the permit through mandamus proceedings.⁷⁰ When a developer has incurred expenses in reliance upon a prior grant of a special use permit, he has a vested right that cannot be defeated by subsequent action of the governing body,⁷¹ although he may lose his right if the permit expires before he commences construction.⁷²

5. *Non-conforming Uses*

The Code states that vested rights shall not be impaired, although the zoning ordinance may provide that non-conforming uses "may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years"⁷³ Any alteration of the buildings on the property must conform to the regulations, and no "'nonconforming' building may be moved on the same lot or to any other lot which is not properly zoned to permit such 'nonconforming' use."⁷⁴ The Virginia Supreme Court defines a nonconforming use as "a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance."⁷⁵

Nonconforming uses should be few in number if the zoning for a particular area is truly reflective of the present uses in that area. There have been no cases in the Virginia Supreme Court involving nonconforming uses. Under the present statute there is no provision for amortizing such uses. It is unclear whether the Virginia courts would allow a local governing body to enact an ordinance calling for a cessation of all nonconforming uses

68. *City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296 (1939), holding that a restriction on the type of lighting to be used at a service station was void and unenforceable.
69. *Planning Comm'n v. Berman*, 211 Va. 774, 180 S.E.2d 670 (1971).

70. *Id.*

71. *Board of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972).

72. *McClung v. County of Henrico*, 200 Va. 870, 108 S.E.2d 513 (1959).

73. VA. CODE ANN. § 15.1-492 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975).

74. *Id.*

75. *C. & C. Inc. v. Semple*, 207 Va. 438, 439 n.1, 150 S.E.2d 536, 537 n.1 (1966), *citing* 2 YOKLEY, ZONING LAW AND PRACTICE § 16-2 (3d ed. 1965).

within a specified period of time. This procedure has been utilized in other states to eliminate nonconforming uses.⁷⁶

6. Variances

A variance permits a property owner to use his property in some way prohibited by the zoning ordinance in order to alleviate conditions peculiar to the particular property.⁷⁷ This procedure adds flexibility to the zoning code and prevents unjust results when there is no corresponding benefit to the community. The granting of a variance differs from rezoning in two respects. First of all, when an area is rezoned, the local governing body is admitting that the present zoning does not relate to the furtherance of health, safety, or general welfare; whereas the granting of a variance merely indicates that the zoning ordinance imposes a severe hardship on a particular property owner. Secondly, if an area is rezoned, all uses proper according to the new zoning classification are available; whereas a variance allows only incidental variations from the present zoning regulations.

A variance should be granted when the proposed use will not be detrimental to the general public and a refusal would cause a severe hardship to the property owner.⁷⁸ For example, a property owner should be granted a variance where he has purchased in good faith a parcel of land which can not be used for any reasonable purpose because the shape of the lot prevents him from constructing a building in conformance with the set-back restrictions in the zoning ordinance. The board of zoning appeals can authorize variances on appeal from the decisions of the administrative officials or on original application.⁷⁹ This authority is discretionary, but must not be exercised arbitrarily or capriciously.⁸⁰ On appeal to the courts, the board's decision is presumed to be correct and will not be set aside unless the decision is plainly wrong.⁸¹

Self-inflicted hardship, for example where the property owner proceeds to construct a building in violation of the zoning ordinance without applying for a variance, will not be sufficient basis for granting a variance.⁸²

76. This procedure is referred to as amortization, and such provisions in zoning ordinances set time limits within which all nonconforming uses must terminate. *See generally*, HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 154-159 (1971).

77. *C. & C. Inc. v. Semple*, 207 Va. 438, 439 n.1, 150 S.E.2d 536, 537 n.1 (1966), *citing* 101 C.J.S. *Zoning* § 273 (1958).

78. VA. CODE ANN. § 15.1-495(b) (Cum. Supp. 1974), *as amended*, (effective June 1, 1975).

79. *Id.* The 1975 amendment allows original applications to the board.

80. *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 114 S.E.2d 753 (1960).

81. *Id.*

82. *Board of Zoning Appeals v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959).

When the hardship claimed is imposed on other noncontiguous property owned by the applicant, relief will not be granted.⁸³ Such a situation would arise where someone owns two lots in the same zoning district that are not adjacent to one another and desires to use one lot in a prohibited manner in order to alleviate some hardship imposed on the other property (e.g., the use of one lot for a parking facility to serve a nearby office building). Where strict application of a zoning ordinance causes undue hardship to one property owner that is not shared by others in the same district, and the requested variance will not adversely affect the health, safety or general welfare of the neighborhood nor change the character of the surrounding area, the variance should be granted.⁸⁴ Although financial loss by itself is not enough to justify a variance, it is one of the factors that should be considered.⁸⁵

7. *The Board of Zoning Appeals*

The board of zoning appeals hears and decides appeals from decisions of zoning administrators, hears and decides on applications for interpretations of the district zoning map and for special exceptions, and authorizes variances upon appeals or original applications.⁸⁶ Public hearings are required before special exceptions and variances are granted by the board.⁸⁷ A person who had no actual notice of the issuance of a building permit may file a suit within fifteen days after the start of construction, even though no appeal to the board was taken, to challenge the validity of the permit.⁸⁸ The board of zoning appeals should state the reasons for its decisions to inform the parties and to provide a basis for review if a decision is appealed.⁸⁹ The board cannot legislate, repeal or amend the provisions of a zoning ordinance or statute.⁹⁰

83. *C. & C. Inc. v. Semple*, 207 Va. 438, 150 S.E.2d 536 (1966).

84. *Tidewater Utilities Corp. v. City of Norfolk*, 208 Va. 705, 160 S.E.2d 799 (1968).

85. *Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (1960).

86. VA. CODE ANN. § 15.1-495 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974), *as amended*, (effective June 1, 1975). The statute provides for an appeal "by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator." The board consists of five residents of the county or municipality, appointed by the circuit court of the county or city, who serve five year terms. *Id.* § 15.1-494.

87. *Id.* § 15.1-495(b)(c) (Cum. Supp. 1974), *as amended*, (effective June 1, 1975).

88. *Id.* § 15.1-496.3 (effective June 1, 1975). See Brown, *Zoning Laws: The Private Citizen as an Enforcement Officer*, 9 U. OF RICH. L. REV. 483 (1975).

89. *Burkhardt v. Board of Zoning Appeals*, 192 Va. 606, 66 S.E.2d 565 (1951). VA. CODE ANN. § 15.1-496.2 (effective June 1, 1975), which provides that the board "shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records."

90. VA. CODE ANN. § 15.1-495(e) (Repl. Vol. 1973), *as amended*, (effective June 1, 1975). See also *Belle-Haven Citizens Ass'n v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959).

A right of appeal to the circuit court is granted to an aggrieved party who must file a petition with the clerk of court within thirty days after the filing of the decision.⁹¹ Although the decisions of the board are presumed correct, the actions of the board will be overturned if the board acted arbitrarily or capriciously.⁹² The board cannot deny a special use permit (in a jurisdiction that reserves that power to the board of zoning appeals) in an effort to prevent an applicant from exercising a right already granted under a valid permit issued by a zoning official.⁹³ On appeal from the board, additional evidence may be presented to the trial court.⁹⁴

8. *Limitations on the Court's Power*

The courts in Virginia will refrain from substituting their judgments for those of the local governing bodies, and will remand a case to the proper officials for final determination rather than rewrite the zoning ordinance.⁹⁵ Nevertheless, the Supreme Court of Virginia recently held that:

[W]hen the evidence shows that the existing zoning ordinance is invalid and the requested use reasonable, and when, as here, the legislative body produces no evidence that an alternative reasonable use exists, then no legislative options exist and a court decree enjoining the legislative body from taking any action which would disallow the one use shown to be reasonable is not judicial usurpation of the legislative prerogative. (citations omitted).⁹⁶

In other words, the court may, in certain circumstances, issue a decree that orders the local governing body to rezone the property.

9. *Confiscatory Zoning*

The Virginia Supreme Court has adopted the rule that when a zoning ordinance deprives the property owner of all beneficial uses of his land such an ordinance will be held invalid as a taking without just compensation.⁹⁷ The power to enact zoning ordinances does not carry with it the power to arbitrarily or capriciously deny a person any legitimate use of his property.⁹⁸ There is no justification for inflicting great financial loss on a prop-

91. VA. CODE ANN. § 15.1-497 (Repl. Vol. 1973), *as amended*, (effective June 1, 1975). See also *Ross v. County Bd.*, 197 Va. 91, 87 S.E.2d 794 (1955).

92. *Hopkins v. O'Meara*, 197 Va. 202, 89 S.E.2d 1 (1955).

93. *Id.*

94. *Wicker Apartments, Inc. v. City of Richmond*, 199 Va. 263, 99 S.E.2d 656 (1957); *Hopkins v. O'Meara*, 197 Va. 202, 89 S.E.2d 1 (1955).

95. *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971).

96. *City of Richmond v. Randall*, ___ Va. ___, 211 S.E.2d 56, 61 (1975).

97. *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971).

98. *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959).

erty owner when the benefit to the general public is minimal.⁹⁹ A zoning ordinance is not invalid merely because it prevents the property owner from using his land for the particular purpose he desires, as long as he is left some reasonable use for the land.¹⁰⁰

10. *Improper Uses of the Zoning Power*

In attacking the validity of an ordinance, the challenger might show that the reasons for adopting the zoning ordinance were not relevant to promoting the health, safety or general welfare of the community. The motives of individual members of a governing body cannot be scrutinized because of the legislative nature of such actions,¹⁰¹ although the ordinance will be held invalid if the whole council or board of supervisors were to adopt a zoning ordinance in an effort to achieve a goal not reasonably related to the health, safety, morals, or general welfare of the community. In other words, the motive of the individual is not subject to attack, while the purpose of the law may be found invalid.

For example, a zoning ordinance cannot be used to encourage low income housing,¹⁰² nor to control the manner in which a property owner is compensated for the use of his land.¹⁰³ Restricting competition among similar businesses in a district is not a proper goal of zoning.¹⁰⁴ Virginia has adopted the rule that a zoning ordinance enacted to promote some private interest rather than that of the whole community will be struck down as illegal spot zoning.¹⁰⁵ Although aesthetic reasons may be one of the factors

99. *Cherrydale Cement Block Co. v. County Bd.*, 180 Va. 443, 23 S.E.2d 158 (1942), *citing* *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937).

100. *Southern Ry. v. City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964).

101. *See, e.g.*, *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948), where the court concluded that evidence concerning the motivation of members of a legislative body was not relevant in determining the validity of an ordinance passed by that body.

102. *Board of Supervisors v. DeGross Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973).

103. *Board of Zoning Appeals v. Columbia Pike Ltd.*, 213 Va. 437, 192 S.E.2d 778 (1972), striking down a decision of the Board of Zoning Appeals prohibiting the leasing of parking spaces separate from the leasing of office spaces in a high rise office building because the ordinance attempted to control the compensation derived from the use of the land.

104. *Board of County Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958).

105. *See, e.g.*, *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959), where the court struck down an amendment to a zoning ordinance requiring a minimum of two acres per lot because "[t]his would serve private rather than public interests." *Id.* at 661, 107 S.E.2d at 396. *See also* *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967), in which the court adopts the following test:

If the purpose of a zoning ordinance is solely to serve the private interests of one or more landowners, the ordinance represents an arbitrary and capricious exercise of legislative power, constituting illegal spot zoning; but if the legislative purpose is to

considered in adopting a zoning ordinance, they alone will not justify restricting the use of property.¹⁰⁸

D. RECENT DEVELOPMENTS

Three recent decisions by the Virginia Supreme Court demonstrate the limitations that have been placed on the local governing body in the exercise of the zoning power.¹⁰⁷ These decisions affected the power to rezone an area from a less restrictive to a more restrictive classification;¹⁰⁸ to deny use permits without a sufficient showing that the denial related to the health, safety, or general welfare of the community;¹⁰⁹ and to restrict the present use of land based solely on a phased development approach to land use.¹¹⁰ These decisions did not foreclose any of these powers altogether; rather they shifted the burden of going forward with the evidence to the governing body to establish the reasonableness of rezoning enacted on the motion of the zoning authority and denials of use permits and requests for rezoning from property owners. Once the property owner whose request has been denied established a prima facie case by showing that the requested use was reasonable, the local governing body had to show that the denial was reasonably related to the health, safety, or general welfare of the community.

In *Board of Supervisors v. Snell*,¹¹¹ property owners sought a declaratory judgment that a zoning ordinance adopted by the Board of Supervisors of Fairfax County reducing the permissible density of part of a zoning district was arbitrary, capricious, and unreasonable, and therefore void.¹¹² The court noted that under traditional case law a presumption of validity generally attached to comprehensive zoning ordinances.¹¹³ The ordinance in-

further the welfare of the entire county or city as a part of an overall zoning plan, the ordinance does not constitute illegal spot zoning even though private interests are simultaneously benefited. *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 173, 131 A.2d 1, 11 (1957). *Id.* at 403-04, 157 S.E.2d at 924.

106. *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881 (1937).

107. *City of Richmond v. Randall*, ___ Va. ___, 211 S.E.2d 56 (1975); *Board of Supervisors v. Allman*, ___ Va. ___, 211 S.E.2d 48 (1975); *Board of Supervisors v. Snell*, 214 Va. 655, 202 S.E.2d 889 (1974).

108. *Board of Supervisors v. Snell*, 214 Va. 655, 202 S.E.2d 889 (1974).

109. *City of Richmond v. Randall*, ___ Va. ___, 211 S.E.2d 56 (1975).

110. *Board of Supervisors v. Allman*, ___ Va. ___, 211 S.E.2d 48 (1975).

111. 214 Va. 655, 202 S.E.2d 889 (1974).

112. The court termed such action as a form of "downzoning," defining it in this case as "a zoning ordinance, enacted on motion of the zoning authority, which effects a piecemeal reduction of permissible residential density . . ." *Id.* at 656, 202 S.E.2d at 891.

113. *Id.* at 658, 202 S.E.2d at 892-93.

volved in this case was a piecemeal downzoning ordinance;¹¹⁴ therefore, once the property owner showed that "there had been no change in circumstances substantially affecting the public health, safety, or welfare" since the adoption of the previous ordinance, the burden of going forward with the evidence shifted to the local governing body to justify the rezoning.¹¹⁵ The burden shifts because a rezoning that denies the property owner of uses that were formerly permissible must be reasonably related to the public interest. If the previous ordinance was enacted because of mistake or fraud, or circumstances in the area have substantially changed to warrant a more restrictive use, then rezoning may be justified. An example of such a change in circumstances suggested by the court in *Snell* would be the reduction of sewer capacity or the lack of police and fire protection.¹¹⁶ The court rejected the contention of the board of supervisors that a change in membership of the board was a change in circumstance sufficient to support a rezoning. The court stated that the "changed circumstance" must be "one substantially affecting the public health, safety, or welfare."¹¹⁷ The change must be "objectively verifiable from evidence."¹¹⁸ The board failed to produce "probative evidence of mistake or fraud in the prior ordinance or of changed circumstances . . ."¹¹⁹ The court affirmed the decree of the circuit court declaring the downzoning invalid and void.

On January 20, 1975, the Supreme Court of Virginia again found an action of the Board of Supervisors of Fairfax County void. In *Board of Supervisors v. Allman*,¹²⁰ property owners sought a declaratory judgment that a denial by the Fairfax Board of Supervisors of an application to rezone their land to a higher density classification was illegal. The court, after determining that the evidence indicated that there were ample public facilities to support the proposed development, concluded that the application was denied "primarily because of its timing, rather than because of its impact on public facilities."¹²¹ Testimony revealed that the board of supervisors, by approving rezoning requests, was encouraging growth around already developed projects, while denying the same requests for land outside the periphery of these projects, even though located in the same area and serviced by the same facilities. It was this policy that the court found to be inconsistent and discriminatory, and therefore arbitrary

114. *Id.* at 658-59, 202 S.E.2d at 892-93.

115. *Id.* at 659, 202 S.E.2d at 893.

116. *Id.* at 660, 202 S.E.2d at 894.

117. *Id.*

118. *Id.*

119. *Id.* at 661, 202 S.E.2d at 894.

120. ___ Va. ___, 211 S.E.2d 48 (1975).

121. *Id.* at ___, 211 S.E.2d at 52.

and capricious, bearing no relation to the health, safety or general welfare.¹²²

On the same day, the court held a denial of a special use permit unreasonable in *City of Richmond v. Randall*.¹²³ In that case two owners of a tract of land sought a declaratory judgment that the zoning classification for their property was invalid and that the refusal of the city council to approve a special use permit for the construction of an office building was arbitrary and capricious. The Virginia Supreme Court affirmed the holding of the circuit court that the existing ordinance as it applied to the plaintiffs' property was unreasonable and confiscatory, and therefore unconstitutional.¹²⁴ The property owners offered evidence that the requested use was reasonable, and that the existing classification prohibited all practical uses for the property. The city council failed to show that the denial of the use permit was related to the health, safety, or welfare of the community. In other words, the city did not meet the burden of going forward with the evidence.

In each of the three cases, the court emphasized the detrimental economic effect that the actions of the local governing bodies would have on the property owners. In *Snell*, the court cited the Virginia Code sections that stated that one purpose of zoning was to "encourage economic development activities that provide desirable employment and enlarge the tax base,"¹²⁵ and that "zoning ordinances . . . shall be drawn with reasonable consideration for . . . the conservation of properties and their values."¹²⁶ The court concluded that "[p]rospects [of profit] are reasonable only when permissible land use is reasonably predictable."¹²⁷ In *Allman*, the court noted that the value of the property would be almost two and a half million dollars greater if the rezoning were granted.¹²⁸ In *Randall*, the court stressed the confiscatory result of the city council's action because the refusal to grant the use permit completely deprived the landowners of all practical uses of their property.¹²⁹

The Virginia Supreme Court overturned the actions of a local governing body three times in nine months. These decisions have several possible

122. *Id.* at ____, 211 S.E.2d at 55.

123. ____, Va. ____, 211 S.E.2d 56 (1975).

124. *Id.* at ____, 211 S.E.2d at 57.

125. Board of Supervisors v. Snell, 214 Va. 655, 657-58, 202 S.E.2d 889, 892 (1974), citing VA. CODE ANN. § 15.1-489 (Repl. Vol. 1973).

126. Board of Supervisors v. Snell, 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974), citing VA. CODE ANN. § 15.1-490 (Repl. Vol. 1973).

127. Board of Supervisors v. Snell, 214 Va. 655, 658, 202 S.E.2d 889, 892 (1974).

128. Board of Supervisors v. Allman, ____, Va. ____, 211 S.E.2d 48, 50 (1975).

129. City of Richmond v. Randall, ____, Va. ____, 211 S.E.2d 56, 58 (1975).

implications for the future of local control over land use in Virginia. Under the "changed circumstances" test enunciated in *Snell*, local governments may be precluded from adjusting their zoning codes to correspond with new concepts in land use planning. This would depend upon whether the court would accept new concepts in land use planning as *sufficiently* changed circumstances to justify rezoning. In *Snell*, the court focused on such things as the public health, safety, and welfare. If the local governing body could establish that the rezoning, based on new ideas in the land use area, was related to the public health, safety or welfare of the community, the court might be willing to uphold it. In all these cases, the court stressed the economic loss that would result to the property owner if the actions of the local governing bodies were upheld. This may mean an expansion of the confiscatory zoning doctrine to situations where the landowner is merely deprived of the one use that is most appropriate to the property, rather than all possible uses.

One of the reasons why the government may have lost the case in each instance may have been the failure to present adequate evidence to support the action taken. The local governing body did not show that the action taken related to the furtherance of the health, safety or general welfare of the community. The court may be demanding a greater showing on the part of the governing body that the measures are part of a comprehensive plan that has been carefully designed in the public interest. The 1975 General Assembly, in line with such a trend, passed legislation requiring the creation of a planning commission in every city or county by mid-1976, the enactment of a local subdivision ordinance by mid-1977, and the establishment of a comprehensive plan by mid-1980.¹³⁰ All of these measures are intended to increase the amount of planning that goes into the enactment of local zoning ordinances. Unfortunately, a requirement that no zoning ordinance be passed without the prior adoption of a comprehensive plan was defeated.

E. THE OPEN-SPACE LAND ACT

In 1966 the General Assembly enacted the Open-Space Land Act which authorized public bodies, including counties and municipalities,¹³¹ to acquire land for the purpose of preserving open-space land in urban and urbanizing areas.¹³² Real property already owned by the public could also be designated as open-space land.¹³³ Open-space land includes land that

130. See notes 2, 3, and 11 *supra*.

131. VA. CODE ANN. § 10-156(a) (Repl. Vol. 1973).

132. *Id.* §§ 10-152, -156(b) (Repl. Vol. 1973), *as amended*, § 10-152 (Cum. Supp. 1974).

133. *Id.* § 10-152.

is set aside for park or recreational services, for conservation of land or other resources, for historic or scenic purposes, for assisting in community development, and for wetlands as provided in the Wetlands Act of 1972.¹³⁴ The public bodies were given the power to borrow funds and make expenditures, accept grants from the federal government and other public and private sources, and cooperate with other public bodies in projects to preserve open-space land.¹³⁵ The public bodies were also given incidental powers needed to carry out the purposes of the Act.¹³⁶

Once acquired or so designated, the real property cannot be converted or diverted from open-space land use unless the public body determines that such action would be essential to the orderly development and growth of the urban area and in accordance with the official comprehensive plan for the urban area in effect at the time.¹³⁷ Unless no longer needed, the public body must substitute land of equal value within a year of the conversion. If open-space property is conveyed to a private party, the property must be sold subject to contractual restrictions designed to maintain its open-space character, unless the land is no longer needed for that purpose.¹³⁸ A 1974 amendment enabled the public body to acquire less than a fee simple interest if the interest did not terminate within thirty years.¹³⁹

F. REAL ESTATE TAXES AND LAND USE

In 1971, the General Assembly passed the Use-Value Assessment Tax Act authorizing the local governing bodies that had adopted a land use plan to enact ordinances designed to encourage the preservation and proper use of real estate devoted to agricultural, horticultural, forest and open-space uses by lower taxation on land devoted to those uses.¹⁴⁰ In localities where such an ordinance has been adopted, a property owner can apply for a special use assessment.¹⁴¹ The local assessing officer determines whether the real estate in question meets the criteria for a special assessment.¹⁴² If the property meets the criteria, then its value is assessed using only those

134. *Id.* § 10-156(c). *See also id.* § 62.1-13.2(f).

135. *Id.* § 10-154 (Repl. Vol. 1973).

136. *Id.*

137. *Id.* § 10-153.

138. *Id.*

139. *Id.* § 10-152 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

140. *Id.* §§ 58-769.4 to -769.6 (Repl. Vol. 1974), *as amended*, (Cum. Supp. 1974). *See generally* Section IXA, *infra*.

141. *Id.* § 58-769.8.

142. *Id.* § 58-769.7 (Repl. Vol. 1974). The property qualifies if it is at least five acres in area and is used for agriculture, horticulture or open-space purposes, or at least twenty acres and is used for forestry. *Id.* § 58-769.8 (Cum. Supp. 1974).

indicia of value that the property has for the stated use.¹⁴³ In other words, land located on the fringe of heavily populated suburban areas may be very valuable as a potential site for a housing development; but if used as a farm, the land would be assessed at a much lower value.

The property owner who receives this special assessment is subject to roll-back taxes if the property is used for a non-qualifying use.¹⁴⁴ The roll-back tax is the difference between what the property owner would have paid if he had not received the special assessment and what he actually did pay. The roll-back tax is charged for the year of the change in use and the preceding five years.¹⁴⁵ A person failing to report a change in use will become liable for the roll-back taxes and such penalties and interest provided for in the local ordinance.¹⁴⁶ If a person makes a material misstatement of fact in applying for a special use assessment, he becomes liable for the roll-back tax plus penalties and interest, and an additional penalty of 100% of the unpaid taxes.¹⁴⁷ If the property is sold, but still used by the new owner for a qualifying use, the roll-back tax is not imposed.¹⁴⁸

Because the Act did not take effect until 1973, it is too soon to evaluate its impact on land use in Virginia. Only four jurisdictions, Loudoun, Fauquier, and Prince William Counties and the City of Virginia Beach, had adopted the ordinances authorized by the Act as of January, 1974.¹⁴⁹ The Virginia Advisory Legislative Council (VALC) studied the effects of tax and economic considerations on land use. Although the VALC believed that it needed more information before making specific recommendations, the council was convinced that real estate tax assessment practices have a substantial impact on land use.¹⁵⁰

Unfortunately use-value assessment can be utilized by land speculators

143. *Id.* § 58-769.9 (Repl. Vol. 1974). The Act establishes the State Land Evaluation Advisory Committee to assist the local assessing officers in determining whether the real estate meets the criteria for the special assessment. *Id.* § 58-769.7 to -769.11. The Act also requires the Directors of the Departments of Conservation and Economic Development and of the Commission of Outdoor Recreation and the Commissioner of Agriculture and Commerce to provide standards to be applied uniformly throughout the state to be used in making such determinations. *Id.* § 58-769.12. A property owner who receives an unfavorable opinion or no opinion at all may appeal to any court of record that has jurisdiction over the county or city wherein the real estate is located. *Id.*

144. *Id.* § 58-769.10 (Cum. Supp. 1974).

145. *Id.* There is also a six per cent interest charge on the difference.

146. *Id.* § 58-769.10:1 (Repl. Vol. 1974).

147. *Id.*

148. *Id.* § 58-769.10 (Cum. Supp. 1974).

149. See REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL: LAND USE POLICIES 35 (1974).

150. *Id.* at 39.

to keep their real estate taxes reduced until they are ready to develop the property. The six per cent charge on roll-back taxes, in a period of high interest rates, would not sufficiently discourage this practice. Suggestions were offered to the VALC to meet some of these problems, including minimum periods of ownership before eligibility, contracts between the property owner and the local government, and ineligibility for land owned by corporations or persons not residing on the land.¹⁵¹

The difficulty in designing an effective tax incentive program is the probability that by encouraging one desired goal, other desirable developments are discouraged. For instance, if tax benefits are provided to those landowners who do not improve their property as an inducement to maintaining open-space use, the same policy may discourage other landowners from improving deteriorating structures on their property. In urban areas, such improvements are impeded by the assessment policies that increase the assessed value whenever the property owner makes improvements. Perhaps some relief in the form of freezing the assessed value of the property, as long as the use is not changed, until the property changes hands would result in less urban blight.¹⁵²

G. CONCLUSION

The actions of the local governing bodies do play a predominant role in land use policy today. Many have criticized this role and have pointed out the shortcomings inherent in such a situation. Some critics believe that the local governing bodies are primarily interested in increasing the tax base in their jurisdictions. Others note that decisions in zoning matters often affect areas outside the territorial boundaries of the county or city making the decision. There are pressures for greater regional, state, and federal roles in land use policy making. However, it is doubtful if the local governing body could be completely eliminated from playing any part in the process of land use planning. First of all, there is a need for the knowledge of local officials. Secondly, input from local residents would appear to be desirable in any land use planning scheme. After all, the real purpose of zoning and planning is to benefit the public. It is the balancing of the interests of the person as a property owner against the interests of the person as a member of the community that presents the difficult problems in land use planning.

151. *Id.* at 36.

152. *Id.* at 37.

IV. REGIONAL LAND USE PLANNING

The results of the traditional domination of local governments over land use decisions have demonstrated their inability to solve problems of regional scope.¹ Ostensibly a regional perspective is required to overcome the inability of local governments to solve regional problems. Regional land use planning is defined as a device "to guide and control physical development in a multi-jurisdictional area."² At least 38 states have enacted some sort of regional planning legislation in an effort to combat areawide problems.³ However, there is no unanimity as to the utility of this approach. One critical evaluation states that:

The extraterritorial legislation in most states . . . renders little more than "lip service" to the concept of coordinating land use among municipalities. The power of extraterritorial planning has had little effect in remedying regional land use problems since most states have failed to provide municipalities with the additional capacity to enforce the plans.⁴

The typical enabling statute authorizes the local governments to operate regional planning agencies, but only with the consent of all the governmental units within the region. Further, most statutes provide that any governmental subdivision may join or withdraw at will. The initial reason for the voluntary nature of these statutes was to reduce local resistance to the idea of regional planning.⁵ Such a scheme "in reality gives each constituent local government a veto power over the decisions of the regional board."⁶ Even where formation and participation are required by statute, the plans which regional agencies produce are usually only advisory. They are designed to "simply provide enlightenment and nonmandatory guidance."⁷ In general, the advice of the regional agency can be ignored and the plan bypassed.

With the above in mind, an analysis of Virginia's approach to regional land use planning as set out in the Virginia Area Development Act of 1968⁸

1. Among the factors contributing to local governments' inability to cope with regional problems are jurisdictional restrictions, a lack of cooperation caused by fragmentation, intergovernmental squabbles, rivalries and competition to attract development. Furthermore, local governments are usually financially unable to underwrite the large scale programs necessary to solve areawide problems.

2. R. ANDERSON, 3 AMERICAN LAW OF ZONING § 18.02 (1968).

3. Note, *State Land Use Control: Why Pending Federal Legislation Will Help*, 25 HAST. L.J. 1165, 1171-72 (1974).

4. *Id.* at 1169.

5. *Id.* at 1172.

6. *Id.*

7. *Id.*

8. VA. CODE ANN. §§ 15.1-1400 *et seq.* (Repl. Vol. 1973).

(VADA) is undertaken to measure its success as compared to the "typical" state response to problems of regional scope.

A. DEVELOPMENT OF VADA

Within the last two decades, rapid urbanization in Virginia has rendered ineffective the traditional allocation of functions among state, county and municipal governments. Once rural counties have become densely populated by urban sprawl and once distinct cities and towns are becoming huge megalopolises. By the mid-1960's the problems caused by this rapid urbanization had become visible and serious, and were spreading beyond local boundaries. Among these problems were "air pollution, crowded schools, traffic congestion, inadequate water supplies, polluted recreation areas, and wasted or destroyed natural beauty."⁹

Recognizing that accelerating growth of metropolitan areas was causing "special and urgent governmental problems" to "both cities and surrounding urban counties," the General Assembly in April, 1966 authorized creation of the Virginia Metropolitan Areas Study Commission to consider these problems, develop solutions, and make recommendations.¹⁰ After an extensive study lasting 18 months the Hahn Commission, so named after its chairman, T. Marshall Hahn, Jr., concluded that the establishment of areawide agencies and procedures would be the most effective means for solving areawide problems. In support of this conclusion were cited the advantages of a broader financial base and a large pool of administrative and planning talent aided by the benefits of exchanging information. Further, cooperation on areawide problems would enhance local governments by freeing resources to be devoted to purely local needs.¹¹

The Hahn recommendations were prefaced by the general goals of discouraging fragmentation of governmental units, reducing conflict among local governments, and stimulating and encouraging intergovernmental cooperation.¹² Among the specific recommendations presented to the Governor and the General Assembly in a report dated November 15, 1967, was the creation of Planning Districts designed to supersede existing voluntary regional planning commissions composed largely of private citizens, inadequately financed, and poorly staffed in the area of professional planning personnel.¹³

9. THE VIRGINIA METROPOLITAN AREAS STUDY COMMISSION, THE REPORT BY THE VIRGINIA METROPOLITAN AREAS STUDY COMMISSION 6 (1967) [hereinafter cited as AREAS STUDY COMMISSION].

10. Va. Acts of Assembly 1966, ch. 479, at 659.

11. AREAS STUDY COMMISSION, *supra* note 9, at 8.

12. *Id.* at 18.

13. *Id.* at 14. At the time, there were 16 such commissions, only nine of which were staffed.

In essence, the Hahn Commission was recommending that Virginia initiate what the Advisory Commission on Intergovernmental Relations¹⁴ (ACIR) has labelled "regional confederalism."¹⁵ This arrangement is defined as a "voluntary interlocal compact or covenant to promote common interests without the individual member units subordinating any of their essential powers or autonomy to the areawide body."¹⁶ The agencies created are designed to stimulate joint action on areawide needs and to encourage implementation of comprehensive plans, but cannot bind their members nor compel them to take implementing action. Further, because regional planning agencies lack the power to tax, legislate, or exercise eminent domain, they cannot be considered units of government. "Their powers are mainly advisory, and their services or assistance to members are usually limited to 'software' functions such as planning, technical assistance, and joint purchasing."¹⁷ Though apparently similar to the voluntary agencies which were replaced, the Planning Districts have a number of advantages which will be discussed later.

B. THE PLANNING DISTRICT COMMISSION

Pursuant to the Hahn Commission recommendations, the new planning districts were authorized by the Virginia Area Development Act of 1968. Thereafter, the boundaries of twenty-two planning districts were drawn by the Division of State Planning and Community Affairs (DSPCA) based on "the community of interest among the subdivisions in the areas, the ease of communication and transportation, the geographic factors and natural boundaries and other measures which indicated a similarity in history and culture among and between the various jurisdictions."¹⁸ The first map of

2 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL GOVERNANCE: PROMISE AND PERFORMANCE 330 (1973) [hereinafter cited as 2 ACIR]. In the report of the Areas Study Commission, these existing commissions were criticized as being dependent on adoption by local governmental bodies and thus lacking a close "relationship between the regional planning function and the political decisionmaking process," a situation which constituted a "serious deterrent to implementation of areawide planning." Such commissions were characterized as having only a "limited potential in the orderly development of metropolitan areas." AREAS STUDY COMMISSION, *supra* note 9, at 14.

14. ACIR is a federal agency created by Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. 42 U.S.C. § 4271 *et seq.* (1970).

15. 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL DECISION MAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS 2 (1973) [hereinafter cited as 1 ACIR].

16. *Id.* at 51.

17. *Id.*

18. DIVISION OF STATE PLANNING AND COMMUNITY AFFAIRS, PROFILES ON VIRGINIA'S PLANNING DISTRICTS, -i- (1973). According to an ACIR study, "[t]he method used by DSPCA may be considered an excellent model for other States to use in drawing substate district boundaries." 2 ACIR, *supra* note 13, at 330. To obtain ideas and information on districting, the

substate districts was drawn in September, 1968, and thereafter discussions of the plan took place with representatives of 159 local governments. Local officials were asked to draw logical districts on blank maps and discuss the consequences of particular boundaries with the DSPCA staff. Finally, plans were released to the news media and public hearings were held from which changes were made affecting only four of the districts. Despite the foregoing process and the recognition it has received, some discontent exists with the boundaries as delineated.¹⁹

By statute, a planning district commission (PDC) is organized through the governing bodies of the jurisdictions encompassing 45% of the population within the district.²⁰ Presumably as a stimulus to participation, governmental subdivisions²¹ which are not a party to the agreement charter are not represented in the membership of the PDC, although they continue to be a part of the planning district.²² One of the traditional barriers to formation of regional planning agencies has been lack of participation by the governmental subdivisions. However, this has not been a problem in Virginia. Spurred by the DSPCA announcement that PDCs formed within three months of the boundary delineations would receive a full fiscal year's appropriation of funds, nine PDC's were organized within that time. By 1973, 21 PDCs were organized and all but two were staffed and operating.²³ Also encouraging participation are federal requirements that localities must participate in a regional planning agency to be eligible for certain federal funds. This situation "almost forces local governments to 'volunteer.'" ²⁴

At least a majority of the membership of the Commission must be com-

DSPCA met with state agencies using multi-jurisdictional districts, existing regional planning commissions, universities, utilities companies, the State Chamber of Commerce, various federal agencies, research institutions, and others. *Id.*

19. One planner who fails to see the rationale of her district boundaries analogized the result to "a kid with a crayon," finding it difficult to show a "community of interest" or a "similarity of culture" between rural Loudoun County and suburban jurisdictions of Arlington, Fairfax, and Alexandria. Interview with Martha A. Schmitz, Human Resources Planner and A-95 Coordinator for the Northern Virginia Planning District Commission, in Fairfax County, Jan. 17, 1975 [hereinafter cited as Schmitz].

20. VA. CODE ANN. § 15.1-1403(a) (Cum. Supp. 1974).

21. The term subdivision refers to "governmental subdivision" which is defined in the VADA as "the counties, cities and towns of this State." VA. CODE ANN. § 15.1-1402(c) (Repl. Vol. 1973). It should not be confused with the same term used to connote a neighborhood built by a particular developer. Also to be distinguished is the term "governmental body" which includes city councils, county boards of supervisors and or other boards or bodies "in which the powers of a political subdivision are vested by law." *Id.* § 15.1-1402(e).

22. *Id.* § 15.1-1403(a) (Cum. Supp. 1974).

23. 2 ACIR, *supra* note 13, at 331.

24. *Id.* at 336.

posed of elected officials from the governing bodies of the participating municipalities and counties.²⁵ The remaining members need only be "qualified voters and residents of the district, who hold no office elected by the people."²⁶ The rationale for these provisions is three-fold: 1) to ensure representation, 2) to improve intergovernmental communication and understanding, and 3) to encourage area citizen participation.²⁷ Beyond this bare statutory outline, qualifications for membership are flexible and vary among jurisdictions.²⁸

In choosing the type of agencies that Virginia's PDCs would be, the Hahn Commission seems to have combined the traditional attributes of a council of government and a regional planning commission. Councils of government are generally defined by ACIR as:

[M]ulti-functional voluntary regional associations of elected officials . . . of the member political jurisdictions . . . [They are] a device for bringing together, at regular intervals and on a voluntary basis, representatives of the local governments within a given area to discuss common problems, exchange information and develop consensus on policy questions of mutual interest.²⁹

By comparison, regional planning commissions are public planning bodies authorized by the state legislatures, having a membership of appointed citizens, which are "primarily responsible for comprehensive planning, traditionally with an emphasis on land-use planning or the coordination of local plans."³⁰ The hybrid agency has the advantage of combining the policy determination and information-exchange functions with the planning and coordination functions.

Beyond the general requirements regarding commission membership, the enabling statute leaves the internal structuring of the PDC to be formulated by the needs of each district. From an overall perspective, there

25. VA. CODE ANN. § 15.1-1403(b)(4) (Cum. Supp. 1974).

26. *Id.*

27. AREAS STUDY COMMISSION, *supra* note 9, at 22.

28. For example, the citizen representatives serving on the Northern Virginia Planning District Commission (NVPDC) are appointed by the governing bodies of the jurisdictions they represent. In some cases they are members of citizen groups, and to this extent the Hahn recommendation of citizen involvement is being implemented. Interview with Ralph J. Basil, Environmental Planner, Northern Virginia Planning District Commission, in Fairfax County Jan. 17, 1975 [hereinafter cited as Basil]. The Richmond Regional Planning District Commission (RRPDC) has, in addition to its citizen members, representatives of a few state agencies participating on its committees. Interview with David W. Shaw, Acting Assistant Director of the Planning Section, Richmond Regional Planning District Commission, in Richmond, Jan. 21, 1975 [hereinafter cited as Shaw].

29. 1 ACIR, *supra* note 15, at 50.

30. *Id.*

are two levels of organization—the commissioners and the staff. The commissioners attend the commission meeting which is scheduled monthly in the more urbanized districts and less often in the rural districts. They are the policy makers of the PDC and have the voting power on proposals which come before the commission. In addition, they are members of committees which prepare proposals and resolutions to be considered by the full commissions.³¹

The staff level in the larger PDCs is also separated into sections such as physical planning, intergovernmental relations, criminal justice, and public safety. The size of the staff varies according to the degree of urbanization in the district.³² Most of the staff members have graduate degrees in planning or related fields such as economics or public administration. The staff in larger PDCs may include engineers, an attorney, and a few research assistants with B.A.s. The work programs of the larger PDCs are determined by the staff, rather than by the commissioners, who are often preoccupied with their local problems.

Once organized, the PDCs are eligible to receive annual state aid not to exceed \$5000 per 25,000 persons residing in the subdivisions which are participating, but in any event, no less than \$10,000 per PDC.³³ Total state assistance to the PDCs amounts to approximately \$775,000 per year.³⁴ This sum is equally matched by funds from the local governments.³⁵ Among the proposed revisions of the VADA considered by the 1973 General Assembly was an increase in funding to 25 cents per capita (up 5 cents) with a minimum of \$30,000 per planning district. This increase, which would be matched by funds from local jurisdictions, was based on the premise that "experience has shown that to maintain an effective program a typical planning district requires a minimum annual budget of \$50,000."³⁶ However, the proposed amendment was not passed and there are those who suspect that this is yet another manifestation of local government fears that regional decisionmaking is inconsistent with their interests.³⁷

31. In RRPDC there are four such committees: (1) Intergovernmental; (2) Physical Development; (3) Transportation Policy; (4) Citizen Involvement. Shaw, *supra* note 28.

32. In NVPDC there are approximately 34 staff members including secretarial help. Basil, *supra* note 28. In RRPDC the number is 24 and the number is much lower in rural PDCs. Shaw, *supra* note 28.

33. VA. CODE ANN. § 15.1-1412 (Repl. Vol. 1973).

34. 2 ACIR, *supra* note 13, at 333.

35. *Id.*

36. THE GOVERNOR'S AD HOC COMMITTEE TO REVIEW THE VIRGINIA AREA DEVELOPMENT ACT, REPORT OF THE GOVERNOR'S AD HOC COMMITTEE TO REVIEW THE VIRGINIA AREA DEVELOPMENT ACT 11 (1973) [hereinafter cited as COMMITTEE TO REVIEW VADA].

37. One planner explains the low funding by saying: "Local governments don't want a regional staff bigger than their own planning staff, fearing that they would generate bigger

Besides state and local revenue, the PDCs have various sources of federal funds including the Federal Highway Administration, the Department of Housing and Urban Development, and the Justice Department under the Safe Streets Act.³⁸ The estimated federal contributions to the PDCs for fiscal year 1973 was about \$1.8 million.³⁹

According to the statute, the purpose of the PDC is purely one of planning on an areawide basis by encouraging and assisting governmental bodies to plan for the future.⁴⁰ It is specifically not the duty of the commission to implement plans and policies, nor to furnish governmental services.⁴¹ According to the Hahn Commission, planning and implementation of a purely local nature "should continue to be the responsibility of local planning commissions and governing bodies."⁴² Thus, the mission of the PDC was envisioned, and continues to be, advisory only, and this necessitates a "high threshold for frustration" among PDC planners.⁴³ However, many PDCs are performing necessary and useful functions in their capacity as advisory and study agencies.⁴⁴

C. PROBLEMS WITH COMPREHENSIVE PLANNING

It appears from the statute that one of the more important functions of the PDC is to prepare a comprehensive plan⁴⁵ concerning matters of im-

and better proposals. Rather, they [local governments] just want to keep it [regional planning] on a low profile." Basil, *supra* note 28.

38. 42 U.S.C. § 3701 *et seq.* (1970).

39. 2 ACIR, *supra* note 13, at 335.

40. VA. CODE ANN. § 15.1-1405(a) (Repl. Vol. 1973).

41. *Id.*

42. AREAS STUDY COMMISSION, *supra* note 9, at 22. A later commission to review VADA, which was also headed by T. Marshall Hahn, Jr., has recommended that the PDCs be given implementing powers in supplying services. COMMITTEE TO REVIEW VADA, *supra* note 36, at 7. These recommendations were rejected by the 1973 General Assembly.

43. Shaw, *supra* note 28.

44. For example, the NVPDC has been active in the planning aspects of METRO, the new Washington, D.C. area subway system. By doing one comprehensive impact study on the marketing pressure around each proposed site for suburban stations, the PDC saved the jurisdictions the increased expense of having to subcontract out to separate consultants. Another Northern Virginia project is an impact study on the Occuquan reservoir and watershed. Upstream siltation has threatened the usefulness of the reservoir as a water supply. According to a NVPDC planner, "[l]ocal governments are coming to us more and more because we've built up a little bit of credibility and they can see we are capable of doing the kind of study they want done." Basil, *supra* note 28.

45. The general statutory provisions regarding the comprehensive plan are set out in VA. CODE ANN. § 15.1-446 *et seq.* (Repl. Vol. 1973). The purpose of the plan is to guide and accomplish "a coordinated, adjusted and harmonious development of the area which will . . . best promote the health, safety, morals, order, convenience, prosperity or general welfare of the inhabitants." *Id.* § 15.1-446(4). The plan shall consider existing development, land uses,

portance to more than one governmental subdivision (as distinguished from matters of purely local concern) for the guidance of the overall development of the district.⁴⁶ The adoption and application of such a plan are important aspects of an effective land use scheme since mere plans are of little value unless implemented. By statute, the comprehensive plan becomes "effective" through a number of steps which include submission of the plan to local planning commissions or governmental bodies, presentation at a public hearing in the localities, recommendations back to the PDC, and approval by the PDC.⁴⁷ Finally, the plan must be "adopted" by a majority of the subdivisions.⁴⁸ Even if adopted by the majority, the plan will not be effective in subdivisions which have not adopted it.⁴⁹ In contrast to this adoption scheme are the general terms of the Hahn report which provided for the plan to become "binding" when approved by the local governing bodies.⁵⁰ This stronger language is conspicuously absent in the statute, thus minimizing the effect and application of the comprehensive plan. The statute merely precludes local governments from building public improvements or facilities, or acquiring or disposing of public lands in a manner conflicting with the district plan.⁵¹ Thus, adoption of the plan is completely voluntary and once adopted its effectiveness is limited since it has little or no control over the private sector.

In practice, formulation and adoption of comprehensive regional land use plans have met with difficulties not experienced in other areas of comprehensive planning:⁵²

Regional plans superimpose a future land use pattern over individual jurisdiction plans; the regional plan, in most instances, is not reflective of local desires. As a result, the local governments rarely recognize the areawide land use plan as an official guide for future regional growth.⁵³

trends, and probable future economic and population growth. *Id.* § 15.1-447(1)(a),(b). The plan shall show long range recommendations for the general development of the area, including designation of: 1) area for various types of public and private development and uses, 2) transportation systems, 3) community service facilities such as parks, schools, public buildings and institutions, etc. *Id.* § 15.1-446(1),(2),(3).

46. *Id.* § 15.1-1406(a) (Repl. Vol. 1973).

47. *Id.* § 15.1-1406(b).

48. *Id.* § 15.1-1406(c).

49. *Id.*

50. AREAS STUDY COMMISSION, *supra* note 9, at 22.

51. VA. CODE ANN. § 15.1-1407 (Repl. Vol. 1973).

52. In explaining the lack of progress in this area, a RRPDC planner believes that land use planning "is not the least developed area, its the least appreciated." Shaw, *supra* note 28.

53. RICHMOND REGIONAL PLANNING DISTRICT COMMISSION, LAND USE—INTERGOVERNMENTAL RELATIONS IN THE RICHMOND METROPOLITAN AREA at 8, n.13 (1974) [hereinafter cited as RRPDC LAND USE].

Three years ago the Richmond Regional Planning District Commission (RRPDC) developed a comprehensive land use plan but it was never adopted by the local jurisdictions. The result in the Richmond Region is a "comprehensive" plan which is just a composite of the various plans of the localities. However, RRPDC has recently taken a new approach that has met with a warmer reception from the localities. Designed as a "response to the realities" of planning problems at the regional level, the new process involves selecting ten "critical issues" for the region. The localities have been polled regarding the areas they think are most important and three critical issues have been selected on which work is to begin immediately. The process combines all the local plans and identifies conflicts, overlaps, gaps, and the impacts of one jurisdiction's plans on the others'. Under this approach the PDC avoids the resentment and resistance caused by imposing plans on unwilling localities.⁵⁴ This new approach in RRPDC is part of an overall search to redefine its role in land use planning and will be considered again later.

The idea of a regional planning agency is not based merely on its soundness as a local approach to areawide problem solving. Such an agency also fulfills the need to coordinate state and federal programs. Often a prerequisite for receiving funds from a federal agency is review or planning by a regional agency.⁵⁵ For example, HUD requires a "certified" areawide planning agency which necessitates preparation and adoption of a regional land use plan.⁵⁶ Similarly, a prerequisite for approval of federal aid for highway projects and mass transit is comprehensive transportation planning which is often done by a regional agency.⁵⁷ Also requiring an approved regional agency is the "A-95" review process regarding applications for federal and state funding of local projects.

54. The process was characterized by a RRPDC planner as "a mechanism to deal collectively with the problems; a rational and practical approach rather than the elitist attitude of saying, 'This is where we will go in the future.' We say 'Look. Here are these critical issues. The only way they can be solved is from a regional perspective.' You can't deal with air quality on a local level, nor transportation, nor public facilities. You can't just put together the local plans and have it work out. Some kind of trade-off is going to have to be made by each jurisdiction." Shaw, *supra* note 28.

55. Nationally in 1964, there were five federal programs which were using the areawide approach. By 1973, there were 24 such programs, involving 11 different federal departments or agencies. 1 ACIR, *supra* note 29, at 168.

56. RRPDC LAND USE, *supra* note 53, at 8.

57. 23 U.S.C. § 134 (1970). The statute calls for "a continuing, comprehensive transportation planning process carried on cooperatively by states and local communities." The RRPDC is responsible for carrying out this "3-C process" in the Richmond region. Further, RRPDC has been charged with the responsibility of preparing a long-range mass transit plan which is a prerequisite for obtaining Urban Mass Transit Administration funds.

D. A-95 REVIEW

The term "A-95" refers to U.S. Office of Management and Budget (OMB) Circular A-95 (revised) which was designed to implement § 201 and Title IV of the Intergovernmental Cooperation Act of 1968,⁵⁸ and § 204 of the Demonstration Cities and Metropolitan Development Act of 1966.⁵⁹ The A-95 function of the PDC involves review of applications for state and federal aid to finance needs and projects of local jurisdictions. The stated purpose of the process is "to facilitate coordinated planning on an intergovernmental basis for certain Federal assistance programs."⁶⁰ In performing A-95 review, "[a]n areawide comprehensive planning organization or state agency officially recognized by the Office of Management and Budget (OMB) [is] to notify other affected local and state governmental units of proposed federal aid," to review the project to be funded, and to comment on its consistency with area or state policies.⁶¹ In Virginia, the recognized "clearinghouses" to perform this function at the regional level are the PDCs.⁶² According to the VADA, the PDC is to advise the local government whether the proposed project has district wide significance and, if so, the PDC shall determine if the project conflicts with the district plans and policies.⁶³ Among the OMB's suggested comments and recommendations to be made by the PDC are the consistency of the project with comprehensive planning; whether the project duplicates, runs counter to, or lacks coordination with other projects; and how the project might be revised to increase its effectiveness or efficiency.⁶⁴

The Advisory Commission on Intergovernmental Relations (ACIR) has recognized the "quasi-compulsory quality"⁶⁵ which regional planning commissions gain from being clearinghouses for state and federal funds and that "nonparticipation could result in a loss of eligibility for certain grants."⁶⁶ Even in this function the PDC's role is little more than advisory since the "element of voluntarism remains as long as no sanction in policy decisions or action programs can be secured."⁶⁷ However, in most cases the

58. 42 U.S.C. § 4201 (1970).

59. 42 U.S.C. § 1453 *et seq.* (1970).

60. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR A-95 (revised) (1973).

61. RRPDC LAND USE, *supra* note 53, at 6, n.8.

62. VA. CODE ANN. § 15.1-1410 (Repl. Vol. 1973).

63. *Id.* § 15.1-1410(b).

64. DIVISION OF STATE PLANNING AND COMMUNITY AFFAIRS, VIRGINIA PROJECT NOTIFICATION AND REVIEW SYSTEM PROCEDURES GUIDE FOR LOCAL, AREAWIDE, AND STATE AGENCIES 3 (1973).

65. 1 ACIR, *supra* note 15, at 51.

66. *Id.*

67. *Id.* It seems that the Hahn Commission envisioned the funding review process as having

PDC recommendations are followed and the A-95 review process is experiencing success in avoiding duplication and reducing conflicts between jurisdictions.⁶⁸

In addition to its areawide coordinating function, A-95 has particular value as a source of regional information. The Northern Virginia Planning District Commission (NVPDC) sends out a weekly list of projects under review which goes to approximately 80 people, reaching all of its jurisdictions, its planning departments, citizen groups and commissioners. It alerts them that a particular grant is under review and it solicits any inputs they may have. The loan applicant and other interested parties are kept informed concerning committee schedules so they can come to the PDC and present the pros and cons of funding the project. With this kind of communication, the localities are able to keep abreast of what is happening in the communities around them, increasing the chance for coordination and cooperation, and decreasing duplication and conflict.⁶⁹

With respect to volume, the majority of grants reviewed in NVPDC are concerned with public safety (*e.g.*, police and emergency equipment). In terms of dollars, the biggest review item involves transportation and mass transit since these programs are among the most expensive. The review process encompasses a whole spectrum of other projects including HEW housing grants and sewage treatment projects. The NVPDC reviews between 200 and 300 applications in a year, while a more rural PDC averages between 40 and 50 per year.⁷⁰

more of a determinative effect on local action than it has in actuality. According to the recommendations, a PDC was to indicate its approval or disapproval of a project and its reasons for the action taken. AREAS STUDY COMMISSION, *supra* note 9, at 22. Further, "[a]ppeal from actions taken by the PDC [would] be to the Commission on Local Government." *Id.* This language, which is absent from the statute, indicates an aura of finality which has not materialized. The fact is that PDCs do not want an absolute say. Rather, the key to the effectiveness which A-95 has experienced lies in the fact that it is a recommendation only. In the words of the NVPDC A-95 coordinator:

If we became that kind of a threatening agency we would alienate all of our jurisdictions. . . . We have never said, 'We recommend disapproval,' because there is really no value in that. Rather, we recommend that it be revised, and this is done early enough that these changes can be made and the project can get funded. . . . We're not here to knit-pick. We're trying to give the localities as much flexibility as possible. After all, it's their program. Schmitz, *supra* note 19.

68. For example, an emphasis on projects which can be shared on a regional basis has led to a regional training center for police officers in the Northern Virginia District. Schmitz, *supra* note 19.

69. *Id.*

70. *Id.*

E. SERVICE DISTRICTS

The ACIR believes that one of the faults of Virginia's substate districting plan is that PDCs are prohibited from engaging in functional activity.⁷¹ According to ACIR, "[r]egional activity would seem to depend upon the integration of planning and functional authority."⁷² The Hahn Commission was well aware of the need for effective control beyond the mere planning and advisory functions, and provisions for such an authority were included in their recommendations for service districts.⁷³ In essence the Hahn Commission envisioned creation of a new governmental unit.⁷⁴ It was to be an actual political subdivision of the state⁷⁵ with its own independent electoral base,⁷⁶ "enjoying the status, general powers . . . and the strength of Virginia's other units of local government."⁷⁷ Service districts were seen as a "mechanism to meet areawide needs while leaving local governments undisturbed in the performance of their vital roles."⁷⁸ Their purpose would be to "undertake a significant number of major governmental functions and services of both a revenue producing and non-revenue producing nature."⁷⁹ Among the services contemplated were water supply, sewage disposal, and air and water pollution abatement.

The Hahn recommendations regarding service districts were partially codified in the VADA.⁸⁰ The statute requires that a service district be coterminous with and succeed to the powers of the PDC.⁸¹ A service district may be created by a favorable vote in a referendum in each of the participating jurisdictions in the district.⁸² The proposed service districts are slated to be governed by a commission, the majority of which would be

71. 2 ACIR, *supra* note 13, at 336.

72. *Id.*

73. AREAS STUDY COMMISSION, *supra* note 9, at 22-23.

74. *Id.* at 22.

75. *Id.* at 23.

76. *Id.* at 24.

77. *Id.* at 23.

78. *Id.*

79. *Id.* at 24.

80. VA. CODE ANN. §§ 15.1-1420 to 1449 (Repl. Vol. 1973).

81. *Id.* § 15.1-1432.

82. *Id.* § 15.1-1425. However, the Hahn recommendations also provided that if the subdivisions had not requested such an election within two years of the preparation of a service district plan, then "a single, general referendum for the entire area" could be imposed in which "[a] favorable majority vote shall constitute approval of the proposed Service District." AREAS STUDY COMMISSION, *supra* note 9, at 26. The Hahn Commission realized that the effect of such a provision was that ". . . the wishes of an individual governmental subdivision within the District . . . could be overridden." *Id.* at 28. This provision elicited strong criticism, even from members of the commission. *Id.* at 39. It was ultimately not included in the VADA.

composed of "elected officials" from single member election districts.⁸³ The remainder of the commission would be "official members" who are elected officials of the local governmental subdivisions making up the district.⁸⁴ The enabling legislation calls for a chairman of the commission, elected by the members,⁸⁵ with each commissioner entitled to one vote.⁸⁶ Among the important powers which distinguish a service district from non-authoritative agencies are its ability to make ordinances, rules, and regulations and to enforce them by a fine up to \$1000 or imprisonment up to a year, or both.⁸⁷ Further, service districts are authorized to establish a fiscal base by pro-rata tax levies on the value of the real estate within the governmental subdivisions.⁸⁸ The district may collect fees, rents, and charges for services provided, such as sewage disposal and water supply.⁸⁹ To finance construction projects and the acquisition of land, the district may issue bonds.⁹⁰ State aid is provided for in the same amount as received by planning districts.⁹¹

Before the service district was authorized by VADA, a number of other approaches had been tried in Virginia to supply services on a multi-jurisdictional basis.⁹² The simplest approach occurs when one jurisdiction provides a single service to another jurisdiction for an agreed price. Such an agreement offers the economies of scale and does not require a new administrative organization. The contract approach is easy to implement and does not pose a threat to jurisdictional independence. However, the shortcomings of this arrangement are impermanence and inflexibility, and it may result in an inequitable sharing of costs because the providing jurisdiction often has the stronger bargaining position.

Another approach has been the single purpose authority, defined as a "special agreement among governments to provide a service jointly."⁹³ Such agreements have a number of advantages over the contract approach. Not only are these single purpose authorities more permanent and more

83. VA. CODE ANN. § 15.1-1427(a) (Repl. Vol. 1973).

84. *Id.* § 15.1-1427(b).

85. *Id.* § 15.1-1429.

86. *Id.* § 15.1-1427(c).

87. *Id.* § 15.1-1431(b)(7).

88. *Id.* § 15.1-1436(a).

89. *Id.* § 15.1-1437.

90. *Id.* § 15.1-1438. The bonds shall be secured by a mortgage on the project or any other property of the service district. *Id.* § 15.1-1438(c).

91. *Id.* § 15.1-1433.

92. RICHMOND REGIONAL PLANNING DISTRICT COMMISSION, ADVANCING COOPERATIVE MUNICIPAL SERVICES IN THE RICHMOND REGION 3-1 (1973) [hereinafter cited as RRPDC COOPERATIVE SERVICES].

93. *Id.* at 3-3.

flexible, but they also offer the participants an equal voice in service policies. On the other hand, authorities have the disadvantages of requiring a separate administrative structure and loss of complete control over the service by the local participating governments. Further, the fragmentation caused by numerous organizations supplying but one service contributes to inefficient and ineffective local government.

In realizing the benefits of cooperative service delivery, the service district concept has the greatest potential.⁹⁴ It offers the economies of scale and reduces overhead expenses because of its multi-service character. This approach ensures equitable decision making and can address problems on a regional basis. However, the service districts authorized by the General Assembly in 1968 have some disadvantages that render their creation improbable in the near future.⁹⁵ The VADA in effect requires participating jurisdictions to release any annexation rights which they have.⁹⁶ The City of Richmond is particularly wary of such a program unless it can be assured that the benefits beyond its existing single service contracts would balance against the loss of its right to approximately 23 square miles of Chesterfield County with its added tax base and lure for industrial development. Moreover, creation of service districts are impractical because of the current statutory provisions regarding commission membership. According to an ACIR study, "if a service district were to be established in the Richmond district, it would have at least 110 members on its commission, an exorbitant number for such a function."⁹⁷ The strongest objection by far is based on the fear that local governments will lose control to a stronger regional authority. Specifically, local officials fear that the service district, especially one which provides sewage treatment and water supply, would usurp local control over the rate of development in the local jurisdictions,⁹⁸ thus leaving the future of the governed localities in hands less responsive to local needs.

According to the Hahn report, the creation of service districts was "expected to evolve naturally following a period of areawide planning involv-

94. *Id.* at 3-5 to -6.

95. *Id.*

96. VA. CODE ANN. § 15.1-1439 (Repl. Vol. 1973).

97. 2 ACIR, *supra* note 13, at 331.

98. RRPDC COOPERATIVE SERVICES, *supra* note 92, at 3-6. To illustrate, the counties of Fairfax, Loudoun and Prince William are now engaged in controversy with the State Water Control Board regarding a proposed regional sewage treatment plant to be located at Dulles Airport in Northern Virginia. The plant is designed to anticipate 50 years of growth, causing the counties to fear loss of control over development in their jurisdictions. Basil, *supra* note 28.

ing citizens and elected officials in a Planning District."⁹⁹ For the reasons mentioned above, this evolution has not taken place. In the few districts which have expressed an interest, the service district has not progressed beyond the planning stage. Even if it reaches the referendum stage, local misgivings toward another layer of government would likely prohibit its creation.

Recognizing the localities' reluctance in moving toward the service district approach, and the need for some areawide mechanism short of the service district, the Governor's Ad Hoc Committee to Review the Virginia Area Development Act set forth some recommendations to the 1973 General Assembly in the hopes of "making the service district concept more acceptable to local governments."¹⁰⁰ The Committee proposed that PDCs should be given an "operational capability, if local government agrees, and not be limited by law to exercise of only a planning function."¹⁰¹ Again, the criticisms that caused defeat of the measure focused on the threat to the domain of local government.¹⁰²

F. ANALYSIS AND CONCLUSION

With the creation of service districts unlikely and the amendment giving the PDCs an operational capability defeated, the existing PDCs are the only agencies authorized to do land use planning at the regional level. Ratings of the effectiveness of the job being done by the PDCs vary with the perspective of the viewer. The Committee to Review VADA, chaired by T. Marshall Hahn, Jr., and composed of such notable state officials as Andrew Miller, T. Edward Temple, and Robert H. Kirby, has predictably praised the successes of the PDCs:

Despite their relatively recent development, planning district commissions in Virginia appear to be well organized, are generally accepted by local governments, and are performing valuable services in the best interests of the citizens of the Commonwealth.¹⁰³

99. AREAS STUDY COMMISSION, *supra* note 9, at 25.

100. COMMITTEE TO REVIEW VADA, *supra* note 36, at 6.

101. *Id.* at 14.

102. According to Henry L. Marsh, III, in his dissenting statement to the committee report: The power of local governments to make critical governmental decisions will be surrendered to an authority-type group, unanswerable to the electorate. . . . (5) The existence of a new layer of government, far-removed from the control of the people, possessing the power to compete with existing local government is a consequence so frightening that it should not be made available as an alternative to local government. *Id.* at 24.

103. *Id.* at 2.

On the other hand, Edward G. Council, III, pointed out the "apparent contradiction"¹⁰⁴ between the above quoted paragraph and statements made at the public hearing conducted by the committee. At that meeting, according to Council:

Five of the eight PDC's represented were criticized directly and the concept [of the VADA] was in general severely questioned in the following terms:

- 1) that PDC's have not reflected or been responsive to the needs and desires of local governments;
- 2) that PDC's have not communicated well with local governments or their officials;
- 3) that PDC's in their planning efforts are ineffective and inefficient;
- 4) that PDC's are expensive and add delay to projects;
- 5) that PDC's may be the forerunners of regional governments.¹⁰⁵

It should be observed that these criticisms were formulated from comments received mainly from mayors, chairmen of boards of supervisors, county/city managers, and generally, officials who represent the views of the localities. Although from DSPCA Director Robert H. Kirby's point of view "the Planning and Service District concepts and the resulting provision of services on a regional basis are the biggest thing to happen to local government in the free world since Jamestown,"¹⁰⁶ it seems clear that these concepts have not been warmly received by the local governments themselves.

Aside from local resistance, effective planning at the regional level is curtailed by the failure of the state to set forth an explicit, coordinated land use policy.¹⁰⁷ In this context, state agencies must operate "under an umbrella of *implicitly* stated policies and procedures which are vaguely defined, contradictory, and illusive."¹⁰⁸ State land use policies and programs "are formulated in a fragmented, piecemeal fashion by most state agencies not directly involved in land use planning per se."¹⁰⁹ Furthermore, all of the state agencies which have programs with land use ramifications have a direct link to local governments, but not all such agencies deal with the PDC in the performance of their function. Of the 19 state agencies

104. *Id.* at 20.

105. *Id.* at 18.

106. *Id.* at 20.

107. RRPDC LAND USE, *supra* note 53, at 2.

108. *Id.* [emphasis in the original].

109. *Id.* at 11. The confusion was furthered by the fact that the multi-jurisdictional districts used by many state agencies did not conform to one another or to PDC boundaries. However, pursuant to Governor Holton's Executive Order 15, the DSPCA expects soon to have all such agency boundaries conforming to the 22 official PDC districts, thus simplifying coordination between state agencies. 2 ACIR, *supra* note 13, at 331-32.

having land use related programs which affected the Richmond region in 1973, only three participated on RRPDC committees. Seven had no relations whatsoever with the PDC. The relations between the PDC and the remaining agencies were based on such tenuous grounds as consideration of RRPDC plans, use of RRPDC information, or supplying information to the RRPDC.¹¹⁰ Those agencies which do have functional relationships with the PDCs also interact independently with the local jurisdictions, thus further complicating matters.

Faced with these problems, the RRPDC has described itself as an agency in search of a new role.¹¹¹ In its own assessment, its role "in land use planning activities is minimal compared to the responsibilities possessed by state agencies."¹¹² Recognizing "its land use planning limitations within the context of strong state and local governments"¹¹³ RRPDC proposes to remedy the lack of "lateral and vertical coordination between state agencies and local governments"¹¹⁴ by acting as a "coordinator and evaluator"¹¹⁵ to resolve the conflicts between the programs of various agencies and levels of government.

However, local resistance and lack of a clear state policy are not the only threats to effective regional planning. A report by the RRPDC cites changes in the federal government indicating that regional agencies may have diminished influence as a source of areawide guidance in the future.¹¹⁶ Because of a freeze on categorical grant assistance¹¹⁷ programs of the Department of Housing and Urban Development (HUD), this agency will have a declining influence on matters involving comprehensive planning at the regional level. In addition the report cites the growing influence of the Environmental Protection Agency which "advocates strong state involvement" as opposed to regional.¹¹⁸ Indeed, the overall national trend indicates an increasing federal government and state role "resulting in an encroachment on local authority over land use."¹¹⁹ From the federal

110. RRPDC LAND USE, *supra* note 53, at Appendix A.

111. *Id.* at 9.

112. *Id.* at 12.

113. *Id.* at 28.

114. *Id.*

115. *Id.* at 29.

116. *Id.* at 9.

117. Such grants concern one specific functional area (such as housing, water supply, sewage treatment, etc.) and are subject to very specific planning requirements and other conditions on the use of funds. The new policy is one of general revenue sharing with no specific requirements and no special conditions. *Id.* at 8, n.14.

118. *Id.* at 9.

119. *Id.* at 5.

perspective, there is a gap caused by increasing expectations of recent legislation assigning responsibilities to areawide organizations and the failure of state legislatures to grant authority to such organizations.¹²⁰ The resistance of local governments to the regional concept is frustrating the federal government's "expectation that national goals will be carried out in substantial coordination with other Federal, State, and local objectives."¹²¹ Perhaps the stage is set for an increasing federal role in land use planning.¹²²

It is clear that the problems and needs of the localities require the resources and coordinated efforts of all levels of government. Advocates of the regional approach believe that a regional agency with substantive powers could be an effective coordinator because of its unique ability to view local problems from an areawide perspective. Perhaps when Virginia initiates a coordinated state land use scheme the regional agency will play an integral part in its implementation.

V. WETLANDS

Among the threatened areas in Virginia are the low-lying coastal areas, the wetlands,¹ which include the marshes and beaches of Virginia's tidal rivers, the Atlantic coastline and the Chesapeake Bay. The following discussion will examine the pertinent statutory provisions regulating land use in these areas, point out some of the problems inherent in them, and suggest ways in which each may be expanded to deal more adequately with the problems of rapid development.

Virginia's adoption of the Wetlands Act² in 1972, made it one of the last eastern coastal states to enact wetlands protective legislation. The Act was the result of a 1969 report of the Virginia Institute of Marine Sciences³

120. 1 ACIR *supra* note 15, at 174.

121. *Id.*

122. "The land use bills which have been introduced in both the Senate and the House of Representatives indicate that the Nixon administration and the Congress now recognize the intolerably slow pace of the states' movement toward effective land use control." Note, *State Land Use Control, Why Pending Federal Legislation Will Help*, 25 HAST. L.J. 1165, 1195 (1974).

1. Approximately 175,000 acres of tidal marshes come within the ambit of the Virginia Wetlands Act.

2. VA. CODE ANN. §§ 62.1-13.1 to -13.20 (Cum. Supp. 1972), *as amended*, §§ 62.1-13.2 to -13.18:1 (Cum. Supp. 1974).

3. M. Wass and T. Wright, *Coastal Wetlands of Virginia* (Virginia Institute of Marine Sciences 1969) (hereinafter cited as VIMS).

emphasizing the complexity, fragility, and importance of the wetlands,⁴ and the consequences of continued indiscriminate alteration.⁵

The Wetlands Act enables each locality containing defined wetland areas to set up a local board which, with certain exceptions, is empowered to pass on all proposed uses of such land. The Act establishes a decision-making process administered through a zoning act, which the localities must adopt if they are to exercise autonomous authority,⁶ and which requires the consideration of a broad range of possible effects of wetlands alteration.⁷ The structure of the Act reveals a legislative policy choice that primary authority for wetlands protection be concentrated at the local level.⁸ The General Assembly felt that the state level approach was unacceptable,⁹ and was no doubt swayed by traditional Virginian distrust of central control and by a desire to maximize citizen participation.¹⁰ The zoning approach was used presumably because neither the state nor the localities could afford to purchase the threatened wetland areas, thus making eminent domain impractical.

Virginia's definition of wetlands, and thus the Act's delineation of those areas affected by its provisions, is a flexible combination of other approaches.¹¹ Section 62.1-13.5 (2)(e) of the Act defines wetlands as "[a]ll that land lying between and contiguous to mean low water and an elevation above mean low water equal to the factor 1.5 times the mean tide range at the site of the proposed project . . .," and upon which any one of an enumeration of grasses is growing. This approach insures adequate

4. VIMS 17-55. Some of the crucial wetlands functions in the ecological process are nutrient recycling, providing nursery areas for aquatic animals, provision of wildlife habitat, protection of upland areas and shorelines, erosion and sedimentation control, and water purification. *Id.*

5. The study showed the wetlands to be one of the most productive and vital of natural areas. For example, ninety-five percent of the annual harvest of commercial and sport fish in Virginia depends on the wetlands in some way. *Id.* at vii.

6. VA. CODE ANN. § 62.1-13.5 (Cum. Supp. 1974).

7. This will be the subject of extensive discussion, *infra*.

8. The Wetlands Zoning Ordinance is intended for adoption by the localities. VA. CODE ANN. § 62.1-13.5 (Cum. Supp. 1974).

9. The General Assembly rejected H.D. 1102-18, Va. Gen. Assem., 1970 Sess., which would have established a central state agency to regulate wetlands control. H.D.J. Res. 60, Va. Gen. Assem., 1971 Extra Sess., endorsed the local approach.

10. For a discussion of these and other factors considered in the preparation of the Act, see Brion, *Virginia Natural Resources Law and the New Virginia Wetlands Act*, 30 WASH. & LEE L. REV. 19, 44-46 (1973) [hereinafter cited as Brion].

11. Wetlands may be defined in three discrete ways: the generic description, N.J. STAT. ANN. § 13:9A-1(b) (Cum. Supp. 1975-75); by tidal range with the high water mark as the upper limit, MD. ANN. CODE art. 66c § 719 (a) (Repl. Vol. 1970); by floral definition, CONN. GEN. STAT. ANN. § 22a-29(2) (Cum. Supp. 1974-75).

coverage of all areas by responding to local tidal conditions, while avoiding the under and over-inclusiveness which results from rigid tidal limits. In addition, the floral provision insures that unimportant areas (*i.e.* those areas not involved in crucial wetlands functions)¹² will not be unnecessarily regulated.

A. STANDARDS, POLICIES AND GUIDELINES

Crucial keys to interpreting the land use policies expressed in the Wetlands Act are found in its provision for standards, policies, and guidelines. Principally these provisions highlight the areas and accent the problems with which the Wetlands Zoning Ordinance, the crux of the Wetlands Act, is intended to deal.

Section 62.1-13.1 sets out the legislative policy behind the Act. Through an enumeration of resources and problems, this section emphasizes the physical significance of the wetlands and the practical results of their indiscriminate alteration. The importance of this enumeration is that it may serve as a checklist for local boards to assess the impact of proposed development and changes in these areas.¹³ The avowed public policy of the Act is "[t]o preserve the wetlands and to prevent their despoliation and destruction and to accomodate necessary economic development in a manner consistent with wetlands preservation."¹⁴

The standards which the Act applies to the use and development of wetlands are found in section 62.1-13.3, wherein a two-tiered evaluatory scheme is set up: (1) "[w]etlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed,"¹⁵ (2) "[D]evelopment in Tidewater Virginia, to the maximum extent possible, shall be concentrated in wetlands of lesser ecological significance, in wetlands which have been irreversibly disturbed . . . and in areas . . . apart from the wetlands."¹⁶ Section 62.1-13.4 provides that the Virginia Marine Resources Commission (VMRC), with the assistance of the Virginia Institute of Marine Sciences (VIMS), must promulgate guidelines for the categorization of the various types of wetlands and probable damage resulting from any disturbance of their natural state.¹⁷

The most obvious problem presented by these policies, standards, and guidelines is that many of the terms employed in the statute remain am-

12. See note 4 *supra*.

13. Brion at 48.

14. VA. CODE ANN. § 62.1-13.1 (Repl. Vol. 1973).

15. *Id.* § 62.1-13.3(1).

16. *Id.* § 62.1-13.3(2).

17. For a discussion of the organization and function of VMRC, see Section VII G, *infra*.

biguous and undefined.¹⁸ It is not at all clear whether these standards are scientific or legislative in nature, or if they are mere generalities. Although the resolution of these questions must await judicial interpretation and the development of administrative practice, the standards do show that development is not per se prohibited. While section 62.1-13.1 ostensibly embodies a presumption that development will not be permitted without a compelling reason and that wetlands of primary ecological significance¹⁹ may not be unreasonably disturbed, apparently development will take precedence in wetlands not enjoying that classification (*i.e.* wetlands of lesser ecological significance may be disturbed). In addition, the provision that wetlands of primary ecological significance may not be unreasonably disturbed does evidence a legislative intent that the Act not prohibit all development in these areas. The determination of what is reasonable lies at the heart of the Wetlands Act, and its resolution is the chief regulatory function to be performed by local boards. Ultimately the answer depends on balancing the ecological and scientific value of the wetlands against the social and economic value of the proposed alterations.

Another rather obvious problem with the expressed standards of the Act is that the decision-making framework or regulatory function requires a scientific judgment. In spite of this, the Act provides only definitions and VMRC-VIMS guidelines to assist the localities, with no other process by which technical assistance can be obtained. Wetlands local boards will in many cases be unable, or at least unwilling, to provide the sums necessary to obtain this expensive and indispensable assistance; thus important decisions may turn on an inadequate factual basis. Additionally, the Act does not provide that these guidelines be adopted in the manner of administrative rule making, thus making it unclear whether the legislature even intended that the guidelines be binding on the local wetlands boards. Clearly this aggravates the aforementioned problems.

The foregoing standards, policies and guidelines, and the considerations involved in their interpretation set out the crucial question of wetlands development: what is necessary economic development and to what extent will it be accommodated? The decision-making process set out in the Wetlands Zoning Ordinance is to provide the answer to this question, and, as seen in the general provisions of the Wetlands Act, an analysis of the

18. These terms and their ostensible definitions will be the subject of extensive discussion, *infra*.

19. The sole reasonable definition of "wetlands of primary ecological significance" which can be found within the Act is those wetlands fitting the statutory definition and whose alteration would yield the disastrous results set out in section one of the Act. VA. CODE ANN. § 62.1-13.1 (Repl. Vol. 1973).

ordinance again turns on a definition of terms. Whether the zoning ordinance, the crux of the Wetlands Act, adequately handles these problems is, at this point in time, a matter of speculation.

B. THE WETLANDS ZONING ORDINANCE²⁰

In an uncharacteristic departure from established practice²¹ the Virginia General Assembly set forth a complete local ordinance regulating wetlands which a locality must adopt verbatim if it chooses to exercise regulatory authority over the wetlands in its jurisdiction.²² Because the ordinance is dictated and the localities are unable to vary either the area which it embraces or the standards by which its terms will be applied, the activities of the localities are administrative rather than legislative.

The ordinance expressly excepts certain non-commercial private uses,²³ commercial harvesting activities, and governmental uses from compliance with its terms.²⁴ The applicant whose use is not excepted must file an application for approval setting forth the public benefit to be derived from the project and the steps he expects to take to reduce deleterious external effects.²⁵ In addition, the application must be made a matter of public record,²⁶ and adjoining land owners must be notified.²⁷ The board must hear the applicant within sixty days, and render a decision within thirty days thereafter or approval is automatic.²⁸ These steps insure compliance

20. VA. CODE ANN. § 62.1-13.5 (Cum. Supp. 1974).

21. This constitutes a significant departure from Virginia zoning and land use statutes which traditionally provide only general standards and guidelines for localities to follow in enacting their own zoning ordinances. The manifest purpose for such a change is to promote uniformity in wetlands control. See, e.g., Virginia Zoning Enabling Act, VA. CODE ANN. § 15.1-486 (Repl. Vol. 1973).

22. Failure to so adopt will vest absolute regulatory authority in VMRC. VA. CODE ANN. § 62.1-13.5 (Cum. Supp. 1974).

23. Private uses such as piers, boathouses and duckblinds are excepted provided they are open pile, permit a reasonably unobstructed flow of the tide, and preserve the natural contour of the marsh. VA. CODE ANN. § 62.1-13.5 § 3 (Cum. Supp. 1974).

24. *Id.* These exceptions are necessary for two reasons: (1) to avoid the constitutional challenge of interference with private property rights; (2) to avoid the deluge of permit applications which any other policy would precipitate.

25. VA. CODE ANN. § 62.1-13.5 § 4 (Cum. Supp. 1974).

26. *Id.* § 4 and § 5.

27. *Id.* § 6 (Repl. Vol. 1973).

28. *Id.* § 7 (Repl. Vol. 1973). This provision apparently resulted from testimony at the wetlands hearings as to the lengthy waiting periods inflicted by the Army Corps of Engineers for uses below mean low water. Brion, *supra* note 10, at 46 n.123. For a discussion of the various permits required and the procedures followed to obtain them, see APPENDIX, D 3 b, *infra*.

with constitutional due process as a valid exercise of the state's police power.²⁹

How, then, does the local wetlands board decide whether to grant or refuse a use permit? The answer to this question is found in section 9(b) of the Zoning Ordinance:

If the board, in applying the standards above, finds that the anticipated public and private benefit of the proposed activity exceeds the anticipated public and private detriment and that the proposed activity would not violate or tend to violate the purposes and intent . . . [of this Act], the board shall grant the permit, subject to any reasonable condition or modification designed to minimize the impact of the activity on the ability of this . . . [locality] to provide governmental services and on the rights of any other person and to carry out the public policy set forth in . . . [this Act].

Will development be allowed to take place in wetlands of primary ecological significance, or will the apparent presumption found in section 62.1-13.1 (*i.e.*, that development will not be permitted unless there is compelling reason to do so) be overcome? In order to understand the above provision as it relates to these key issues an examination of the factors which wetlands boards may consider is in order.

Three factors are of significant importance in the wetlands board's consideration: (1) the "accommodation of necessary economic development" provision set forth in section 62.1-13.1; (2) the implied policy of constitutional fairness: wetlands regulation should not involve unnecessary interference with private property rights; and (3) the balancing of public and private benefit and detriment set out in the ordinance.

The "accommodation of necessary economic development" has two possible meanings. Arguably the legislature may have intended the accommodation of industries displaying a high degree of economic efficiency.³⁰ Since the developer is usually heavily armed with concentrated analyses of the benefits of his proposal, while the harm which may result will be suffered cumulatively to the detriment of countless entities without organization and without ready access to fact gathering processes, such an interpretation would be weighted heavily in favor of the developer. This is clearly contrary to the overall tenor and expressed goal of the Act. The more likely meaning of this provision is that the locality may be faced with a situation where, for example, unemployment is high, the proposed development will greatly alleviate this problem, and although the wetland on which it is

29. See note 31 *infra*.

30. While the term "economic efficiency" is self explanatory to a certain degree, many considerations are involved. See Brion, *supra* note 10, at 59 n.165.

built will be destroyed, the far reaching effect of the alteration will not be severe. Under these circumstances this language would condone such a trade-off as acceptable. It is *not* apparent that the legislature intended by this language alone to accomodate extensive and highly damaging heavy industry (e.g., oil exploration) on the basis of its utility, since such an interpretation would make the consideration of a wide range of factors, a key aspect of the Zoning Ordinance, unnecessary.

The second of the factors which wetlands boards may consider in their decision, the implied policy of constitutional fairness, is, while rather diffused, crucial to an understanding of the functioning of the zoning ordinance. The ordinance provides for what can best be characterized as an impact study on all private individuals who may be affected by the proposed use. This approach is more constitutionally palatable since it places the burden of local development, or the refusal thereof, upon a broad section of the community rather than a few individuals.³¹ This is achieved by the requirement that all entities be allowed to participate,³² and that the broad criteria of balancing public and private benefit and detriment be employed.³³ This treatment opens the inquiry to the broadest possible range of factors from all segments of the affected area (a function quite similar to the environmental impact statement), thus minimizing the tendency to fix upon the readily available benefit analyses mentioned above. The clear implication is that the local board should be receptive to relevant factors from all quarters, and that its decision must reflect a fair consideration of each, without deference to highly organized and compacted pro-development expertise.

The final and perhaps most important of the factors which local wetlands boards may consider is the balancing of public and private benefit and detriment expressed in section 9(b) of the zoning ordinance. This language is unique in these Virginia statutes,³⁴ and on that basis alone perhaps evidences an intent on the part of the legislature that traditional

31. Significantly, the decisions finding constitutional difficulties with wetlands acts have found too much concentration of economic burden on a few people to advance the public welfare as a whole. See, e.g., *State v. Johnson*, 265 A.2d 711 (Me. 1970). *Contra*, *Candlestick Prop. Inc. v. San Francisco Bay Conservation and Dev. Comm'n*, 11 Cal. 3d 557, 89 Cal. Rptr. 897 (1970). For an exhaustive survey of the constitutional problems with wetlands legislation see Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876 (1972).

32. See VA. CODE ANN. §§ 62.1-13.2(c), 62.1-13.5 § 2(c) (Cum. Supp. 1974).

33. VA. CODE ANN. § 62.1-13.5 (b) (Repl. Vol. 1973).

34. Usually the expression "public health, safety, and welfare" is employed. See, e.g., VA. CODE ANN. § 15.1-489 (Repl. Vol. 1973) (zoning); VA. CODE ANN. § 62.1-44.2 (Repl. Vol. 1973) (water pollution control).

norms be discarded in interpreting it. Section 9(b) sets out three matters which are relevant in the interpretation of the Act. These matters are: (1) the minimization of the impact of the proposed activity on the ability of the locality to provide governmental services (*i.e.* growth control); (2) protection of the rights of persons affected by the proposed use; and (3) insured adherence to the basic public policy of the Act.

The minimization of the impact of the proposed activity on the ability of the locality to provide governmental services focuses the inquiry upon the net economic benefits of the proposal as measured by its tax revenue consequences. If the proposed development will generate more demand for services than tax revenues to pay for them, this provision exposes such a plan and presumably allows severe restriction thereof through conditional approval or rejection.

The provision for the minimization of the impact of the new development on the rights of any person embraces the question of standing, and includes the broad statutory definition of "person" found in the Act and in the Zoning Ordinance.³⁵ However, there is no statutory definition of rights or words limiting rights, and the presumption is strong that the "injury-in-fact" test developed by the United States Supreme Court in similar cases³⁶ is intended to apply. Thus, tortious and economic injury as well as injury to property is included. This interpretation is consistent with the implied policy of constitutional fairness discussed above, and the implication is clear that a vast range of private rights which may potentially be harmed by the proposed development should be considered in any decision by a wetlands board.

The final matter expressed as relevant to the balancing of public and private benefit and detriment is the importance of carrying out the public policy of the Act. Presumably this means two things. First, that the specific types of direct injury set forth in the policy section of the Act³⁷ are to be avoided if at all possible. Secondly, so long as the injury is expressed as a specific, direct effect on individuals and not just on the general public welfare, then any injury is relevant to the inquiry. This provision under-

35. VA. CODE ANN. §§ 62.1-13.2(c), 62.1-13.5 § 2 (c) (Cum. Supp. 1974). These entities include any corporation, association, partnership, one or more individuals, or any unit of government or agency thereof. *Id.*

36. *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The cases require that for the constitutional requirement of standing under Article III of the Constitution the aggrieved parties need only fall within the "zone of interests" sought to be protected, *e.g.*, economic injury. *See also*, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

37. VA. CODE ANN. § 62.1-13.1 (Repl. Vol. 1973).

scores the premium placed on wetlands preservation, the accommodation of private rights by the Wetlands Act, and the intent of the legislature that proposed wetlands alteration be given intensive scrutiny.

In summary, the wetlands decisional process is two-tiered. First the Act asks whether the wetlands involved are of lesser ecological significance or are already irretrievably altered. If so, development will presumably be approved of, since such a condition would not justify an exercise of the police power to rehabilitate them. If the wetland in question is of primary ecological significance the Act requires that the development be reasonable. In answering this question the board must balance public and private benefit and detriment considering all interests and effects to the greatest extent possible. The inescapable conclusion is that the accommodation of necessary economic development is to be of *secondary importance*, that the wetlands are to be protected and that indiscriminate alteration must end. This result is justified by the urgent need to preserve the crucial wetlands functions.³⁸

C. REVIEW AND APPEAL

The Wetlands Act provides that an appeal may be sought by VMRC on its own initiative, by the applicant, by the locality, or by any twenty-five freeholders in the locality.³⁹ The standards on which the review is based are two: (1) does the decision adequately achieve the ends of the Act; (2) is it *ultra vires*, unconstitutional, arbitrary or capricious?⁴⁰

These standards for review are mandatory, and unlike the discretionary language found in the General Administrative Agencies Act,⁴¹ the Wetlands Act provides that the Commission shall modify, reverse or remand the case if they are not met. This mandatory language gives VMRC a broadly based tool by which it can insure that the intent of the legislature is carried out in the administrative decisions of the local boards and that the application of the Act will be uniform (thus avoiding constitutional issues of arbitrariness and capriciousness). Perhaps an even more important consideration is that these provisions give VMRC power to minimize the effect of local arm twisting and back scratching.

D. ANALYSIS AND CONCLUSION

While the Virginia Wetlands Act reveals a suitable concern for the pro-

38. See note 4 *supra*.

39. VA. CODE ANN. § 62.1-13.10,11 (Repl. Vol. 1973).

40. VA. CODE ANN. § 62.1-13.13 (Repl. Vol. 1973).

41. "The court may affirm . . ." VA. CODE ANN. § 9-6.13(g) (Repl. Vol. 1973).

tection of private property rights, the accommodation of absolutely essential economic development, and, above all, the importance of protection of the wetlands and the preservation of its vital ecological systems, there are three problem areas which require further elaboration and study.

The first is the extreme degree of decentralization of authority which the Act embraces. While placing the responsibility for ecological protection on the individual citizenry and relying on the affected populace to counterbalance the intense political and economic pressure to develop is a worthy scheme by traditional democratic standards, a crucial ecological area is thereby jeopardized to a degree which, when thrown into the balance, far outweighs the potential benefits of such a method. Can the public adequately protect itself in such a manner? It is submitted that the answer is almost certainly in the negative. If the direct participation of VMRC cannot be initiated, then at least some method of constant monitoring of wetlands development employing more intense scrutiny than the self-initiated appeals provision should be implemented. Closely related to this proposal is the need for coordination of wetlands development control. Research has demonstrated that ecosystems do not function in a vacuum, and that a cause may yield an ecological effect at a great distance, both geographically and biologically. In spite of this problem the Wetlands Act provides for decisions on a local level, without attention to what may be happening in other parts of Tidewater Virginia or even in the next county. It is submitted that these considerations outweigh the merits of marked decentralization and require regional agencies, or perhaps a central wetlands board.

The second problem area is the passive role played by VIMS. The institute is to develop guidelines only,⁴² and, as shown above, it is not clear that even these must be adopted by the localities. The decisional process in the Act calls for considerable scientific judgment in addition to the consideration of practical effects. In so crucial an area the availability of scientific expertise is highly desirable, and some means of expanding the role of VIMS, should be implemented⁴³ to offset the natural tendency of the opponents of wetlands development to be less organized and less financially able to afford expert assistance than the prospective developer.

Finally, it is strongly urged that the Wetlands Act be expanded to control the extensive and virtually rampant development of second home waterfront recreational sites. Virginia's wealth of tidal rivers and water-

42. VA. CODE ANN. § 62.1-13.4 (Repl. Vol. 1973).

43. The Act does provide that the locality must supply to the wetlands board consulting services as may be needed. VA. CODE ANN. § 62.1-13.8 (Repl. Vol. 1973). But it is unlikely that local budgets would be able to accommodate more than limited assistance.

front property has made her acutely susceptible to this growing problem. The definition of wetlands found in the Act⁴⁴ already embraces the beaches on which these developments are taking place, and thus requires no further expansion. However, it is suggested that the definition of wetlands proposed in the 1970 bill be incorporated into the present definition, so as to protect land contiguous to the Wetlands areas. That definition provided:

“Coastal wetlands” shall mean any bank, marsh, swamp, flats, beach, or submerged shallow between the vertical bounds of mean higher high water and mean lower water *and such contiguous lands* and water as the Commission of Marine Resources reasonably deems necessary to insure the physical stability of the wetland, adequate quality of the water and adjacent bottoms and the wellbeing of its fauna and flora.⁴⁵ [emphasis added]

The inclusion of these lands within the natural watershed and the expansion of participation by VMRC, would give that body the authority to control second-home development by declaring certain higher grounds upon which such development would take place contiguous lands crucial to the stability of the wetlands. Such a decision would place approval of these developments before wetlands boards and subject to the present VMRC review or preferably the proposed direct administration. The control of these developments must be initiated to avoid disruption of wildlife habitats and fouling of the marine environment which will inevitably result from recreational crowding.

The Wetlands Act is a welcome response to a pressing need in Virginia. Judicial decision and the development of administrative practice will answer the question of whether it is indeed an adequate one. While the Act may adequately dispose of the bulk of present wetlands development problems, as expansion becomes more pronounced, it is submitted that the suggested changes will yield an act more responsive to the attendant realities and thereby insure the continued existence of these ecologically strategic areas.

VI. STATE ACTIVITIES TANGENTIALLY AFFECTING LAND USE

No agency in Virginia is specifically authorized or directed to perform land use functions, so in a sense all state activity which affects land use is tangential to some other main purpose. However, a number of state agencies exist primarily to serve environmental ends and in that sense may be said to directly affect land use. On the other hand, the State Board of Housing, Department of Highways and Transportation, and the State Cor-

44. VA. CODE ANN. § 62.1-13.2 (f) (Cum. Supp. 1974).

45. H.D. 1116, Va. Gen. Assem., 1970 Sess.

poration Commission perform functions and exercise control in areas which can only be said to affect land use tangentially.

A. BUILDING AND HOUSING CODES

1. *Building Codes and the Virginia Uniform Statewide Building Code*

Regulations governing building construction are as ancient as the Hammurabi Code (2100 B.C.) and address such problems as fire hazards, building collapse and health conditions.¹ As distinguished from housing codes, building codes regulate new construction by setting structural standards.² Building codes have so long been a function of local government that they are often defined only in terms of local ordinances.³ The justification for this reposal of power in municipalities is based on the theory that citizen protection is the responsibility of the lowest level of government.⁴ Local codes also permit allowances for characteristics peculiar to the locality. However, where local codes are permitted a lack of uniformity among jurisdictions results which can hamper the efficiency of the construction industry.

Building codes which have uniform statewide application permit builders to adopt standardized construction procedures and are particularly helpful in promoting industrialized housing,⁵ but are somewhat inflexible and tend to discourage new methods and products.⁶ Whether uniform or local codes are most satisfactory for a particular state may depend on the degree of geographical and climatic diversity in the state and the state's goals with respect to new construction. Either type of code can be used as a land use tool to influence growth and in time to alter the character of a community.⁷ This can be accomplished by favoring one use over another or by making the code so strict that industries find the area unattractive and seek other locations, thereby hampering growth.⁸

1. Thompson, *Preparation and Revision of Building Codes*, in *URBAN LAND USE POLICY: THE CENTRAL CITY* 133 (R. Andrews ed. 1972).

2. Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 *U. CHI. L. REV.* 180, 182 n.9 (1963).

3. See Sussna, *Building Codes and Housing Codes*, 45 *CONN. B.J.* 401 (1971). Sussna defines a building code as "a locally adopted ordinance enforceable by the police powers controlling the design, construction, alteration, repair, quality of materials, and related factors of any structure within its jurisdiction." *Id.*

4. Note, *Building Codes: Reducing Diversity and Facilitating the Amending Process*, 5 *HARV. J. LEGIS.* 587, 596 (1968).

5. Sussna, *supra* note 3, at 402.

6. See Rivkin, *Courting Change: Using Litigation to Reform Local Building Codes*, 26 *RUTGERS L. REV.* 774, 782 (1973).

7. Thompson, *supra* note 1, at 136.

8. *Id.*

Virginia has chosen to adopt a uniform code which has statewide application and in furtherance of that decision the Virginia General Assembly, in 1972, created the Office of Housing⁹ and within it the State Board of Housing.¹⁰ The Board was directed to adopt a Uniform Statewide Building Code which would supersede any existing state or local regulations and building codes.¹¹ The Board "selected a nationally recognized, performance oriented code . . . [based on] the model code of Building Officials and Code Administrators, International, Inc. (BOCA) . . ."¹² Being a performance oriented rather than specifications oriented code, its emphasis is on functional aspects rather than specific materials, *i.e.*, whether a building will withstand certain heat, stress, weight, etc., rather than whether it is constructed of materials of specified dimensions or quality.¹³

With a few exceptions,¹⁴ the Code applies to "the construction, alteration, addition, repair, removal, demolition, use, location and occupancy and maintenance of all buildings and structures . . . in the State of Virginia . . ."¹⁵ It does not override any local zoning ordinances or provisions of the Code of Virginia,¹⁶ or any regulations pertaining to mobile homes or industrial housing prescribed by the State Corporation Commission.¹⁷ Historic buildings are not exempt *per se*, but do receive special consideration and need not comply with the Code's provisions if found to be safe by a building official.¹⁸

9. Va. Acts of Assembly 1972, ch. 559, at 649-50.

10. *Id.* at 651-52.

11. VA. CODE ANN. § 36-98 (Cum. Supp. 1974).

12. VA. UNIFORM STATEWIDE BUILDING CODE 1 (Accum. Supp. 1974) [hereinafter cited as VUSBC].

13. See Note, *supra* note 4, at 604. For example, a specifications code might require that wood of a minimum grade and thickness be used for floor material and supports, whereas a performance code would generally require that the floor be able to support a certain amount of weight. *Id.* at 604 n.84.

14. A building could remain under existing regulations if a building permit had been obtained for it, it was in existence or under construction, or if "working drawings [had] been prepared in the year . . . prior to the effective date of the Building Code . . ."¹⁵ VA. CODE ANN. § 36-103 (Cum. Supp. 1974); VUSBC § 105.1 (1970), *as amended*, (Accum. Supp. 1974).

15. VUSBC § 100.1 (1970), *as amended*, (Accum. Supp. 1974).

16. *Id.* § 200.2. This seems to be both a wise and necessary policy. The Uniform Statewide Building Code exists by mandate of the General Assembly and the General Assembly should not be subservient to it. Zoning ordinances permit local governing bodies to exercise some control over the pattern and extent of growth in their respective jurisdictions. Since a certain amount of land use control was removed from the localities when the Uniform Statewide Building Code was adopted, permitting the Code to override local zoning ordinances might remove too much control from the local governing bodies. The present policy seems to strike a better balance.

17. VA. CODE ANN. § 36-119 (Cum. Supp. 1974); VUSBC § 425.0 (Accum. Supp. 1974); see VA. CODE ANN. § 36-73 (Cum. Supp. 1974).

18. VUSBC § 318.0 (Accum. Supp. 1974). The provisions of the Code are currently accu-

A grandfather clause excluding buildings already in existence when the Code became effective¹⁹ is only partially applicable if such buildings are later repaired or altered. If alterations²⁰ or repairs exceed fifty per cent of the building's physical value prior to the alterations or repairs, they must comply fully with the Code.²¹ If the repairs or alterations are between twenty-five and fifty per cent it is left to the building official's discretion as to what extent the repairs or alterations must meet Code requirements.²² Repairs or alterations less than twenty-five per cent need not comply with the Code as long as the structure is safe.²³ The grandfather clause is also inapplicable if the building's floor area or number of stories is increased,²⁴ or if its occupancy or use is changed.²⁵

When the Code became effective on September 1, 1973, approximately fifty Virginia localities had no building codes at all. Forty-two localities which already had building codes were given extensions during which they could remain under their old codes.²⁶ There are currently only nine localities not under the Code and they must comply by September 1, 1975.²⁷

Although the Code itself is uniform throughout Virginia, its enforcement is strictly a local matter for which each municipality's building department is responsible.²⁸ Appeals from decisions of building officials are heard by local boards of appeal.²⁹ Further appeal is permitted to the State Build-

ulated in ten pamphlets: BOCA Basic Building Code 1970, BOCA Basic Building Code Accumulative Supplement 1973, BOCA Basic Mechanical Code 1971, BOCA Basic Plumbing Code 1970, BOCA Basic Plumbing Code Accumulative Supplement 1972, One and Two Family Dwelling Code 1971, One and Two Family Dwelling Code Accumulative Supplement 1973, National Electric Code 1971, Electrical Code for One and Two Family Dwellings and Virginia Administrative Amendments 1973 Edition (merged with the 1974 Accumulative Supplement), *Id.* at 3.

19. See note 14, *supra*.

20. In determining what percentage of a building has been altered, all alterations within a twelve month period are considered. VUSBC § 106.1 (1970).

21. *Id.* §§ 106.0-106.2.

22. *Id.* § 106.3.

23. *Id.* § 106.4.

24. *Id.* § 106.5.

25. *Id.* § 106.6.

26. See VA. CODE ANN. § 36-101 (Cum. Supp. 1974); VUSBC at 37 (Accum. Supp. 1974).

27. Telephone interview with Mr. Edward A. Ragland, Executive Director of the Office of Housing, Richmond, Virginia, January 6, 1975.

28. VA. CODE ANN. § 36-105 (Cum. Supp. 1974). If a locality has no building department "the local governing body [must] enter into an agreement with the local governing body of another county or municipality or with some other agency, or a State agency approved by the State Board, for [code] enforcement." *Id.* Violation of the Code is a misdemeanor carrying a fine of up to one thousand dollars. VA. CODE ANN. § 36-106 (Cum. Supp. 1974), as amended, VA. CODE ANN. § 36-106 (effective June 1, 1975).

29. VUSBC § 127.1 (1970). "Application for appeal may be made when it is claimed that:

ing Code Technical Review Board.³⁰ Appeal from decisions of the Review Board is to the Supreme Court of Virginia.³¹ Local enforcement has not been a problem in large jurisdictions but in small towns and rural counties where no code previously existed, assistance is needed and the Office of Housing hopes to initiate training programs for local building inspectors. There is also the possibility that some local building officials might intentionally refuse to enforce the Code. The Code does not provide a remedy for such a situation and apparently mandamus would be the only recourse.

The Code's basic contribution to land use is its prohibition against using land for the erection of shoddy or unsafe buildings. Uses which may have been acceptable under local codes or in municipalities where no code existed at all, may disappear under the Uniform Code because compliance with its standards makes construction economically infeasible. In addition to this general effect, the Code's provision for fire district subdivisions excludes various uses from certain areas. There are two classes of fire district subdivisions and a designation for areas not within a fire district, *e.g.*, fire district one, fire district two and outside fire limits.³² All three areas are subject to some regulations, but in fire district one, which is basically comprised of congested industrial and business uses,³³ high hazard uses are completely excluded unless approved by the local governing body.³⁴ Since small to moderate size cities and towns will generally have only one fire district (to which fire district one restrictions would apply),³⁵ such a city or town would probably exercise its authority to permit high hazard uses in that fire district.

In response to the energy crisis, the Virginia General Assembly has directed the State Board of Housing "to promulgate insulation standards . . . for possible inclusion in . . . [the] Uniform Statewide Building Code."³⁶ The Board's report to the Governor and General Assembly³⁷ indi-

the true intent of the Basic Code . . . [has] been incorrectly interpreted, the provisions of the Basic Code do not fully apply, or an equally good or better form of construction can be used." *Id.*

30. VA. CODE ANN. § 36-114 (Cum. Supp. 1974); VUSBC § 127.6 (Accum. Supp. 1974). A person, though not a party to the decision of the board of appeals, may appeal to the State Building Code Technical Review Board if aggrieved by the decision. VUSBC § 127.6 (Accum. Supp. 1974).

31. VA. CODE ANN. § 36-116 (Cum. Supp. 1974); VUSBC § 127.7 (Accum. Supp. 1974).

32. VUSBC §§ 301.1-.3 (1970), *as amended*, (Accum. Supp. 1974).

33. *Id.* § 301.1.

34. *Id.* § 302.3 (1970). A high hazard use includes buildings "used for the storage, manufacture or processing of highly combustible or explosive products or materials . . . which may produce poisonous fumes or explosions . . ." *Id.* § 203.0.

35. *Id.* § 301.0, Note A.

36. See Va. H.D.J. Res. 131, in REPORT OF THE STATE BOARD OF HOUSING 3 (1974).

37. REPORT OF THE STATE BOARD OF HOUSING 4 (1974).

cated that the Board is reviewing *Design and Evaluation Criteria for Energy Conservation in New Buildings* (a National Bureau of Standards publication), and is going to work with the National Conference of States on Building Codes and Standards to develop a national standard. Extensive research is being done in this area on the national level and the State Board of Housing does not intend to promulgate standards for Virginia until a national standard is developed.³⁸

Whether the BOCA Code is an improvement over other building codes is open to question and some Virginia localities would have preferred the Southern Standard Building Code. The important aspect of the Code is its statewide application which eliminates diversity and assures that all localities have adequate building standards. Substantively the Code seems to be an acceptable standard for Virginia. Procedurally, either the General Assembly or the State Board of Housing should adopt some method for insuring that local officials properly enforce the Code. If the Office of Housing is exercising supervisory controls informally this should be codified so that an individual will have some recourse other than mandamus if he feels that the Code's standards are not being enforced. The appeal procedure seems to be adequate, but is of no assistance in the situation where Code provisions are being ignored by both the builder and local building official.

2. *Housing Codes*

Housing codes are related to building codes but address a different area, *i.e.*, the fitness of a building for occupancy.³⁹ There is some overlapping, of course, but a housing code affects structural aspects only to the extent necessary to insure that minimum standards are maintained.⁴⁰ Housing codes are not common in Virginia; Richmond is one of the few jurisdictions which has one.⁴¹ Richmond's housing code covers both residential housing⁴² and nonresidential accessory structures.⁴³

Richmond has made dramatic use of its housing code to obtain federal aid in rehabilitating portions of its southside.⁴⁴ This federal aid was made

38. *Id.*

39. See Comment, *supra* note 2.

40. *Id.*

41. Housing codes are not a function of the state in Virginia and are covered here only because they are so closely related to building codes.

42. RICHMOND, VA. CODE §§ 24-1 to -49 (1968), *as amended*, RICHMOND, VA. CODE §§ 24-1 to -49 (Supp. 1969).

43. *Id.* §§ 20-39 to -49 (Supp. 1969).

44. Bryan, *Concentrated Code Enforcement*, 27 J. OF HOUSING 300, 311-12 (1970).

available under a 1965 amendment to the Housing Act of 1949,⁴⁵ which provides for such aid to communities to help pay for the cost of code enforcement and certain public improvements.⁴⁶ Code enforcement worked well in south Richmond. While homes were brought up to code standards, the city planned public improvements totalling approximately \$1,050,262, two-thirds of which was paid by the federal government.⁴⁷ In addition, the city on its own improved underground utility installations and streets bordering the federally funded project area, and the Redevelopment and Housing Authority made public improvements on abutting lands.⁴⁸ Ostensibly, the enforcement of housing codes is a viable alternative to urban renewal in areas which have not reached a stage of severe deterioration.

Housing codes are also a desirable means of maintaining quality housing. A housing code has recently been proposed for Henrico County to attain that goal. The proposal grew out of efforts to conform the county's zoning ordinance to its land use plan.⁴⁹ Perhaps this is a recognition of the fact that an effective land use plan must coordinate a number of different areas. Building standards are an integral part of the overall plan and can only increase in importance as housing becomes more critical. The Uniform Statewide Building Code is a step in the right direction, but unless standards are maintained after construction, deterioration is the ultimate result.

B. DEPARTMENT OF HIGHWAYS AND TRANSPORTATION

As the body designated by law to locate and establish state highways,⁵⁰ the State Highway and Transportation Commission⁵¹ has a significant effect on land use. The taking of land by condemnation, in and of itself puts land to a new use, apart from any effect which the highway has. But the highway is the important factor, especially with respect to development patterns.⁵² In fact street patterns and land use are so interrelated that

45. 42 U.S.C.A. § 1468 (1969), *as amended*, 42 U.S.C.A. § 1468 (Cum. Supp. 1975).

46. Bryan, *supra* note 44, at 300. The legislation stemmed from a "concern for greater use of code enforcement and rehabilitation to minimize the need for demolition and clearance in urban renewal." H.R. REP. NO. 365, 89th Cong., 1st Sess., in U.S. CODE CONG. & AD. NEWS 2641.

47. Bryan, *supra* note 44, at 312.

48. *Id.*

49. Richmond Times-Dispatch, Jan. 26, 1975, § D, at 1, col. 4.

50. VA. CODE ANN. § 33.1-12(1) (Cum. Supp. 1974).

51. The State Highway and Transportation Commission and the Department of Highways and Transportation are both generally referred to as the Highway Department and that designation will be used in the remainder of this section except where distinction is important.

52. S. MAKIELSKI, JR., LOCAL PLANNING IN VIRGINIA: DEVELOPMENT, POLITICS AND PROSPECTS

there is disagreement over whether the land use results from the street patterns or vice versa.⁵³

In a very broad sense, highways tend to economically integrate a region more than any other mode of transportation, generally increasing demand for the area's services and products.⁵⁴ The highway's greatest influence on land use is probably in an interchange area. This is due to the large amount of acreage required for the interchange itself and to the intense development in interchange areas. Historically the interchange has been a focal point and therefore thought to be most valuable for commercial development. This great pressure for commercial use has caused many planners to lose sight of the primary function of the interchange—to carry traffic from one road to another as part of a transportation system. Once an interchange becomes clogged with local traffic because of the surrounding commercial use, it no longer serves its primary function.

Basically, there are only three appropriate land uses for an interchange area; those requiring convenient freeway access, those significantly benefiting interchange traffic, and in some cases those uses which are aesthetically pleasing, such as rest areas, golf courses and forest preserves.⁵⁵ Whether or not the land surrounding an interchange is put to an appropriate use depends upon such factors as the area's land market, planning objectives, pattern of land use and the location of the interchange and type of traffic using it.⁵⁶ With so many factors to consider, problems are inevitable unless great care is taken in planning interchanges and use of the surrounding land.⁵⁷

The problems are often the result of zoning too much land around an interchange for commercial or industrial use when there is already sufficient acreage for such uses elsewhere.⁵⁸ There may also be an actual conflict between the community's land use and that of the interchange, as where an industrial trucking area develops in the interchange area while the community is undergoing substantial residential expansion.⁵⁹ More

37, 38 (1969).

53. *Id.* at 37.

54. G. KRAFT, J. MEYER & J. VALETTE, *THE ROLE OF TRANSPORTATION IN REGIONAL ECONOMIC DEVELOPMENT* 40 (1971).

55. BARTON-ASCHMAN ASSOCIATES, *HIGHWAY AND LAND-USE RELATIONSHIPS IN INTERCHANGE AREAS* 28 (1968).

56. *Id.* at 32.

57. Dale City, Virginia, has experienced one such problem where two large shopping centers are dependent on one inadequate interchange. *REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL ON LAND USE POLICIES* 33 (1974) [hereinafter cited as VALC REPORT].

58. BARTON-ASCHMAN ASSOCIATES, *supra* note 55, at 13.

59. *Id.*

significantly, a community may waste land in the interchange area by poor planning.⁶⁰ This lack of foresight, in extreme cases, may result in an interchange area whose major features are hot dog stands and junkyards.⁶¹ This sort of loss prevents the interchange from ever being put to its fullest use and adversely affects the state as well as the local community.⁶²

With few exceptions, the Highway Department has little responsibility for surrounding land once a highway has been constructed, and a great burden is upon the local governing body to prevent some of the problems which have been mentioned. On the other hand, the Highway Department must decide where a highway will go and the factors considered in this decision can be important. In spite of the great land use effect which highways have, until recently highway planning had been based almost exclusively on demand forecasting with only slight consideration given to any other factors.⁶³ Although environmental and economic factors are now given greater weight, demand is still a key factor because the Highway Department is understandably reluctant to construct a new highway unless it feels that there is a need for it.⁶⁴ To adequately evaluate need, the Department studies trip patterns, population and other highway use factors in a given area and works closely with local policy committees. In planning where and what size highways are needed, the Department must consider not only the present needs of an area, but also the additional needs which will be generated by the new highway, and attempt to provide for them. It is easy to see how this can spiral, with each factor increasing the need for the other.

The Highway Department also considers local needs in setting standards for acceptance of roads into the secondary system of highways.⁶⁵ These standards were not codified until 1968,⁶⁶ but the Department had had a

60. *Id.*

61. *Id.* at 14.

62. *Id.*

63. A. HOWARD, L. GROSENICK, D. BARNES & J. MASHAW, VIRGINIA'S URBAN CORRIDOR, A PRELIMINARY INQUIRY 144 (1970).

64. See MAKIELSKI, *supra* note 52, at 37.

65. The streets must be at least forty feet wide, the county must recommend in writing to the Highway Department that such streets be accepted into the secondary system and the county must agree "to contribute from county revenue one half of the cost to bring the streets up to the necessary minimum standards for acceptance." VA. CODE ANN. § 33.1-72(c) (Cum. Supp. 1974). The streets must also have been "shown on a plat which was recorded prior to July one, nineteen hundred fifty-eight, at which time it was open to and used by motor vehicles, and which, for any reason, has not been taken into the secondary system of State highways and has on it at least three families per mile." *Id.* § 33.1-72(a) (Repl. Vol. 1970).

66. Va. Acts of Assembly 1968, ch. 601, at 905-06.

similar policy since July 1, 1964.⁶⁷ This policy was found to be necessary because there had been subdivision development in counties where no subdivision control ordinance existed, resulting in substandard roads which were unacceptable to the Highway Department and thus would not be maintained by it.⁶⁸ The subdivision residents found that they could not afford to maintain the streets, and the resulting deterioration caused the value of the lots and homes in the development to decline.⁶⁹ The Department's policy was designed to assist these homeowners and to encourage adoption of subdivision control ordinances by the counties.⁷⁰

Another area of land use in which the Highway Department and local jurisdictions must work together is the preparation of an official map.⁷¹ If the proposed map includes streets under the Highway Department's jurisdiction, the commission preparing the map must consult the Department for comment.⁷² Highway Department recommendations are incorporated in the map or supplement it when the map is sent to the local governing body for approval.⁷³

A new and untested area of local participation with the Highway Department respecting land use is in the design of urban highways which are partially funded by the locality.⁷⁴ A municipality may have a competent

67. Clark, *Subdivision and Zoning Controls*, in TWENTY-FOURTH ANNUAL VIRGINIA HIGHWAY CONFERENCE PROCEEDINGS 53, 55 (1971). The Highway Department's policy pertained to development between July 1, 1949, and November 15, 1959, or between July 1, 1949, and the adoption of a subdivision control ordinance by the county which had certain requirements which were equal to or greater than the requirements of the Department of Highways for subdivision streets.

Streets developed as outlined in this policy can be considered for addition to the secondary system provided:

1. The county has passed a subdivision control ordinance having street requirements meeting or exceeding the Department of Highways standards for subdivision streets.

2. No more than 15 per cent of the lots along the street or streets are owned by a subdivider, developer, or land speculator.

3. One-half of the Highway Department estimate of cost of developing the streets to minimum rural standards is donated through the county and a certified copy of plat indicating street right-of-way, drainage easements and place of recordation, and detailed record of lot ownership along with the required donation is furnished with the submission of the resolution from the County Board of Supervisors requesting the addition of the streets to the secondary system. *Id.*

68. *Id.* at 54-55.

69. *Id.* at 55.

70. *Id.*

71. VA. CODE ANN. § 15.1-462 (Repl. Vol. 1973).

72. *Id.*

73. *Id.*

74. *Id.* § 33.1-47.1 (effective June 1, 1975).

authority conduct a study of the effect which the proposed highway could have on the area's shrubbery and trees, and of the highway modifications that would be needed to minimize possible damage.⁷⁵ After considering any recommendations which the study proposes, the Highway Department must make any reasonable modifications necessary to protect the area's flora.⁷⁶

Of great importance to the Highway Department with respect to land use, is the increased national interest in protecting the environment. The Department is particularly susceptible to criticism in this area because of the great potential for pollution when highway work is being done.⁷⁷ The most important federal guidelines and requirements for the Highway Department are in the National Environmental Policy Act of 1969 (NEPA)⁷⁸ and the Federal-Aid Highway Act.⁷⁹ The Federal-Aid Highway Act encompasses the construction of federal interstate highways for which the federal government pays ninety percent.⁸⁰ When such a highway is to be constructed, the state's plan must first be approved by the Secretary of the U.S. Department of Transportation.⁸¹ This approval will only be given if

75. *Id.*

76. *Id.*

77. Some of the sources of pollution noted by a research engineer for the Highway Department are:

Potential sources of water pollution—1. Erosion of soil with resulting siltation of streams, ponds, reservoirs, fields and yards, during construction. 2. Erosion from bare spots on seeded slopes. 3. Erosion from unseeded slopes on secondary roads. 4. Erosion from unpaved ditches on steep gradients. 5. Contamination of streams, ponds, reservoirs, and wells by deicing salts. 6. Improper maintenance of cut slopes. 7. Sediments from wash water used in stone quarries and sand and gravel operations. 8. Cleaning of construction equipment in streams. 9. Depositing of engine oil in streams near shops. 10. Cleaning of spray bar of asphalt distributor into streams. 11. Mud agitation during marine construction. 12. Drainage from concrete batching and mixing operations.

Potential sources of air pollution—1. Burning of debris during clearing of right-of-way. 2. Dust from drying operations of asphalt plants. 3. Dust from quarrying and crushing operations. 4. Dust from detours on construction sites. 5. Dust from unpaved secondary roads. 6. Fumes and particles from construction equipment. 7. Solvent evaporation from volatile asphalt products and other volatile coatings such as concrete curing compounds.

General—1. Noise from construction equipment. 2. Human waste at rest areas lacking toilet facilities.

Dillard, *Erosion Control Practices and Desired Results*, in TWENTY-FIFTH ANNUAL VIRGINIA HIGHWAY CONFERENCE PROCEEDINGS 43, 45 (1971).

78. 42 U.S.C. §§ 4321-4347 (1970); see Section XD, *infra*.

79. 23 U.S.C.A. §§ 101 *et seq.* (1966), as amended, 23 U.S.C.A. §§ 101 *et seq.* (Cum. Supp. 1975).

80. *Id.* § 103 (Cum. Supp. 1975).

81. *Id.* § 106(a) (1966).

the state highway department certifies that an opportunity for public hearings has been afforded in the localities through which the proposed highway will pass, and submits a report indicating what consideration has been given to the various effects (including economic and environmental) of the highway and any alternatives.⁸²

NEPA requires that all federal agencies submit an environmental impact statement when making a report or recommendation "on proposals for legislation and other Federal actions significantly affecting the quality of the human environment" and that this statement receive comment by "appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards . . ."⁸³ As a result of this legislation, the Highway Department established an environmental quality division in 1971.⁸⁴ One of the most important functions of this division is the preparation of environmental documents.⁸⁵

There are a number of different procedures which the environmental division follows in meeting federal requirements, depending upon the size of the project and the effect it will have on the environment.⁸⁶ The initial investigation, however, is the same for all projects and includes, in addition to public hearings, a review of the proposal with representatives of numerous federal and state agencies.⁸⁷ If the project is major or will adversely affect the environment, an environmental impact statement is required which will be reviewed and commented upon by twenty-seven federal and state agencies.⁸⁸ An additional document must be prepared if the proposed highway will affect waterfowl or wildlife refuges, a public recrea-

82. *Id.* § 128(a) (Cum. Supp. 1975); see *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

83. 42 U.S.C. § 4332(2)(C) (1970). This statement is to include

(i) the environmental impact of the proposed actions, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved if the proposed action should be implemented. *Id.*

For a study of environmental impact statements as they relate to highways, see Comment, *Environmental Analysis and Reporting in Highway System Planning*, 121 U. PA. L. REV. 875 (1973).

84. Robb, *Anatomy of an Environmental Impact Statement*, in VA. HIGHWAY BULL., Sept. 1973, at 5.

85. *Id.*

86. *Id.*

87. *Id.* The agencies include "the State Water Control Board, the Commission of Game and Inland Fisheries, the Air Pollution Control Board, the Historic Landmarks Commission, and at least 10 additional state and federal agencies." *Id.*

88. *Id.* at 6.

tion area or historic property.⁸⁹ The final approval or disapproval for a project comes from the Council on Environmental Quality.⁹⁰

These federal requirements have not been ignored by individuals and groups in Virginia who have felt that an interstate highway was not desirable for their particular area. In *Arlington Coalition on Transportation v. Volpe*,⁹¹ interested citizens in Arlington, Virginia, sought an injunction against the continued construction of I-66.⁹² Continuation was supported by all of Virginia's congressmen and Governor Godwin, but was opposed by various citizens groups, the governing bodies of Fairfax and Arlington Counties and the cities of Alexandria and Falls Church.⁹³ The Arlington Coalition was successful in obtaining an injunction until the effect of the highway on the environment could be evaluated even though the I-66 project had been initiated prior to the enactment of NEPA. The court felt that the project should properly be covered by the Act since the project was a continuing one.

However, in *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*,⁹⁴ the court found insufficient federal involvement in the construction and planning of the Richmond Beltline for federal environmental requirements to be applicable. But in that case the project received federal funds only after rising costs had been encountered and for only part of the project. It can be anticipated that the Virginia Highway Department will encounter future litigation where there is a question of federal involvement in the construction of a highway and proper consideration has not been given to the environmental consequences of the proposed highway.

Virginia's concern for land use and the environment in its highway policy is not limited to bare compliance with federal mandates. The Highway Commission is authorized, in conjunction with the Commission of Outdoor Recreation, to designate a highway as a Virginia byway or scenic highway.⁹⁵ A scenic highway is one which is constructed through a scenic corridor, in a manner which enhances and preserves the cultural value and beauty of

89. *Id.*

90. *Id.*

91. 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); see Section XD2a, *infra* at notes 153-54 and accompanying text.

92. 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); see ENV. REP. CURR. DEV. 1558 (1974).

93. Washington Star-News, Sept. 20, 1974, in Va. Dep't of Highways & Trans., HEADLINES, Vol. 8, No. 19, Oct. 1, 1974 (unpaginated).

94. 359 F. Supp. 611 (E.D. Va. 1973), *aff'd mem.*, 481 F.2d 1280 (1973); see Section XD3, *infra* at notes 171-73.

95. VA. CODE ANN. § 33.1-62 (Repl. Vol. 1970), *as amended*, § 33.1-62 (Cum. Supp. 1974).

the area,⁹⁶ while a Virginia byway leads to or is within an area of natural, recreational or historical significance.⁹⁷ When a road has been designated as a Virginia byway, certain actions are possible:

Property owners can donate scenic easements and the highway department can purchase land considered essential to preserving the road's scenic and historic character.

Outdoor signs will be prohibited and "distinctive" signs will be erected identifying the road as a scenic byway.

Special parking areas may be built where feasible to allow travelers to pull off the road at areas of scenic beauty or historical interest.

Highway officials will investigate landscaping needs and confer with utility companies to see whether utility lines can be buried or relocated away from the roadside.⁹⁸

As desirable as such a designation may appear, the response by local governing bodies and individuals is not always favorable. An example is the attempt to designate Route 5 between Richmond and Williamsburg as a Virginia byway. It was hoped that Route 5 could be protected and in some cases partially relocated so as to bypass areas of development. However, in Charles City County the local governing body opposed the designation of Route 5 as a Virginia byway, fearing that such a designation would restrict the county's growth.⁹⁹ Residents along Route 5 also balked at the idea, assuming that the Highway Department would buy up strips of right-of-way to protect the road's character as a Virginia byway. However, it was anticipated that the local jurisdiction would handle the protection aspects through such means as setbacks, zoning and limited access to the byway.¹⁰⁰ It was not intended that a locality's growth be stymied, but only that growth occur in a planned and orderly fashion along the byway.¹⁰¹

96. *Id.* § 33.1-64 (Repl. Vol. 1970).

97. *Id.* § 33.1-63. A scenic highway (such as the Blue Ridge Parkway) is one which is constructed as such from inception. A Virginia byway, on the other hand, is a designation given a highway which is already in existence and which meets the requirements of section 33.1-63. In June of 1974, Old Georgetown Pike in Northern Virginia was designated as the state's first Virginia byway. Washington Star-News, June 26, 1974, in Va. Dep't of Highways, HEADLINES, Vol. 8, No. 14, July 15, 1974, (unpaginated). The article mistakenly refers to the road as a scenic byway.

98. Washington Star-News, *supra* note 97.

99. See VALC REPORT, *supra* note 57, at 34-35.

100. Interview with Mr. Robert L. Hundley, Environmental Quality Engineer, Virginia Department of Highways and Transportation, in Richmond, Virginia, December 31, 1974.

101. *Id.* In fact, "[w]ere [Route 5] to have been designated as was proposed, with development allowed to proceed according to the plan developed for the highway, there is reason to believe land values along that highway would have been enhanced more than has been true

A locality has the opportunity to oppose a scenic highway or Virginia byway by requesting that the Highway Department hold a public hearing.¹⁰² This allows local governing bodies and citizens to express their views on the proposed designation and helps the Highway Department determine if the designation is in the public interest. If the road is designated in spite of opposition, the Highway Department is faced with a problem. It does not wish to buy strips of right-of-way to insure that the highway's character is maintained, but the locality is under no obligation to control development. If scenic highways and Virginia byways are to serve their intended purposes, the Highway Department must buy right-of-way land to prevent unsightly development, or a statutory requirement must be imposed upon local governing bodies to insure that development is consistent with the highway's designation.

The future role of the Highway Department in relation to land use will increase as highway construction continues and available land decreases. In mid-1950 Virginia had approximately 300 miles of divided, multilane highways but it is anticipated that by mid-1980 that figure will exceed 3,000 miles.¹⁰³ Undoubtedly, land use will be greatly affected by the mere volume of highways and the accompanying development. Because of the increasing environmental crisis in this country, greater state and federal control over the Highway Department is likely. This usually involves more paperwork and expense in the form of permits and other documents which indicate the environmental effect of a proposed highway. In view of this, the Highway Department is revising its procedures in an attempt to convince the regulatory bodies that it will comply with environmental standards without having to prove it with paperwork for every project.¹⁰⁴ This attempt, combined with local pressure, undoubtedly will make the Highway Department more conscious of local needs and land use problems.

C. STATE CORPORATION COMMISSION

Sometimes referred to as the fourth branch of government in Virginia,

with the relatively scattered unplanned strip development which has taken place." VALC REPORT, *supra* note 57, at 35.

102. VA. CODE ANN. § 33.1-62 (Repl. Vol. 1970), *as amended*, § 33.1-62 (Cum. Supp. 1974).

103. VA. HIGHWAY COMM'N, SIXTY-SEVENTH ANNUAL REPORT 6 (1974).

104. Interview with Mr. Robert L. Hundley, *supra* note 100. Currently the Highway Department is the only state agency that is not required to provide the Soil and Water Conservation Commission with a set of plans when disturbing the earth. The Soil and Water Conservation Commission examines the Highway Department's specifications, standards and procedures annually, and if these are approved it merely checks for compliance with these standards. The Highway Department would like for this to be the procedure for complying with other laws and agency regulations. *Id.*

the State Corporation Commission (SCC) is a powerful agency whose jurisdiction covers a wide range of activities. The SCC is in a rather protected position since it exists by constitutional authority¹⁰⁵ and therefore can only be eliminated by constitutional revision. The Commission is procedurally similar to a court of record¹⁰⁶ and only the Supreme Court of Virginia may "review, reverse, correct, or annul [its actions] or . . . enjoin or restrain it in the performance of its official duties . . ." ¹⁰⁷ Thus, any determination which the SCC makes affecting land use carries great weight.

With respect to two corporations both having eminent domain power,¹⁰⁸ the SCC is the proper forum for any condemnation proceeding brought by one against the other.¹⁰⁹ In *Boulevard Bridge Corp. v. City of Richmond*,¹¹⁰ Richmond contended that the SCC's jurisdiction in eminent domain disputes did not extend to municipal corporations and that in any case it could not issue a declaratory judgment on the matter.¹¹¹ The Virginia Supreme Court sustained the Commission's authority against both challenges. In dealing with municipalities and eminent domain, the SCC inevitably became involved with zoning ordinances and their validity. Here the court drew the line, finding that the SCC had no authority to decide issues concerning the validity of a zoning ordinance.¹¹² Nevertheless, what is today a municipal park may tomorrow be a railroad yard and if there is a dispute between the railroad and municipality over condemnation, the SCC will be the arbiter.

Public utilities¹¹³ come under the regulatory authority of the State Corporation Commission and are so tightly controlled that a public utility is prohibited from operating in an area unless it receives a certificate of public convenience and necessity from the Commission.¹¹⁴ Unless the Com-

105. VA. CONST. art. IX, § 1.

106. *Id.* art. IX, § 3.

107. *Id.* art. IX, § 4.

108. Since the Highway Department is not a corporation it is not covered. *Tiller v. Norfolk & Western Ry.*, 201 Va. 222, 225-26, 110 S.E.2d 209, 212 (1959).

109. VA. CODE ANN. § 25-233 (Repl. Vol. 1973).

110. 203 Va. 212, 123 S.E.2d 636 (1962).

111. Under attack was Rule 13 (currently Rule 5:3) of the SCC's Rules of Practice and Procedure. The Rule provides, *inter alia*, that "[a] person having no other adequate remedy may petition the Commission for a declaratory judgment under Code § 8-578." SCC R. OF PRAC. & PROC. 5:3.

112. *City of Richmond v. Southern Ry.*, 203 Va. 220, 225, 123 S.E.2d 641, 645 (1962).

113. A public utility is any company owning or operating facilities in Virginia "for the generation, transmission or distribution of electric energy for sale, for the production, transmission or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas for sale for heat, light or power, or for the furnishing of telephone service, sewerage facilities or water." VA. CODE ANN. § 56-265.1(b) (Repl. Vol. 1974).

114. *Id.* § 56-265.3.

mission finds that the utility would be "in the public interest" a certificate will not be granted.¹¹⁵

Electric utilities have received particular attention and in 1972 the General Assembly made it mandatory for the SCC, before approving the construction of an "electrical transmission line of two hundred kilovolts or more. . . [to] determine that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic and environmental assets of the area concerned."¹¹⁶ In addition, the SCC must hold a public hearing at the request of any interested person.¹¹⁷

One writer has seen this legislation as having little effect since in his opinion the SCC has limited itself in this field; a fact which he feels the statute does not change.¹¹⁸ Others have seen the legislation as expanding the power of the SCC over electric power facilities.¹¹⁹ Even if it is assumed that the former view was correct in 1972, that no longer appears to be the case. Three new commissioners have been appointed who are apparently much more concerned about the environment than were the former commissioners.¹²⁰ There have been two applications for transmission line extensions since the enactment of section 56-46.1, one of which is still pending.¹²¹ The decided case involved Appalachian Power Company and the procedure which was followed hopefully is indicative of the SCC's current attitude. In determining what route, if any, the requested power lines should take, the SCC was assisted by a group headed by a professor of biology at Virginia Polytechnic Institute & State University. A grid survey was done of all possible routes, and factors such as land use, population and wildlife were given various weights¹²² and fed into a computer. With the computer

115. *Id.* If the applicant is seeking to provide water or sewerage service the requirements are stricter. More detailed information is required on the application, and in addition to being in the public interest, the SCC must also find that "no other publicly or privately owned system is able to adequately provide service in the . . . area; . . . the applicant's proposed facilities will provide proper and adequate service for the area; . . . the applicant's proposed rules, regulations and rates, fees and charges for the service to be rendered are reasonable; and . . . the applicant has the financial and managerial ability necessary to properly install, maintain and operate the proposed facilities and to render the required service . . ." *Id.*

116. *Id.* § 56-46.1.

117. *Id.*

118. See Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 288-92 (1972). Willrich's opinion is based primarily on a memorandum of former Commissioner Catterall dated Jan. 6, 1971. *Id.* at 289.

119. See Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 WM. & MARY L. REV. 589, 598 (1973).

120. Telephone interview with Mr. Bernard L. Henderson, Jr., Administrative Assistant to the Commissioners, State Corporation Commission, Richmond, Virginia, January 28, 1975.

121. *Id.*

122. The weighted values ranged from one to ten with ten being the most critical. If the

evaluating all the information given to it for the various routes, a route which was least detrimental to the environment was established. The new commissioners apparently do not feel bound by the past policy of the Commission, and if this is the case, section 56-46.1 can be an effective land use tool. But the effectiveness of the statute should not have to depend on the composition of the SCC. More explicit guidelines and stricter standards would insure that the SCC does not exercise its discretion to weaken the statute.

In connection with its authority over electric utilities, the SCC is the licensing authority for all hydroelectric dams across waters of the state.¹²³ Waters "of the state" and "within the state" have different meanings in Virginia and the SCC's power is different respecting them. As to waters of the state (basically, those affecting interstate or foreign commerce) the Commission has the licensing power for any dams.¹²⁴ Concerning waters within the state (those not affecting interstate or foreign commerce) it may only license dams for the generation of hydroelectric power.¹²⁵

Riparian land is obviously affected by dam construction not only because the flow of the stream or river is altered but because of pollutants which are created. Consequently, jurisdictional conflicts have arisen between the SCC and the State Water Control Board.¹²⁶ A recent conflict involved whether the SCC's or the Water Control Board's proposed minimum release schedules should prevail for a power project on the North Anna River.¹²⁷ Even though the Water Control Board had jurisdiction, because power development was involved the SCC prevailed.¹²⁸ To avoid further conflicts, it has been suggested that "waters of the state" be redefined or that the authority of the SCC and the State Water Control Board be realigned to avoid overlapping jurisdictions.¹²⁹

The SCC also exercises regulatory authority over industrialized building

proposed power lines would pass through an area set aside for migratory birds, for example, wildlife would receive a ten. *Id.*

123. VA. CODE ANN. § 62.1-83 (Repl. Vol. 1973). A hearing is required before such a dam may be constructed and before a license is granted the SCC must determine "that the public interest will be thereby promoted or will not be detrimentally affected," *Id.* See also *id.* § 62.1-89; Brasfield, *supra* note 119, at 598.

124. Vaughan v. VEPCO, 211 Va. 500, 501-02, 178 S.E.2d 682, 684 (1971). See VA. CODE ANN. § 62.1-81 (Repl. Vol. 1973).

125. Vaughan v. VEPCO, 211 Va. 500, 501-02, 178 S.E.2d 682, 684 (1971).

126. See Miri, *Some Problems of Water Resource Management in Virginia: A Preliminary Examination*, 13 WM. & MARY L. REV. 388, 401-07 (1971).

127. *Id.* at 410.

128. *Id.*

129. *Id.* at 406.

units and mobile homes in a manner similar to that exercised by the State Board of Housing over buildings in general.¹³⁰ The SCC is responsible for establishing standards of health and safety for these units¹³¹ and is also responsible, along with local building officials,¹³² for their enforcement.¹³³

The influence on land use is much more limited than that of the State Board of Housing, of course, because the SCC's scope of authority is much narrower. Nevertheless, within these limits, the Commission has established detailed standards which affect land use to the extent that they make industrial and mobile units more or less desirable than other alternatives. This is especially true in the case of mobile homes, which require little more in the way of land than what they actually occupy and often result in dozens of families being clustered together in mobile home parks.

To aid enforcement of its regulations, the SCC keeps a list of approved facilities which inspect industrialized and mobile units for compliance with the Commission's safety standards. These facilities affix a permanent label on units after they have passed inspection indicating compliance with the SCC's regulations.¹³⁴ After a unit has been labeled, the manufacturer applies the SCC's registration seal.¹³⁵ Once a unit is labeled and registered it is considered to be in compliance with all local requirements and is subject to only minimal inspection by a local building official.¹³⁶ On the other hand, an unlabeled unit cannot be used in Virginia until it has been fully inspected by the local building official for the locality in which it is to be used.¹³⁷ The labelling requirements are obviously for the protection of purchasers of industrial and mobile homes, but in the area of unlabeled units a problem has arisen. Such units must carry a warning that they are not labeled and that they must be "approved by the local building official having jurisdiction."¹³⁸ A person buying an industrial or mobile home in one jurisdiction for use in another is faced with the possibility that the unit could be inspected and approved in the jurisdiction of

130. See text accompanying notes 14-18, *supra*.

131. VA. CODE ANN. § 36-73 (Cum. Supp. 1974).

132. *Id.* § 36-81.

133. *Id.* § 36-82. The Office of the Chief Fire Marshall represents the SCC in enforcement of its regulations. VA. INDUS. BLDG. UNIT & MOBILE HOME SAFETY REGS., § 102-2 (1974) [hereinafter cited as INDUS. BLDG. REGS.]. Violation of any of the Commission's regulations is a misdemeanor carrying a maximum fine of five hundred dollars. VA. CODE ANN. § 36-83 (Cum. Supp. 1974).

134. INDUS. BLDG. REGS. §§ 100, 500-1 to -4.

135. *Id.* §§ 501-1, -2.

136. *Id.* § 103-2.

137. *Id.* § 103-3.

138. *Id.* § 103-3.1.

purchase and subsequently disapproved in the jurisdiction where it is to be used. The SCC recognizes the problem but still requires that the unit be approved by a building official in the locality where it will be used.¹³⁹ Whether the benefit of such a requirement is worth the possible problems to an unsuspecting¹⁴⁰ purchaser is questionable. The problem would be partially resolved by making it clear that the "local building official" refers to the locality where the unit will be located. The buyer would certainly be on notice but would still face the possibility that the local building official where the unit is located would reject it. A better solution would require inspection in the locality where the unit is purchased to be recognized in any other locality as meeting all requirements.

The Commission has not been timid about enforcing its regulations even where the federal government has been involved. In 1972 the Department of Housing & Urban Development had purchased a large number of mobile homes for assistance in flood relief.¹⁴¹ Although these units were unlabeled, the SCC felt that as long as HUD held title to them and charged no rent, that it (the SCC) could take no action.¹⁴² However, the SCC informed HUD that if it were to sell, rent or give away units in Virginia it would be considered a dealer and in violation of state law.¹⁴³

As broad as the State Corporation Commission's authority is, it does not appear that this authority will be narrowed in the near future. In fact with respect to land use the contrary appears to be the case. The 1975 General Assembly proposed legislation which would have given the SCC the power to lease and sell land on Virginia's outer continental shelf for oil and gas drilling.¹⁴⁴ Because the United States Supreme Court decided in *United States v. Maine* that the Atlantic coastal states do not own land beyond the three mile limit¹⁴⁵ the statute did not become effective.

The wisdom of placing considerable land use control with the SCC is questionable. The involvement of corporations or power development does not necessarily mean that the SCC has the staff with the greatest expertise in the area. In some cases an environmental agency might more appropriately control the area, in others the creation of a new agency should be considered.¹⁴⁵

139. VA. INDUS. BLDG. LAW INFO. BULL. 12-74 (Oct. 3, 1974).

140. Unsuspecting, because in spite of the warning, the average buyer would probably feel safe in having a unit inspected when it is purchased.

141. VA. INDUS. BLDG. LAW INFO. BULL. 8-72 (Oct. 27, 1972).

142. *Id.*

143. *Id.*

144. See VA. S. 788, 1975 Gen. Assem.

145. Richmond Times-Dispatch, Mar. 18, 1975, § A, at 1, col. 1.

D. CONCLUSION

State activities which tangentially affect land use exert an important influence which can not be ignored in Virginia's land use goals. The need for a state land use plan and a coordinating agency is even more apparent in this area than with state activities which directly affect land use. Agencies tend to view their particular area of concern as the most important and to forget that other considerations must be balanced. The Highway Department is particularly distressed over its coordination requirements with numerous agencies and the imposition of negative requirements with few or no positive goals.

A state agency empowered to promulgate and supervise a land use plan could eliminate jurisdictional conflict and bureaucratic red tape which currently exists among state agencies exercising land use influence, and positive goals and objectives could be set. Coordination on the state level would not have to be inconsistent with local planning. In fact state and local authorities should work together more closely to insure that a proper balance is maintained between state and local needs. Adequate provisions for public hearings could also be maintained and strengthened so that neither level of government would be permitted to act contrary to the public interest or in disregard of individual concerns. The first step in such a plan requires Virginia to establish an agency which would function exclusively in the area of land use planning.

VII. STATE AGENCIES DIRECTLY AFFECTING LAND USE

Although Virginia has not developed a state program of land use regulation or planning, the following state agencies affect growth and development in the exercise of their present statutory powers. The current agencies with land use responsibilities are primarily concerned with environmental quality.

However, Virginia has shown a reluctance to initiate a coordinated and effective plan for the development of the state's land resources. The absence of meaningful land use planning by the following agencies reflects this reluctance.

A. COUNCIL ON THE ENVIRONMENT

As part of the Virginia Environmental Quality Act,¹ and in furtherance

1. VA. CODE ANN. § 10-177 to -186 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

of a new constitutional mandate,² the Governor's Council on the Environment was created in 1972.³ The Council consists of ten members, three appointed by the Governor and the balance consisting of chairmen of related state environmental agencies.⁴ Serving as an advisory arm of the executive, the Council is designed to insure uniform and coherent environmental policies, coordination among state agencies, and implementation of the overall environmental policy of the state.⁵ Since numerous state agencies play key roles in Virginia's environmental and natural resource management, the Council has sought to establish a climate of cooperation and coordination to facilitate information sharing and joint efforts by these agencies.⁶ The Council holds annual public hearings throughout Virginia, issues a report on its activities and the state of the environment, and makes recommendations designed to strike a balance between environmental protection and the economic well-being of the state.⁷

The Council is empowered to conduct pre-construction environmental impact review for certain state and federal projects,⁸ enabling it to insure rational land use decisions. As the state liaison for communications with federal agencies involving environmental problems,⁹ the Council has assumed the task of coordinating the review of environmental impact statements with the federal government under the National Environmental Policy Act (NEPA) for proposed major projects which are federally funded

-
2. To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CONST. art. XI, § 1.

The 1971 Virginia Constitution elevated protection of the environment to a position which may be termed "fundamental." Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972). It is an enduring "constitutional statement of public policy which serves to bind state agencies and officials, as well as courts, and which gives meaning and substance to Virginia's public trust in its lands, waters and other natural resources." *Id.* at 207.

3. VA. CODE ANN. § 10-180 (Repl. Vol. 1973). The Council on the Environment was first established in 1970 by former Governor Linwood Holton, however, it was reconstituted and given statutory standing in 1972.

4. *Id.* § 10-181 (Repl. Vol. 1973), as amended (Cum. Supp. 1974). The 1975 Virginia General Assembly added a tenth member to the Council on the Environment. (H.B. No. 1762).

5. VA. CODE ANN. §§ 10-184.1 to -185 (Repl. Vol. 1973), as amended, (Cum. Supp. 1974).

6. THE COUNCIL ON THE ENVIRONMENT, THE STATE OF VIRGINIA'S ENVIRONMENT 13 (Dec. 1973).

7. VA. CODE ANN. § 10-186 (Repl. Vol. 1973). The annual report is published and made available for purchase by the public.

8. *Id.* § 10-17.108 (Cum. Supp. 1974).

9. *Id.* § 10-185 (Repl. Vol. 1973), as amended, (Cum. Supp. 1974).

or licensed.¹⁰ In 1973, the Council was given the task of evaluating the environmental impact of all state construction projects costing over \$100,000 with the exception of highways.¹¹ Absent, however, is the authority to require private developers to submit environmental impact statements.

1. *Environmental Impact Statements*

The environmental impact statement (EIS) is instrumental in the Council's review of a proposed project. Guidelines for preliminary environmental impact statements (PEIS) have been furnished to state agencies for use when qualifying construction is proposed.¹² The PEIS program represents the Council's attempt through early warning and advanced planning to obviate the need for a full scale EIS which would not only be time consuming but also financially impractical for smaller projects.¹³ Such statements are to be submitted well in advance of construction¹⁴ and are to detail the following:

1. The environmental impact of the proposed construction;
2. Any adverse environmental effects which cannot be avoided if the proposed construction is undertaken;
3. Measures proposed to minimize the impact of the proposed construction;
4. Any alternatives to the proposed construction; and
5. Any irreversible environmental changes which would be involved in the proposed construction.¹⁵

Upon receipt of the PEIS, the Council reviews it and if necessary solicits the technical expertise of other state agencies competent to assess environ-

10. THE COUNCIL ON THE ENVIRONMENT, PROCEDURES MANUAL FOR ENVIRONMENTAL IMPACT STATEMENTS IN THE COMMONWEALTH OF VIRGINIA 1 (Dec. 1973). See also The National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321 et seq. (1970). The Council provides state input for the federal review. Federally licensed projects such as nuclear power plants licensed under the Atomic Energy Commission are reviewed although private in nature.

11. VA. CODE ANN. §§ 10-17.107 to .112 (Cum. Supp. 1974). "The environmental impact statement is not merely a procedural matter which is to be treated as an appendix to decisions already made; it is intended to affect and alter those decisions as necessary." VIRGINIA'S ENVIRONMENT, *supra* note 6, at 12. "Highway projects are excepted because many are already covered by federal requirements." THE COUNCIL ON THE ENVIRONMENT, ENVIRONMENTAL IMPACT STATEMENTS PROGRESS REPORT 1 (Dec. 1973).

12. PROCEDURES MANUAL, *supra* note 10.

13. The state agency usually sends an officer or its planner to discuss environmental impact with the Council on the Environment.

14. This insures that sufficient time is allowed "to permit any modification of the proposed construction which may be necessitated because of environmental impact." VA. CODE ANN. § 10-17.111 (Cum. Supp. 1974).

15. *Id.* § 10-17.108. Aesthetic considerations are left to the localities through such devices as zoning. See generally Section III, *supra*.

mental impact.¹⁶ At the conclusion of the review, the Council reports its recommendations to the Governor who ultimately decides the fate of the project.¹⁷ Prior to written approval of the Governor, the State Comptroller is directed not to authorize payments of funds from the treasury for construction.¹⁸ Through this informal review process “. . . which is a product of the interaction between the State agencies preparing PEIS's and the environmental review agencies and other interested parties,”¹⁹ the Council hopes to avoid the necessity of a full scale EIS,²⁰ at the same time insuring the rational use of land.²¹

In Virginia, decisions relating to land use have traditionally been local in nature.²² Localities which have the advantage of proximity to local problems and feelings, are generally free to implement zoning and other land use schemes.²³ Unfortunately, localities are often technically incompetent and too compromising to local interests.²⁴ Moreover, they lack the capability to supervise projects which have a greater than local significance in

16. PROCEDURES MANUAL, *supra* note 10, at 13.

17. At the time of submission to the Governor, the statement of the Council is available to the General Assembly and to the general public. The statement to the Governor is made within 60 days of receipt of the environmental impact report. VA. CODE ANN. § 10-17.109 (Cum. Supp. 1974).

18. *Id.* § 10-17.110.

19. PROCEDURES MANUAL, *supra* note 10, at 17.

Each reviewing agency will examine the proposed project in view of its statutory authority, policies and practices and report on any inconsistencies with the environmental policies of Virginia and measures it plans to take to eliminate the inconsistencies [T]he commenting agencies may recommend modifications to the proposed facility which will avoid or minimize adverse environmental impacts. *Id.* at 19-20.

Each agency has thirty days to respond for state projects. *Id.* “The Council views public participation in the review process as necessary and desirable.” *Id.* at 8. Ideally, prior to submission of a PEIS, a notice of intent should be filed with the Council indicating PEIS's are being prepared and when they can be expected. *Id.* at 16.

20. *Id.* at 18.

21. [O]ur procedure will reflect and facilitate a unity of purpose and direction among state environmental agencies that results in a review process that is efficient, comprehensive, consistent and open. We also hope to gain a fuller appreciation of the patterns of development as a guide to assessing aggregate impacts and an overall picture of land use trends. PROGRESS REPORT, *supra* note 11, at 5.

22. VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAND USE POLICIES, 13 (1974). See generally Vestal, *Government Fragmentation in Urban Areas*, 43 U. COLO. L. REV. 155 (1971).

23. “Virginia and its political subdivisions have an impressive lot of good land use laws and programs However, the evidence shows the available land use planning mechanisms are too often not put to good use.” VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAND USE POLICIES, 13 (1974).

24. Communities are often eager to increase their real estate tax bases and consequently are anxious to attract development. *Id.* at 14.

their impact upon the environment.²⁵ The attendant "parochialism"²⁶ and disregard for effects on neighboring localities points to the need for a balanced regional or state framework for land use decisions.²⁷

Although the Council on the Environment has initiated efforts to manage state or federal capital outlays affecting land,²⁸ a roadblock to land use management exists in traditional attitudes toward private ownership of land.²⁹ Fear of government intervention into private land use decisions impedes such involvement:

[O]ur legal and political structures are heavily biased toward resource development through a free enterprise system. Government controls of land use have been adopted in each instance only as absolutely necessary exceptions in order to meet specific urgency problems, and even then, only after bitter resistance.³⁰

25. "[E]nvironmental impact of many developments simply does not coincide with the boundaries between political subdivisions." *Id.* at 13.

Surely it is naive . . . to think the consequences of one property user's activities are confined to his property. Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships which is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

26. See Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

27. In *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972), the California Supreme Court stated "that a municipality may no longer make land use decisions that serve its own interests at the expense of the interests of neighboring nonresidents." Comment, *Judicial Limitations on Parochialism in Municipal Land Use Decisions: Scott v. City of Indian Wells*, 25 HAST. L. J. 739, 767 (1974).

28. See accompanying text and footnotes on Environmental Impact Statements (EIS).

29. The difficulty of operating an effective land use policy for the State of Virginia can be perceived with the realization that, according to the most recent estimates, approximately ninety per cent of the land in the State is under private ownership. The situation is further complicated by the traditional attitude in the Commonwealth reflecting a minimum amount of regulation for the use of private land. THE COUNCIL ON THE ENVIRONMENT, LAND USE TASK FORCE REPORT 34 (Dec. 1971).

30. *Id.* at 10.

Since real property cannot be separated from its environment and since successive generations will depend upon it for sustenance, the integrity of the land and its ecosystems demands that the arbitrary personal use of any part of it be subject to social interposition if the acts of an owner pose a threat to the continuing welfare of the community. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 766 (1974).

The Council on Environment is in theory charged with the duty of implementing the state's policy of protecting the environment. However, such a broad generalization is deceiving. Enabling legislation which would allow supervision of private development is lacking as well as a state land use plan which would furnish specific policies for implementation. As a result, the Council has no authority to fill the vacuum on nonregulation existing among localities nor can it reach private land use decisions.³¹ Cumbersome state bureaucracy to achieve these ends is not advocated, but it is apparent that additional state or federal input will be required in the future to prevent the often myopic use of land.³²

2. Conclusion

The Virginia General Assembly is exhorted by the Virginia Constitution to work in concert with state agencies and private citizens to protect the environment.³³ The state, however, has not furnished its agencies or its citizenry with a comprehensive land use plan or strategy to make this mandate meaningful.³⁴ Broad constitutional statements on environmental protection, although certainly not without meaning, fail to provide specific policies so essential to daily public and private decisions affecting land. The EIS process is well conceived but is at best only a token effort due to its limited scope.

A voluntary redefinition of rights arising out of and incident to private land ownership is not likely to be forthcoming.³⁵ Consequently, in the

31. See Comment, *Environmental Law: State Land Use Statutes*, 13 WASHBURN L.J. 232, 233 (1974). Attempts to make the environmental impact statement extend to private development have failed. The 1975 Virginia General Assembly refused a bill (H.B. 923) requiring such a statement for land use involving a high density development.

32. Interview with B.C. Leynes, Associate Director of the Commerce and Resources Section of the Division of State Planning and Community Affairs, in Richmond, Virginia, Nov. 22, 1974. "[W]here these higher levels of government demonstrate the inability to act, municipal police power can be an effective alternative until a uniform and coordinated policy is formulated." Comment, *Expanding the Role of Municipal Police Power in Pollution Control: A Pragmatic Approach*, 21 BUFFALO L. REV. 139, 173 (1971).

33. VA. CONST. art. XI.

34. Land use control should not be viewed as an essentially negative mechanism that seeks to prohibit certain specified uses. Such plans should also aid and encourage certain more beneficial uses of land. *Metropolitanization and Land-Use*, supra note 26, at 658. A statewide plan while insuring an even distribution of growth and providing local guidance would also insure that policy decisions throughout the state would prevent the land from being ravaged. Too often land use legislation comes in the wake of destructive development. Even if the focus of land use control is to remain local, a master strategy would insure that the local administration is effective and would require cooperative planning for development with a greater than local significance.

35. The persistence of archaic concepts of ownership rights is possibly the principal

absence of further state or federal initiatives, uniform land use management will be slow in coming to Virginia.

B. STATE WATER CONTROL BOARD

The State Water Control Board is charged with the responsibility of implementing the state's water policies. Although the Board has no authority to institute direct land use controls, any forceful measures designed to maintain the water quality of Virginia will affect the pattern of growth in the state. Land use and water policy are inextricably related; thus, an attempt to deal with the issue of water quality should be closely aligned with a program of land use control.³⁶

Virginia has made a firm commitment to the protection of its water resources.³⁷ The Board was established in 1946³⁸ and the Division of Water Resources was merged into it in 1972 creating one state agency to supervise the preservation of Virginia water resources.³⁹

1. *Effect of Federal Law*

The recent advent of federal concern in the area of water quality has resulted in the powers of the Board being grounded not only upon state law, but also the Federal Water Pollution Control Act Amendments of 1972.⁴⁰ Under this Act, each state is required to promulgate water quality standards which are acceptable to the Environmental Protection Agency (EPA).⁴¹

obstacle to effective land use planning. A redefinition of the rights flowing to an individual from his ownership in land is thus a necessary concomitant to land use planning, as well as to environmental management. Land law rooted in the conventions of Tudor England cannot be expected to serve the needs of the post-industrial society now emerging. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759-60 (1974).

36. W. R. WALKER, INTEGRATED STATE LAND AND WATER POLICY: COMPLEMENTS AND CONFLICTS, IN LAND USE ISSUES, PROCEEDINGS OF A CONFERENCE 22 (Publication 629, Cooperative Extension Service November 1974).

37. VA. CODE ANN. §§ 62.1-10 TO -13 (Repl. Vol. 1973).

38. The Board consists of seven members appointed by the Governor and confirmed by the General Assembly. *Id.* § 62.1-44.8 (Repl. Vol. 1973).

39. *Id.* § 62.1-44.35 (1973).

40. 33 U.S.C.A. §§ 1251 to 1376 (Cum. Supp. 1975) (often referred to by Pub. Law No. 92-500). See also Section X, *infra*.

41. 33 U.S.C.A. § 1313 (Cum. Supp. 1975). Under this section, if a state fails to establish acceptable standards, the E.P.A. has the duty to prepare and publish regulations setting forth water quality standards for the state. Acceptable standards for the control of the discharge of pollutants are ones which require the application and enforcement of standards of performance to at least the same extent as those which are established by the E.P.A. *Id.* § 1316(c).

Water quality standards are enforced by requiring a permit or certificate as a condition precedent to conducting any activity which may result in discharge into navigable waters.⁴² If a state establishes its own permit program and its water pollution agency has adequate implementation authority, the state program will supplant the federal permit requirements.⁴³ Before acceptance, the state must have an approved continuing planning process which sets forth the standards and plans to be used.⁴⁴

Another important aspect of the federal effect on the Board's power is the extensive grant funds available to aid in the construction of waste treatment plants.⁴⁵ Before any sanitary district can receive federal assistance to upgrade its sewage treatment facilities, it must meet Board approval and conform to state plans and standards.⁴⁶ Because of the high costs involved in meeting the current pollution standards, localities have actively sought federal assistance to mitigate the expense of such facilities.⁴⁷ The Board's control of this funding allows it to play an influential role in determining what measures the localities must take in order to meet the strain on sewage treatment facilities created by urbanization and development.⁴⁸

The federal statutes empower EPA to bring an action against persons violating conditions or limitations on a permit issued by the Board,⁴⁹ and if a pollution source or combination of sources presents an imminent and substantial danger to anyone's health or livelihood, EPA may seek an injunction to restrain the pollution source.⁵⁰ Furthermore, a private citizen

42. *Id.* § 1341.

43. *Id.* § 1342(b), (c).

44. *Id.* § 1313(e).

45. *Id.* § 1281.

46. *Id.* § 1284(2), (3). The plans and standards referred to by this section is the continuing planning process required of the state under 33 U.S.C.A. § 1313(e).

47. The Board in fiscal year 1973 allocated seventy-seven million dollars to thirteen Virginia communities for construction of facilities. STATE WATER CONTROL BOARD, FIRST ANNUAL REPORT 5 (Fall, 1972-Winter, 1973).

48. *See* VA. CODE ANN. § 62.1-44.15:1 (Cum. Supp. 1974). If the Board commits itself to provide financial assistance from federal and state funds to a locality or authority in control of sewage treatment, then it has the power to require that sewage treatment facilities be constructed to upgrade the present level of treatment and abate existing water pollution or expand the system to accommodate additional growth. This represents an expansion of the Board's power under its permit program which is discussed below.

49. 33 U.S.C.A. § 1319 (Cum. Supp. 1975).

50. *Id.* § 1364. This statute specifically mentions the marketing of shellfish as being an endangerment to the livelihood of persons. This is of particular interest in Virginia because the decisions of the Board in the tidewater area are often influenced by the possible harm to shellfish areas caused by pollution discharges.

may bring suit against any person alleged to be in violation of federal or state water quality standards.⁵¹

Virginia possessed a permit system of regulating water pollution prior to federal regulation and was one of the first states to be granted interim permit authorization by EPA.⁵² But the federal legislation has resulted in a strengthening of the Board's authority because any curtailment of the Board's power by the state would result in administration of the same standards by EPA. The choice is no longer whether Virginia will have a water quality control program but who will administer it, the Board or EPA.

2. *State Statutory Provisions*

The Board has a good deal of discretion in determining what is necessary to preserve water quality in Virginia. It is authorized to establish and change any standards of quality, to take all appropriate steps to prevent water quality alteration contrary to the public interest or established standards,⁵³ and to adopt any regulations it deems necessary to enforce its water quality management program.⁵⁴

The Virginia definition of water pollution is broad and inclusive.⁵⁵ Under Virginia Code section 62.1-44.3 almost any change in the natural condition of the land that produces an alteration of the physical, chemical or biological property of water can constitute pollution. The land use implications are substantial. For example, Attorney General Andrew Miller has stated that this definition includes pollution caused by sediment runoff from the land.⁵⁶ Increased development and urbanization of land will inevitably result in sediment runoff.

The Attorney General's opinion also indicates that the Board has authority to control non-point source pollution⁵⁷ which would give it potential

51. *Id.* § 1365.

52. STATE WATER CONTROL BOARD, VIRGINIA WATER 5 (April 1973).

53. VA. CODE ANN. § 62.1-44.15(3)(a) (Repl. Vol. 1973).

54. *Id.* § 62.1-44.15(10).

55. *Id.* § 62.1-44.3(6). When this statute was amended, the framers intended to create a definition broad enough to include thermal pollution and the loss of dissolved oxygen in the water due to the constructions of dams. VA. CODE COMMISSION, REVISION OF TITLE 62 OF THE CODE OF VIRGINIA (1967). Virginia's definition is superior to that of most jurisdictions and is believed to result in a tightening of common law nuisance. Note, *Public Regulation of Water Quality in Virginia*, 13 WM. & MARY L. REV. 424, 444-46 (1971).

56. 1972 OP. ATT'Y GEN. 374.

57. Non-point discharges are discharges that result from water running off the land. Point discharges are those caused by the owner allowing a pipe or other point source to emit effluent into state waters.

power to regulate land use whenever activity on land results in water pollution.⁵⁸ The Board has exercised restraint in the area of non-point source pollution control, but a recent enforcement action against an orchard owner in Albemarle County illustrates the effect on land use of this power. The orchard owner had sprayed his trees with a chemical which was later discharged into a stream in the runoff from the orchard. The result was a fish kill and an action against the owner by the Board.⁵⁹ Although the enforcement action was motivated by concern over water quality, financial and other impairments created by the litigation impinged on the owner's use of the land as an orchard.

3. *Exercise of Authority*

The Board's efforts to combat water pollution are centered largely around the administration of its permit program. It consists of issuance of certificates for discharge of sewage, industrial and other wastes.⁶⁰ The Board is also empowered to issue special orders to parties who permit or cause pollution of state waters or violate the conditions of certificates of discharge.⁶¹

The Board's authority does not constitute a direct form of land use planning because it is basically reactive. However, the active exercise of its power in a conscientious effort to preserve water quality creates a restriction on the free use of the land. Anyone contemplating the construction of an industrial facility or a subdivision should be cognizant of the requirement for a certificate to discharge industrial wastes or sewage. The high costs of meeting the conditions imposed by the issuance of the certificate could make the planned development economically prohibitive for a given location.

The Board has received pressure recently to become more involved in actual land use control when issuing sewage discharge certificates in a

58. Neither the statutory definition of pollution nor the statutory powers of the Board draw a distinction between point and non-point source pollution. See VA. CODE ANN. §§ 62.1-44.3(6), -44.15 (Repl. Vol. 1973).

59. *Id.* § 62.1-44.15(11).

60. *Id.* § 62.1-44.15(5). This section provides for certificate regulation of sewage, industrial waste, and other wastes. The reason for the inclusion of "other wastes" was to provide a "catchall" for appropriate control by the Board of all substances other than industrial wastes and sewage which may cause pollution in the waters of Virginia. REVISION OF TITLE 62, *supra* note 55, at 15. Pursuant to this statutory authority, there are presently 1200 permits regulating waste discharges in the state. In 1972-73, 182 old sewage certificates were revoked and 225 new ones were issued, and 72 old industrial waste permits were revoked with 121 new ones issued, including 88 "non-discharge" certificates. SWCB, ANN. REP. *supra* note 47, at 6.

61. VA. CODE ANN. § 62.1-44.15(8)(a) (Repl. Vol. 1973).

region containing shellfish areas. Because shellfish can easily become contaminated and unsafe to harvest as a result of pollution,⁶² development which results in increased water pollution in the Tidewater area has met with acute opposition from representatives of the shellfish industry.

When the Board grants a discharge certificate to a sewage treatment facility, its concern is to insure that the facility itself does not emit a dangerous level of pollution into state waters. However, the Board has been requested to consider, not only the facility's effect, but also the resulting pollution caused by future land development in the vicinity of the sewage treatment plant.⁶³ It is unclear whether the Board has the statutory authority to consider the factor of future growth in its permit program.⁶⁴ With increasing growth throughout the state endangering Virginia's water quality, more pressure may be exerted on the Board to engage in projections of future land use in rendering its decisions.

The most controversial exercise of power by the Board with land use implications is a moratorium on the building of sewers or new connections

62. See Memorandum to General P. McCarthy, Council of the Environment from Mack I. Shanholtz, M.D., November 25, 1974.

63. Cabin Creek Pre-Hearing Order, at 14-15 (Nov. 1973) (on file at the Board). This order involved a petition by developers for a discharge certificate to construct a sewage treatment plant to service a planned development. Representatives of the shellfish industry intervened seeking to restrain the issuance of a certificate.

64. A member of the Board's Enforcement Division expressed to this writer the opinion that the Board's concern should only be whether the plant itself will result in pollution and there should be no consideration of any future, indirect effects such as the development served by the facility.

Although the specific powers of the Board may not encompass the consideration of such extrinsic factors, the powers and duties of the Board, when viewed in the aggregate, may allow such action. However, VA. CODE ANN. § 62.1-44.15:1 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974) does impose certain limitations on such actions by the Board. It provides:

Nothing contained in this chapter shall be construed to empower the Board to require the State, or any political subdivision thereof, or any authority created under the provisions of § 15.1-1241, to construct any sewerage system, sewage treatment works, or water treatment plant, waste treatment works or system necessary to (1) upgrade the present level of treatment in existing systems or works to abate existing pollution of State waters, or (2) expand a system or works to accommodate additional growth, unless the Board shall have previously committed itself to provide financial assistance from federal and State funds equal to the maximum amount provided for under § 8 or other applicable sections of the Federal Water Pollution Control Act (P. L. 84-660, as amended), or unless the State or political subdivision or authority agrees, or is directed by the Board with the concurrence of the Governor, to proceed with such construction, subject to reimbursement under § 8, or other applicable sections of such federal act.

The foregoing restriction shall not apply to those cases where existing sewerage systems or sewage or other waste treatment works cease to perform in accordance with their approved certificate requirements.

to existing sewers. Under an administrative rule promulgated by the Board, it can impose such a moratorium when a Sanitary District is failing to treat sewage adequately and thus polluting state waters.⁶⁵ The effect of this action is severe curtailment of construction in the affected area.

The Board's invocation of this measure has led to resistance and litigation. In 1970, such a moratorium was imposed on Fairfax County, one of the fastest growing areas in the nation, because it had failed to improve its sewage discharge treatment program to accommodate growth. In response, the County prepared a plan to alleviate the problem and meet the standards required by the Board. The protest from developers was vociferous and court actions were initiated to determine the moratorium's effect on development planned before its imposition.⁶⁶

The Board sought to enforce its moratorium by obtaining an injunction to stop additional sewage connections until permissible pollution limits were met.⁶⁷ The court refused to grant the injunction, basing its decision on the good faith efforts of the County to implement its plan for improving sewage treatment facilities. The detrimental economic effects of the moratorium were noted but development was allowed to continue because the upgrading of sewage treatment would enable the County to accommodate additional growth.⁶⁸ The court temporarily lifted the moratorium and ordered periodic progress reports of the County's corrective actions.⁶⁹

Perhaps the best illustration of the Board's role is provided in a series of hearings held in 1973 to determine whether a moratorium should be imposed on Hampton Roads Sanitation District.⁷⁰ The situation arose when local authorities failed to plan adequate sewage treatment facilities capable of accommodating the area's growth. Since improvement of sewage treatment would mean higher rates for resident-users, there was a reluctance to act until the Board threatened to impose a moratorium on sewage hook-ups.⁷¹ The witnesses before the Board were representatives of the different interests which must be balanced in land use decisions. Real-

65. State Water Control Board, Requirement No. 1 (1961). This and other regulations of the Board are set forth in SWCB, State Water Control Law.

66. Board Files, Fairfax County July 1973 - September 1973.

67. State Water Control Board v. Board of Supervisors, Chancery No. 31671 (Fairfax County, Va. Cir. Ct. July 28, 1970), 1 ENV. REP. 1482 (1970).

68. 1 ENV. REP. 1482 at 1483 (1970).

69. *Id.* at 1483 (1970).

70. These hearings are on file at the Board.

71. SWCB, Record of Hearing, Hampton Roads Sanitation District, James River Plant at 29-30 (Richmond, Va. April 23, 1973). According to Mr. John Buckley of the Newport News Federation of Civil Organizations, "the city knew of the vast increase in demand because of a record number of new building permits but did not plan for it." *Id.* at 69.

tors and construction industry representatives spoke of the harmful economic effects of a moratorium. Countering their testimony were spokesmen for environmental groups and the shellfish industry who argued that state water quality standards were being violated and the Board should act accordingly.

The firm state and federal statutory base of the Board became apparent in these hearings. When a state senator voiced opposition to the moratorium and stated that such actions could persuade the General Assembly to reduce the Board's power,⁷² Chairman Cole of the Board pointed out that due to federal law, such legislation would only shift control to EPA and localities would still have to meet the standards.⁷³

The Board is reluctant to impose a moratorium and if the locality is making its best efforts to upgrade sewage treatment, such action will not be used. Land use per se is not a concern of the Board and attempts to implement a moratorium for purposes other than water quality have been rejected by the Board as a misuse of water control law.⁷⁴

4. *The Groundwater Act of 1973*

Current concern over the preservation of Virginia's groundwater resources may result in another conflict between the Board's exercise of power and future development. As in the sewage waste issue discussed above, the absence of effective growth planning has resulted in a water quality problem, and the Board is intervening in the interest of preserving water quality with remedial action that has the effect of curtailing land development.

In many areas of Virginia, groundwater is the primary water resource and with increasing urbanization, the supply has been severely taxed. In 1971, it was estimated that groundwater withdrawal in some areas was forty times higher than thirty years earlier.⁷⁵ When the withdrawal of groundwater is too rapid, the ability of the aquifer, source of the groundwa-

72. *Id.* at 37-38.

73. *Id.* at 40. The effect of federal legislation on the Board's power is discussed in the accompanying text and footnotes. The Board informed the local authorities that a failure to meet the standards could result in suits by private citizens or the E.P.A. and fines and possible imprisonment as a consequence.

74. *See*, SWCB, Record of Hearing, Boat Harbor Sewage Treatment Plant, (Richmond, Va. September 17, 1973). In this instance, the Board stated certain officials in the Health Department were desirous of having a moratorium imposed for reasons divorced from water quality. *Id.* at 6-8.

75. Miri, *Some Problems of Water Resource Management in Virginia: A Preliminary Examination*, 13 WM. & MARY L. REV. 388, 413 (1971).

ter, to replenish itself is endangered and the result is a possible exhaustion of supply.⁷⁶

In 1973, the Groundwater Act was enacted giving the Board authority to preserve and protect groundwater resources.⁷⁷ As a result, the rights of groundwater users in Virginia underwent a transformation from a protective common law policy to the implementation of government control. At common law in Virginia, the owner of real property was considered to own groundwater found on the property.⁷⁸ The owner could, in the absence of malice or negligence, appropriate such water for his own use even if such use diverted groundwater from adjacent property to the extent of exhausting its supply.⁷⁹

The Groundwater Act of 1973 represents a shift from the view of private ownership of groundwater:

[T]he right to reasonable control of all groundwater resources within this State belongs to the public and that in order to conserve, protect and beneficially utilize the groundwater of this State and to ensure the preservation of the public welfare, safety and health, it is essential that provision be made for control of groundwater resources.⁸⁰

State control of groundwater resources is centered around establishment of critical groundwater areas in which the Board will enforce use regulations.⁸¹ Proceedings may be initiated by the Board to declare a portion of the state a critical groundwater area whenever there is an excessive decline in the groundwater level, the wells of two or more groundwater users interfere with one another, the available supply is in danger of being

76. *Id.* The diminishing of groundwater resources affects not only the quantity for use but also results in quality deterioration because the pollution content increases due to salinity and seepage into the water table of industrial and sewage wastes.

77. Groundwater Act of 1973, VA. CODE ANN. §§ 64.1-44.83 to .107 (Cum. Supp. 1974).

78. *Heninger v. McGinnis*, 131 Va. 70, 108 S.E. 671 (1921). It should be noted the rule stated here applies only to subsurface waters which percolate. When subsurface waters flow in a definite marked channel the owner is entitled to make only a reasonable use of the water for his tract of land and cannot dispose of or interfere with the natural flow of the surplus. *Id.* at 75. The groundwater which this article discusses is percolating water. See also 20 MICHIE'S JURISPRUDENCE, *Waters and Watercourses* §§ 8-9 (1952).

79. *Miller v. Black Rock Springs Improvement Co.*, 99 Va. 747, 40 S.E. 27 (1901). The concept of what the owner's use can be is broad. A coal mining operation which caused an adjacent property owner's spring to cease flowing was considered a lawful use of property and in the absence of negligence, the mine operator was not liable. *C & W Coal Corp. v. Salyer*, 200 Va. 18, 104 S.E.2d 50 (1958).

80. VA. CODE ANN. § 62.1-44.84 (Cum. Supp. 1974).

81. A critical groundwater area is "a geographically defined area in which the Board has deemed the levels, supply or quality of groundwater to be adverse to public welfare, health, and safety." *Id.* § 62.1-44.85(6).

overdrawn, or the area's groundwater has or is reasonably expected to become polluted.⁸² If the Board finds that it is necessary for the public health, welfare, and safety, it may declare the area to be a critical groundwater area.⁸³

In such an area the common law rules are altered and the right to use the groundwater is regulated by the issuance of certificates of groundwater rights.⁸⁴ Two exemptions are embodied in the certificate plan: (1) use or supply of groundwater for agricultural and livestock watering purposes, for human consumption or domestic purposes, or for any single industrial or commercial purpose not exceeding fifty thousand gallons a day;⁸⁵ (2) persons using groundwater in the area or engaging in construction, alteration, rehabilitation, or extension of a well prior to the declaration have a right to apply the groundwater to the extent of their intended beneficial uses,⁸⁶ and obtain a certificate of groundwater rights by simply registering with the Board.⁸⁷

Any person who is not exempted must obtain a certificate from the Board before using groundwater in a critical groundwater area.⁸⁸ The issuance of certificates is predicated upon the effect the applicant's use will have on persons already engaged in groundwater use in the area.⁸⁹ This results in the alteration of the common law concept of groundwater use without regard to diversion from other users. Instead, a priority system is created based upon the idea of first in time, first in right. By making use of the groundwater, the property owner acquires a vested right in the groundwater supply which will be protected by the Board.

The Groundwater Act has been in force for a short period of time and its impact on land use is not fully known. However, on January 24, 1975, the Board declared a large portion of southeastern Virginia a critical groundwater area and began to exercise its enforcement powers.⁹⁰

82. *Id.* § 62.1-44.95.

83. *Id.* § 62.1-44.96.

84. *Id.* § 62.1-44.97.

85. *Id.* § 62.1-44.87.

86. *Id.* § 62.1-44.93.

87. *Id.* § 62.1-44.97.

88. *Id.* § 62.1-44.99. This section requires any such user to register with the Board to preserve his right to use the groundwater in a critical groundwater area. The Board will not examine the effect of the use on the area groundwater supply but will automatically issue a certificate to the registrant.

89. *Id.* § 62.1-44.100(e).

90. The background for this action by the Board is available in the Memorandum for Agenda of Jan. 23-24, 1975, which was issued by the Board preceding its meeting on that date.

5. Conclusion

The absence of effective land use planning is a definite factor in producing strains upon water quality. The State Water Control Board, through enforcement action, will often impose controls which curtail and restrict an owner's use of his property. This indirect form of land use control should diminish in the future if a program of controlled growth is developed for Virginia.

If Virginia does initiate a state-wide land use plan, the Board is equipped with statutory authority and expertise to supply needed information on state water quality and resources.⁹¹ Until the development of an effective land use management program, however, the Board will be unable to preserve fully Virginia's water resources.⁹²

C. STATE AIR POLLUTION CONTROL BOARD

The dramatic increase in the pervasiveness and intensity of man-made air pollution along with the failure of the states to initiate meaningful programs designed to abate the problem prompted the federal government to enact the Clean Air Act of 1970.⁹³ The purpose of the Act is to eliminate hazardous levels of air pollution by providing uniform standards, financial assistance, and encouragement for states to implement individual plans designed to achieve these standards.⁹⁴

The Act directs the Administrator of EPA to develop national primary and secondary ambient air quality standards.⁹⁵ These standards establish the maximum acceptable concentrations of air pollutants for ambient, or surrounding air.⁹⁶ The primary standards are those requisite to the protection of public health, while the secondary standards are for the protection of the public welfare.⁹⁷

91. See VA. CODE ANN. §§ 62.1-44.15(2), .36, .38, .39 (Repl. Vol. 1973).

92. According to WALKER, *supra* note 1, at 27, "Water-quality control, without land-use control is doomed to failure, for alone it cannot insure a specific quality of water for our surface streams. In a void, the economics of land-use development will determine the minimum amount of [water] pollution"

93. Clean Air Act of 1970, 42 U.S.C. §§ 1857-58 (1970). See generally Section X, *infra*.

94. Congress determined "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments" *Id.* § 1857(a)(3). "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." *Id.* § 1857c-2(a).

95. *Id.* § 1857c-4.

96. *Id.*

97. *Id.* The national primary ambient air quality standards require "that the concentration

Each state has the primary responsibility for assuring its air quality and is required to submit an implementation plan specifying the manner in which the national primary and secondary air quality standards will be achieved and maintained.⁹⁸ Through its implementation plan, each state retains authority to adopt and enforce standards provided they are not less stringent than the federal regulations or those approved under the state implementation plan.⁹⁹ As a consequence, stricter state regulation is encouraged while insuring a minimum air quality level.¹⁰⁰

The State Air Pollution Control Board of Virginia (SAPCB) was established in 1966 and is empowered to conduct investigations and inspections;¹⁰¹ initiate research;¹⁰² formulate regulations for controlling air pollution;¹⁰³ conduct public hearings;¹⁰⁴ institute legal proceedings;¹⁰⁵ and issue

of pollutants in the air remain below levels known to cause danger to human health." Comment, *The Nondegradation Controversy: How Clean Will Our "Clean Air" Be?*, 1974 U. ILL. L.F. 314, 315 (1974). The national secondary ambient air quality standards require even lower concentrations of air pollutants:

The goal of these standards is to protect the public welfare from the adverse effects of air pollution. The concentrations of pollutants in the air can be low enough to eliminate any danger to public health, yet high enough, nonetheless, to cause reduced visibility, danger to plant life, and deterioration of paint and metals. The secondary air standards require air that is pure enough to eliminate even these effects. *Id.*

98. 42 U.S.C. § 1857c-5 (1970). *But see* Comment, *1970 Clean Air Amendments: Use and Abuse of the State Implementation Plan*, 26 BAYLOR L. REV. 232 (1974) where the author examines the proposition that state implementation plans allow sufficient latitude within the state to obstruct the federal purpose.

99. 42 U.S.C. § 1857d-1 (1970). It has been suggested that implicit in the federal act is a policy preventing deterioration of air presently cleaner than required by federal standards. In *Fri v. Sierra Club*, 412 U.S. 541 (1973), a 4-4 court affirmed a lower court decision [*Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972)] granting an injunction which barred the Administrator of the EPA from approving state plans that allow such deterioration. The rules and regulations promulgated by the Virginia State Air Pollution Control Board "shall not promote or encourage any substantial degradation of present air quality in any air basin or region which has an air quality superior to that stipulated in the rules and regulations." VA. CODE ANN. § 10-17.18 (Repl. Vol. 1973), *as amended*, VA. CODE ANN. § 10-17.18(b) (Cum. Supp. 1974). *See* Comment, *The Nondegradation Controversy: How Clean Will Our "Clean Air" Be?*, *supra* note 97.

100. In a similar fashion, Virginia encourages stricter local ordinances but insures a minimum standard. For new local ordinances, the State Air Pollution Control Board will not approve any local ordinance "less stringent than the pertinent regulations of the Board." VA. CODE ANN. § 10-17.30(b) (Repl. Vol. 1973).

101. *Id.* § 10-17.17.

102. *Id.* § 10-17.18(a).

103. *Id.* § 10-17.18 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

104. *Id.*

105. *Id.*

special orders.¹⁰⁶ SAPCB administers the federally required state implementation plan¹⁰⁷ and is one of the tools used to give meaning to Article XI of the Virginia Constitution which makes preservation of the environment the stated policy of the Commonwealth.¹⁰⁸ Significantly, the embodiment of this policy in the Constitution not only signals an environmental awareness but also "gives additional backing to the actions of agencies whose statutory mandate it is to police the environment, such as . . . the Air Pollution Control Board."¹⁰⁹ Through its regulations, SAPCB has established a permit requirement for sources of air pollution.¹¹⁰

Since most land development produces air pollution either directly¹¹¹ (industrial development emitting pollutants) or indirectly¹¹² (development inducing automobile traffic), SAPCB, through its permit requirement, participates in the decision-making process for siting of such projects. The pre-construction review undertaken by the Board must indicate that the siting of the source and its operation will not impair air quality in the

106. *Id.* § 10-17.18:1. The failure to comply with SAPCB regulations or orders is a misdemeanor punishable by a maximum fine of \$1,000 for each violation. Each day of continued violation after a conviction is considered a separate offense. *Id.* § 10-17.29. A private citizen is allowed to seek damages or other relief on account of injury to persons or property by air pollution. *Id.*

107. VA. CODE ANN. § 10-17.18 (Repl. Vol. 1973). "With the exception set forth in this subpart, the Administrator approves Virginia's plan for the attainment and maintenance of the national standards." 40 C.F.R. § 52.2423(a) (1974). "Because of the late submission of Virginia's plan for review of new or modified indirect sources, the public has not had adequate opportunity to comment on its approvability. Therefore, the Administrator disapproves this portion of the plan pending completion of the public comment period and the Administrator's evaluation of the plan." *Id.* § 52.2448(a). The SAPCB information officer stated that the EPA has informally indicated that the balance of the plan will be approved by July 1975. Telephone Interview with Information Officer, State Air Pollution Control Board, Richmond, Virginia, Jan. 31, 1975.

108. Article XI of the Virginia Constitution in part provides:

To the end that the people have clean air . . . it shall be the policy of the Commonwealth to conserve . . . its natural resources Further, it shall be the Commonwealth's policy to protect its atmosphere . . . for pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth. VA. CONST. art. XI, § 1.

109. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 215 (1972).

110. Regulations for the Control and Abatement of Air Pollution, The Virginia State Air Pollution Control Board 2.06 *et seq.* (1972), *as amended*, (Supp. 1974) [hereinafter cited as SAPCB Reg.].

111. "Manufacturing and electric power plants produce about 21% by weight of the total air pollution in Virginia." THE COUNCIL ON THE ENVIRONMENT, THE STATE OF VIRGINIA'S ENVIRONMENT, 29.

112. "[E]xhaust emissions from cars, trucks and buses comprise 72% by weight of all air pollution in Virginia." *Id.*

area.¹¹³ Performance standards, where applicable, must also be met.¹¹⁴

SAPCB has designated seven air quality control regions in Virginia¹¹⁵ in an attempt to provide a decentralized yet coordinated system for reviewing permit applications and monitoring air quality. The regional approach, by vesting authority at a level higher than the municipality, facilitates non-fragmented land use planning as means to pollution control especially for development which has a greater than local significance.¹¹⁶ At the same time, regional control is not so remote that it fails to harmonize problems peculiar to a locality with the interests of the region. The regional approach to air pollution represents a departure from the past:

Historically, land use authority in this country [and in Virginia] has been delegated to local government with full autonomy to pass and administer regulations. Air quality control has been delegated to the states subject to federal criteria and while the states may in turn delegate powers of administration to regional and local agencies, the basis for the exercise of pollution control is regional and not local.¹¹⁷

1. *Sources of Air Pollution*

Stationary sources of air pollution are either direct or indirect. A direct source is defined as "[a]ny stationary source in which the points of emission of air contaminants originate directly from the source itself."¹¹⁸ A classic example is the power plant.¹¹⁹ With the exception of insignificant direct sources,¹²⁰ all owners of direct sources are required, prior to commencement or modification of such sources, to obtain a permit from SAPCB.¹²¹ An indirect source is defined as "a facility, building, structure, or installation, which when completed will attract or may attract mobile

113. SAPCB Reg. 2.06(d) (Supp. 1974).

114. *Id.* 4.02.00 *et seq.* (1972).

115. The seven regions are: Southwest Virginia, Valley of Virginia, Central Virginia, Northeastern Virginia, State Capital Region, Hampton Roads, and Northern Virginia. Air Quality Control Region 7 (Northern Virginia), has its own regulations in recognition of the air pollution problems peculiar to the area. The SAPCB regulations for Region 7 should be consulted for any questions pertaining to this area.

116. Mandelker and Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 *Ecol. L.Q.* 235 (1973).

117. *Id.* at 273. The SAPCB may create air pollution control districts within a region to aid in the administration of Board regulations. VA. CODE ANN. § 10-17.19 (Repl. Vol. 1973).

118. SAPCB Reg. 1.01 (Supp. 1974). *See* note 111 *supra*.

119. *See* Willrich, *The Energy—Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257 (1972).

120. SAPCB Reg. 2.06(g)(1) (Supp. 1974).

121. *Id.* 2.06(a)(1).

source activity”¹²² Here, air pollution levels are increased indirectly by attracting automobile traffic which generates exhaust emissions. Although a threshold which exempts minor development is provided,¹²³ most commercial development of any size is affected by the permit requirement for indirect sources of air pollution.¹²⁴ Naturally, some development qualifies as both a direct and indirect source. Owners of sources existing prior to implementation of the state regulations must also apply to SAPCB for a permit to operate such a source.¹²⁵

Indirect source review is the method by which SAPCB can reach most private development. Despite assurances that indirect source regulation is not designed as a “no growth measure,” commercial developers have not been convinced.¹²⁶ EPA and SAPCB insist, however, that indirect source review merely requires planning in order to maintain air quality in Virginia and will be limited accordingly.¹²⁷ As a consequence, SAPCB could conceivably prevail upon its permit applicants to follow a land use policy or plan provided this policy somehow relates to the state air pollution control strategy.¹²⁸

2. Permit Procedure

The permit application process is a pre-construction review designed to take no more than ninety days.¹²⁹ Initially, a local or regional office of

122. *Id.* 1.01. “[I]ndirect sources include but are not limited to 1. Highways and roads 2. Parking facilities 3. Retail commercial and industrial facilities 4. Recreation, amusement, sports, and entertainment facilities 5. Airports 6. Office and Government buildings 8. Education facilities.” *Id.* With the attraction of vehicles to these facilities, the resulting pollution leads to atmospheric stagnation and generally dangerous levels of pollutant concentrations. See note 112 *supra*.

123. In a SMSA (standard metropolitan statistical area), a permit is not required when the source will attract fewer than 700 vehicles to the roadways and parking facilities serving the source over the one hour period during which the maximum number of vehicles is anticipated, and fewer than 1750 vehicles to the roadways and parking facilities during the eight hour period when the maximum number of vehicles is expected. SAPCB Reg. 2.06(g)(2)(i)(a) (Supp. 1974). The figures are 1400 and 3500 respectively outside a SMSA. *Id.* 2.06(g)(2)(ii)(a). In Region 7 (Northern Virginia), the figures are 250 and 625 respectively. *Id.* 2.706(g)(2)(i) (1974).

124. See note 122 *supra*.

125. SAPCB Reg. 2.04(b) (Supp. 1974).

126. SAPCB, Indirect Source Regulation Seminar, Richmond, Virginia (Nov. 15, 1974).

127. The SAPCB indicated that review of applications for permits will be limited to considerations relating to air pollution. *Id.*

128. Even limited to air quality considerations, the resulting effect on land could be great. Marcellus Wright, Jr., President of the Central Richmond Association suggests that indirect source regulation could put a ceiling on land values and cause spread versus concentration, as well as limit building heights. Richmond Mercury, Nov. 20, 1974, at 2, col. 1.

129. SAPCB Reg. 2.06(e)(1) (Supp. 1974).

SAPCB is available to offer assistance in determining if a permit is required. There is no cost for a permit. Permit applications are prepared and distributed to the main Richmond office, the regional office, and the local office.¹³⁰ The local agency makes a review and forwards its recommendation to the regional office which in turn forwards its report and recommendation to the Richmond office.¹³¹ More detailed information may be sought to aid in the review.

SAPCB's analysis consists of an independent review of the information along with the recommendations of the regional office and local agency.¹³² SAPCB arrives at a tentative decision which is forwarded to the regional office and made available for public comment at a hearing.¹³³ Upon receipt of these comments, the final decision is made. Prior to the issuance of a permit, SAPCB must be convinced that the design of the source will not cause violation of its regulations and that its operation will not interfere with the attainment or maintenance of air quality standards for Virginia.¹³⁴ "Any owner aggrieved by a final decision of the Board . . . is entitled to judicial review thereof . . . in the Circuit Court of the City of Richmond"¹³⁵

SAPCB involvement does not end with the issuance of a permit. The Board may, if it deems necessary, require an owner to monitor emissions and make periodic reports.¹³⁶ The mere existence of a permit is not a defense to violation of applicable regulations.¹³⁷

3. Conclusion

The Clean Air Act of 1970 requires that state implementation plans

130. For the information required of applicants, see SAPCB Reg. 2.06(c) (Supp. 1974), and SAPCB, INSTRUCTIONS FOR THE COMPLETION OF REGISTRATION/PERMIT APPLICATION FORM (SAPCB form 7) (1974).

131. SAPCB, INSTRUCTIONS FOR THE COMPLETION OF REGISTRATION/PERMIT APPLICATION FORM (SAPCB form 7) (1974).

132. *Id.*

133. "Prior to approval, all permit requests must be subject to a *public comment period* of at least 30 days. In addition, at the end of the *public comment period*, a public hearing will be held." SAPCB Reg. 2.06(a)(3) (Supp. 1974).

134. The standards for granting permits are set forth in SAPCB Reg. 2.06(d) (Supp. 1974). For information on variances, see SAPCB Reg. 2.01(h) (Supp. 1974).

135. VA. CODE ANN. § 10-17.23:2 (Repl. Vol. 1973). Challenges to a ruling will require expert testimony since the SAPCB criteria as set forth in the SAPCB regulations is often technical and not easily comprehended by the layman.

136. *Id.* § 10-17.21; SAPCB Reg. 2.07 (Supp. 1974). The SAPCB has a right of entry to obtain this information. VA. CODE ANN. § 10-17.22 (Repl. Vol. 1973); SAPCB Reg. 2.13 (Supp. 1974).

137. SAPCB Reg. 2.06(i) (Supp. 1974).

entail measures necessary to insure attainment and maintenance of federal standards "including but not limited to land-use and transportation controls."¹³⁸ With the power to issue permits for construction and operation of stationary sources of air pollution, SAPCB is potentially capable of fostering at least one facet of an overall state land use strategy.¹³⁹ Its influence is, however, likely to be limited to a land use policy which either directly or indirectly produces and maintains air quality within the state.¹⁴⁰ Inasmuch as a balanced land use plan necessitates consideration of numerous factors, environmental and aesthetic, SAPCB's role will only be a part of a land use plan developed for Virginia. In the absence of a comprehensive state land use plan, SAPCB as well as other state agencies will continue to make significant land use decisions on an ad hoc basis without the benefit of specific guidelines based on a land use plan. This fragmented approach is unfortunate since land use decisions often work irreparable damage. Moreover, an ad hoc approach is itself contrary to the concept of balanced land use planning.

D. SOIL AND WATER CONSERVATION COMMISSION

The Soil and Water Conservation Commission is responsible for implementing the state policy of erosion prevention. Improper land use practices are the primary cause of erosion and attendant consequences.¹⁴¹ Urbanization of land dramatically accelerates the rate and intensity of erosion. The Commission has estimated the conversion of land from rural to urban use can result in soil erosion increasing from as little as fifty tons per square mile per year to more than fifty thousand tons per square mile per year.¹⁴²

In 1973, the Erosion and Sediment Control Law was enacted directing the Commission to supervise a state-wide coordinated erosion and sediment control program.¹⁴³ Pursuant to this Act, the Commission developed

138. 42 U.S.C. § 1857c-5(a)(2)(B) (1970). "The legislative history of the Act reveals that Congress approved land-use controls as a general method for achieving air quality standards." Mandelker and Rothchild, *supra* note 116, at 239. "The effectiveness of land use as a supplementary air pollution control technique is vividly illustrated by considering the number of state implementation plans that have failed because they do not include it." Comment, *The Nondegradation Controversy: How Clean Will Our "Clean Air" Be?*, *supra* note 97, at 335.

139. A state land use policy does not exist in Virginia. As a result, any such policy would generally reflect only the SAPCB's land use policy which is derived from air pollution considerations alone.

140. See note 126 *supra*.

141. VA. CODE ANN. § 21-2 (REPL. VOL. 1960), as amended, (Cum. Supp. 1974).

142. SOIL AND WATER CONSERVATION COMMISSION, VIRGINIA EROSION AND SEDIMENT CONTROL HANDBOOK I-4 (1974).

143. VA. CODE ANN. § 21-89.2 (Cum. Supp. 1974).

guidelines for erosion and sediment control and established minimum standards.¹⁴⁴ These standards are enforced by requiring an erosion and sediment control plan from any person engaged in a land disturbing activity.¹⁴⁵ Approval of the plan is a condition precedent to obtaining a building permit.¹⁴⁶ The definition of a land disturbing activity is extremely broad: "any land change which may result in soil erosion from water or wind and the movement of sediments in State waters or onto lands in the State, including, but not limited to, clearing, grading, excavating, transporting and filling of land"¹⁴⁷

Enforcement of the Commission's standards and approval of the erosion and sediment control plans is primarily a local responsibility. In regions of the state which are part of erosion and soil conservation districts,¹⁴⁸ the districts will prepare a soil and erosion control program consistent with the Commission's standards and guidelines.¹⁴⁹ In areas not within a district, the county, city, or town will prepare a program.¹⁵⁰ Any county, city, or town within a district has the option of adopting its own program and being exempted from district supervision.¹⁵¹ In default of action by a district or locality, the Commission will prepare a program for the area.¹⁵² Localities are currently in the process of adopting programs and submitting them to the Commission for approval. Some localities have merely adopted the model ordinance prepared by the Commission while others have studied the situation closely and conceived their own program.¹⁵³

The authority preparing the plan for the locality has the responsibility of evaluating erosion and sediment control plans for land disturbing activities in its jurisdiction.¹⁵⁴ The decisions of districts are subject to review by

144. *Id.* § 21-89.4. The Board's standards, guidelines, and criteria are found in *EROSION AND SEDIMENT CONTROL HANDBOOK*, *supra* note 142.

145. VA. CODE ANN. § 21-89.6(a) (Cum. Supp. 1974).

146. *Id.* § 21-89.7.

147. *Id.* § 21-89.3. This section also sets forth certain exempted activities such as farming, small construction projects, and activities such as surface mining which are regulated by other provisions in the Code.

148. The soil and water conservation districts are established by the Commission and are composed of supervisors elected by the residents of each district. *See* VA. CODE ANN. §§ 21-12.1 to 21-65 (Cum. Supp. 1974).

149. *Id.* § 21-89.5(a) (Cum. Supp. 1974).

150. *Id.* § 21-89.5(b).

151. *Id.* § 21-89.5(c).

152. *Id.* § 21-89.5(d).

153. Interview with Commission staff, in Richmond, Va., January 30, 1975.

154. VA. CODE ANN. § 21-89.6 (Cum. Supp. 1974). If a land disturbing activity is located in two plan approving authority's jurisdictions, the owner may submit his plan directly to the Commission. *Id.*

the Commission. Final decisions of the Commission and the cities, counties, and towns may be challenged by filing an appeal in circuit court.¹⁵⁵

An erosion and sediment control plan must include proposed actions by the landowner to insure minimal erosion from the construction. Under Commission guidelines, the plan must contain a narrative report describing the project's purposes and construction schedule and setting out the conservation practices, calculations and assumptions upon which they are based. Moreover, the applicant must submit overlay maps which illustrate proposed alterations of the area and location of control measures.¹⁵⁶

These requirements do not per se severely alter growth patterns. Proper engineering techniques can effectively dissipate erosion problems of a land disturbing activity. According to the Commission, the additional expenditures incurred as a result of control measures will not make a contemplated construction project economically unfeasible.¹⁵⁷ The plan requirements should improve the site location of builders and increase the pre-planning of construction. As a consequence, the Commission predicts that enforcement of the Erosion and Sediment Control Law will result in higher quality housing.¹⁵⁸

A second program of the Commission with an effect on land use planning is the Soil Survey Master Plan. Enacted in 1970, the plan's goal is to complete a soil survey and mapping of Virginia by 1990.¹⁵⁹ Primarily designed for agricultural purposes, soil surveys also have extensive value in non-agricultural use of land.¹⁶⁰ The identification of soil characteristics is beneficial in deciding the best use which should be made of the land. The information accumulated by the soil surveys will be readily available to planners and governmental bodies. The data will aid reduction of erosion and sediment damage, help overcome soil oriented problems in construction, as well as assist in the selection and preservation of prime agricultural land.¹⁶¹ The Commission contends that any long range land use planning should consider the nature of the soil as a factor in assessing alternatives.

155. *Id.* § 21-89.10 (Cum. Supp. 1974).

156. *Erosion and Sediment Control Handbook*, *supra* note 142, at II-7.

157. Interview, *supra* note 153.

158. *Id.*

159. VA. CODE ANN. § 21-5.2 (Cum. Supp. 1974). At this time, the state soil survey is behind schedule and if it continues at the current rate, will not be completed until 2015. The Commission has requested additional funding to enable the survey to get back on schedule. SOIL AND WATER CONSERVATION COMMISSION, SOIL SURVEY MASTER PLAN PROGRESS REPORT.

160. SOIL AND WATER CONSERVATION COMMISSION, SOIL SURVEY MASTER PLAN (1971).

161. *Id.* at 5-6.

E. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT

The Department of Conservation and Economic Development supervises the use and preservation of Virginia's natural resources.¹⁶² Operations and duties are delegated to departmental divisions including Forestry, Parks, Mineral Resources, Mined Land Reclamation, and the Virginia State Travel Service.¹⁶³

The Division of Parks and the Division of Forestry are actively involved in purchasing land for creation of state forests and parks,¹⁶⁴ under the direction of the Commission of Outdoor Recreation as a part of the Virginia Outdoors Plan.¹⁶⁵ In addition to purchasing land for state forests, the Division of Forestry is responsible for the special classification of property devoted to forest use subject to local tax assessment.¹⁶⁶ The purpose of this special assessment is to create an incentive for owners to devote their land to forest use.¹⁶⁷

The land use activity with which the Department is most actively involved is surface mining. In recent years, the practice of surface mining, particularly coal strip mining, has become highly controversial due to the adverse environmental results.¹⁶⁸ In 1973, surface mining constituted eighty percent of the mining in the United States and coal stripping accounted for forty-one percent of the surface mining.¹⁶⁹ Although safer and more efficient than deep mining, surface mining renders land useless and pollutes the surrounding water and air. Surface mining removes the topsoil of the land and replaces it with a low grade soil called spoil. The process of revegetating the land is thus slowed down and, in the interim, serious erosion problems are created.¹⁷⁰

162. The operation of the Department is the responsibility of a director appointed by the Governor. He is assisted by a twelve-member board also appointed by the Governor. VA. CODE ANN. §§ 10-1, -3, -12 (Repl. Vol. 1974).

163. *Id.* § 10-8.1.

164. *Id.* § 10-21, -33.

165. See generally Section VII F, *infra*.

166. VA. CODE ANN. § 58-769.5(c) (Repl. Vol. 1974).

167. See Section VII F, *infra*.

168. Surface mining has been defined as the process of removing the overburden of topsoil, rock and other material covering a mineral deposit, in order to extract the mineral. There are five types of surface mining methods: strip, auger, open pit, dredging and hydraulic. A REITZE, JR., ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES 12-2 (1974).

169. Several reasons account for the predominance of surface mining over deep (subsurface) mining. The production costs of surface mining are much lower than deep mining, and it allows for the recovery of many deposits which cannot be deep mined. It is also a much safer operation than deep mining. Binder, *A Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339, 341-43 (1973).

170. Note, *New Surface Mining in Wisconsin*, 1973 WIS. L. REV. 234, 237-40.

The effects of surface mining operations are felt far beyond the mine site. In addition to marred aesthetic qualities of the land the operation causes the discharge of acidic water which upon entering the area's watershed is capable of destroying the entire eco-system of its streams.¹⁷¹ The damage of surface mining can be mitigated through a program of land reclamation, but the surface mining industry has refused voluntary measures to restore the land and curtail pollution.¹⁷² Since the industry has not considered the social cost of their operations, governments have been forced to regulate surface mining in those states with significant operations.¹⁷³ Virginia has adopted a regulatory program similar to those found in other states.¹⁷⁴ This program is the responsibility of the Department and is administered by its Division of Mineral Land Reclamation.

The statutory provisions for surface mining regulations are set forth in two distinct parts. One set of regulations applies only to coal mining operations,¹⁷⁵ while the other regulates all other surface mining operations.¹⁷⁶ The control methods are essentially the same. Before any person engages in surface mining in the state, a permit must be obtained from the Department.¹⁷⁷ Before the Department will issue a permit, the applicant must submit plans that describe the measures which the mine operator will take to minimize environmental damage and to reclaim the land upon termination of the mining operation.¹⁷⁸ To insure a reclamation effort on the mined land the operator must furnish a bond.¹⁷⁹ If the operator fails to complete reclamation of the land satisfactorily, the bond is forfeited and the Department will apply the funds to the completion of land reclamations.¹⁸⁰ Other enforcement measures are injunctions¹⁸¹ and criminal sanctions for willful violators of the coal surface mining regulations.¹⁸²

Although the level of success of this type of regulatory program is debatable, it is certainly a better alternative than dependance upon the volun-

171. REITZE, *supra* note 168, at 12-3.

172. *See* WIS. L. REV., *supra* note 170, at 240.

173. *See* REITZE, *supra* note 168, at 12-11 to -12. Coal which is strip-mined is approximately \$4.00 per ton cheaper than deep-mined coal. Some observers believe this difference in cost should be applied to the reclamation of strip-mined lands. BUSINESS WEEK, Nov. 4, 1972, at 54.

174. REITZE, *supra* note 168, at 12-14 to -15.

175. VA. CODE ANN. §§ 45.1-198 to -220 (Repl. Vol. 1974).

176. *Id.* §§ 45.1-180 to -197.2.

177. *Id.* §§ 45.1-181, -202.

178. *Id.* §§ 45.1-181 to -182, -203 to -204.

179. *Id.* §§ 45.1-183, -206.

180. *Id.* §§ 45.1-186, -209.

181. *Id.* §§ 45.1-193, -210.

182. *Id.* § 45.1-214.

tary efforts of the surface coal mining industry.¹⁸³ While the current regulations curtail the damage of surface mining, they do not seriously limit the landowner's ability to exploit his property's mineral value.¹⁸⁴

F. VIRGINIA OUTDOORS PLAN

The Virginia Outdoors Plan is third in a series of comprehensive outdoor recreational land use plans compiled through federal, state, and private efforts.¹⁸⁵ It serves as a guide for decisions and "provides current information and a statement of broad policy for all agencies—federal, State and local—concerning recreational needs of the Commonwealth."¹⁸⁶ Formulation of the plan as well as its implementation is primarily the responsibility of the Virginia Commission of Outdoor Recreation.¹⁸⁷

The Commission of Outdoor Recreation has created eleven recreational planning regions within Virginia (each comprised of planning districts) in

183. Under the statutory provisions, the maximum bond the Department can require an operator to post is one thousand dollars per acre. *Id.* §§ 45.1-183, -206 (Repl. Vol. 1974). Some authorities would contend such an amount would not always be a sufficient allocation to effectively reclaim the land. See Binder, *supra* note 169, at 350. Moreover, others (most notably Congressman Ken Hechler (W.Va.)) believe there can be no effective reclamation and the practice of strip-mining should be abolished. *FORTUNE*, May, 1974 at 217.

Reitze is critical of the effectiveness of the existing state regulations such as Virginia's stating that much of the present reclamation effort is just meeting a legal test and the "result is legally reclaimed land that looks like the surface of the moon." REITZE, *supra* note 168, at 12-15 to -16.

184. Binder, *supra* note 169. According to Binder, unreclaimed lands are worthless and when the land is reclaimed the operator will have the land with a value possibly worth more than the cost of reclamation. He continues, "About the only certainty is that the cost of reclamation has seemingly little effect on the continued prosperity of surface mining." *Id.*

185. THE COMMISSION OF OUTDOOR RECREATION, THE VIRGINIA OUTDOORS PLAN, 1 (1974) [hereinafter cited as THE OUTDOORS PLAN]. [The first was prepared in 1965 by the Virginia Outdoor Recreation Study Commission by direction of the 1964 General Assembly. That report, titled *Virginia's Common Wealth*, launched the State into a broad program of open space conservation and recreational development. The second plan was published by the Commission of Outdoor Recreation as the *Virginia Outdoors Plan, 1970.*"] *Id.*

186. *Id.* at 5. The plan is long range and comprehensive. It establishes the broad interest of the state in outdoor recreation and a quality environment and provides a statement of policy on public-private responsibilities, and information on recreational supply and demand. *Id.*

187. The purpose of the Commission shall be, through the exercise of its powers and performance of its duties . . . to create and put into effect a long range plan for the acquisition, maintenance, improvement, protection and conservation for public use of those areas of the State best adapted to the development of a comprehensive system of outdoor recreational facilities in all fields . . . and to facilitate and encourage the fullest public use thereof. VA. CODE ANN. § 10-21.4 (Repl. Vol. 1973).

order to facilitate recreational supply and demand analysis.¹⁸⁸ Within this framework, the plan includes recreational planning standards designed to provide "general planning guides for local, regional, State, federal and private recreation planning"¹⁸⁹ Specifically, area standards establish the average acreage need for a given recreational purpose¹⁹⁰ and management standards establish the level of desirable use or capacity of an area.¹⁹¹ With such standards, the utility of recreational land is maximized and the users are provided with "an optimal recreation experience."¹⁹²

To aid the Commission in the planning process, a state-wide survey was conducted in 1972 to ascertain present and projected public demand for outdoor recreational services both from Virginians and out-of-state visitors.¹⁹³ Combining the information thus gathered with available inventories¹⁹⁴ of recreational land and facilities creates a planning tool capable of insuring adequate resource allocation for efficient recreational land use.

The Virginia Outdoors Plan creates fifteen major outdoor recreation systems¹⁹⁵ each of which generally falls within the responsibility of a state or federal agency.¹⁹⁶ For example, the Scenic Rivers Act of 1970, which declares that the conservation and preservation of certain rivers in Virginia possessing great natural beauty is in the best interest of the state, established the Virginia Scenic River System.¹⁹⁷ The Commission of Outdoor Recreation is given the responsibility for studying Virginia's rivers and making recommendations to the Governor and General Assembly for rivers to be included in the system.¹⁹⁸ Once established, greater attention is focused on any proposals which may change the character of the river, and

188. THE OUTDOORS PLAN, *supra* note 185, at 26.

189. *Id.* at 29.

190. *Id.* Area standards establish minimum acreage needs for recreational facilities as well as the acres per thousand in population. *Id.*

191. *Id.* at 30.

192. *Id.*

193. *Id.* at 33.

194. See VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, VIRGINIA OUTDOOR RECREATION INVENTORY (1972). The inventory is a comprehensive survey of available recreation facilities created for the Commission of Outdoor Recreation and is available to the public.

195. The remaining outdoor systems are: National Parks, National Forests, National Wildlife Refuges, Federal Areas, State Parks, State Wildlife Management Areas, State Forests, Small Watershed Projects, Local and Regional Parks, Natural Areas, Trails, Scenic Highways and Virginia Byways (See Section VI *supra*), Hostels, and the Private Sector. *Id.* at 61-89.

196. THE OUTDOORS PLAN, *supra* note 185, at 59.

197. VA. CODE ANN. §§ 10-167 to -175 (Repl. Vol. 1973).

198. THE OUTDOORS PLAN, *supra* note 185, at 85. The 1975 Virginia General Assembly designated the Staunton River (H.B. No. 72) and the Rivanna River (H.B. No. 1068) as scenic rivers under the Scenic Rivers Act.

an act of the General Assembly is required before a dam or other structure impeding the natural flow of the river may be constructed, operated, or maintained.¹⁹⁹ Preservation techniques may include local zoning and planning, fee acquisition, land trusts, and open space easements in the river corridor.²⁰⁰

1. *Virginia Historic Landmarks Commission*

Although separately administered, the Virginia Historic Landmarks Commission (VHLC) is a significant aspect of the Virginia Outdoors Plan. VHLC was created in 1966²⁰¹ in recognition of the fact that Virginia leads the states in the number of historic sites.²⁰² Its primary objective is to "recognize and protect all structures and sites of historical significance within the Commonwealth."²⁰³ To accomplish this, VHLC conducts surveys²⁰⁴ to catalogue and designate as historic landmarks those buildings, structures and sites which have a state-wide or national historical significance.²⁰⁵ Once designated as a certified landmark or established as an historic district, the site or structure qualifies for preferential tax treatment.²⁰⁶ This aids in inducing voluntary dedication of historic easements to VHLC.²⁰⁷ As an advisor, VHLC reviews and comments on all proposed

199. After designation of any river or section of river as a scenic river by the General Assembly, no dam or other structure impeding the natural flow thereof shall be constructed, operated, or maintained in such river or section of river unless specifically authorized by an act of the General Assembly. VA. CODE ANN. § 10-174 (Repl. Vol. 1973). A political subdivision affected by such designation may prior to such designation request a public hearing, however their approval is not required. *Id.* § 10-172.

200. THE OUTDOORS PLAN, *supra* note 185, at 85.

201. VA. CODE ANN. § 10-135 (Repl. Vol. 1973).

202. THE OUTDOORS PLAN, *supra* note 185, at 155.

203. THE RICHMOND REGIONAL PLANNING DISTRICT COMMISSION, LAND USE—INTERGOVERNMENTAL RELATIONS IN THE RICHMOND METROPOLITAN AREA, A-91 (1974).

204. [T]his survey is an ongoing activity whereby the VHLC . . . compiles photographs, drawings, maps and written documentation on historical sites and structures These materials are systematically catalogued and stored by the VHLC, providing an expanding, usable archival resource for the State *Id.*

205. VA. CODE ANN. § 10-138 (Repl. Vol. 1973). Properties listed in the Virginia Register qualify for historic easements. Landowners interested in offering open space easements to protect their historic properties obtain assistance from the VHLC which accepts and administers such easements under the Open Space Land Act of 1966. LAND USE—INTERGOVERNMENTAL RELATIONS, *supra* note 203, at A-93.

206. VA. CODE ANN. §§ 10-139 to -140 (Repl. Vol. 1973).

207. The present approach of the VHLC is ". . . to encourage and promote the acquisition, permanent preservation and proper administration of historic landmarks by public and private organizations and individuals, rather than to take on the potentially tremendous burden of acquiring and administering such properties itself." LAND USE—INTERGOVERNMENTAL RELATIONS, *supra* note 203 at A-92.

state appropriations for historic preservation.²⁰⁸ It also recommends methods of avoiding conflict with historic sites on plans submitted by state and local agencies as well as private developers.²⁰⁹

2. *Implementation of the Virginia Outdoors Plan*

The Virginia Outdoor Foundation was created to promote the preservation of open space land and to encourage donations of money, land or other property for the purpose of preserving the natural, scenic, historic, scientific and recreational areas of the state.²¹⁰ Scenic, historic or open space easements²¹¹ offer a means for private owners to preserve their land for future generations without giving up their ownership and with the possibility of certain tax advantages.²¹²

The Virginia Outdoors Fund, consisting of state and federal funds, "is a major source of money for the acquisition and development of recreational lands at the State and local levels."²¹³ Since available funds have been inadequate to meet the objectives set forth in the Virginia Outdoors Plan, the issuance of general obligation bonds has been advocated in the Plan.²¹⁴

Given the limited funds allocated to recreational needs, considerable reliance on other sources such as voluntary acts is necessary to implement the Plan.²¹⁵ Fundamental to the success of the Plan is a "public willingness

208. *Id.*

209. *Id.* "The Virginia Department of Highways, VEPCO, and the Appalachian Power Company voluntarily submit project plans for review by VHLC staff to identify potential conflicts with historic properties." *Id.*

210. VA. CODE ANN. §§ 10-159 to -166 (Repl. Vol. 1973).

211.

Such an easement is simply a dedication of restrictions on the future use and development of the property, given voluntarily to a public or semi-public agency in trust The owner and his successors in ownership retain the right of continued ownership and usage, not inconsistent with the restrictions. The donor is eligible for a one-time deduction in his federal and State income taxes and in the inheritance taxes on his estate. He . . . may also receive a continuing tax benefit through the Land Use Assessment Law . . . or the Open Space Land Act The easement is not a give-away of land but rather a way to get an agency to enforce your restrictions for you. THE OUTDOORS PLAN, *supra* note 185, at 147.

212. *Id.* See note 221 *infra*.

213. *Id.* See notes 219, 220, and 223 *infra*.

214. THE OUTDOORS PLAN, *supra* note 185, at 149. Virginia Constitution Article X, § 9(b) authorizes the state to incur bonded indebtedness for capital expenditures at a much higher level than was allowed by the previous constitution. The Virginia Outdoor Recreation Bond Act of 1974 (S.B. 520) which would authorize the issuance of bonds for outdoor recreation was not passed by the 1975 Virginia General Assembly.

215. State funds for the 1972 - 1974 biennium totaled \$8,274,000 and federal funds totaled \$5,169,584. The Outdoors Plan, *supra* note 185, at 148.

to control and protect the use of land in the public interest."²¹⁶ To lure voluntary participation, the Open Space Land Act of 1966 provides a tax incentive.²¹⁷ Open space easements granted to public bodies for a minimum of thirty years²¹⁸ may lower the property assessment for purposes of property tax by reflecting "any change in the market value of the property which may result from the interest held by the public body."²¹⁹ Additional tax incentives are made available by the Land Use Assessment Law:²²⁰

This is a local option measure, authorizing each city and county to adopt a taxing system in which certain lands that are devoted to agricultural, horticultural, forestry or open space uses are taxed on the basis of their value for that use, rather than the full market value otherwise required. The law has some of the characteristics of both the "preferential assessment" and the "deferred taxation" laws in other states, since it includes a roll-back payment requirement in case of change of use.²²¹

The federal government supplies financial assistance and direct assistance²²² through the National Forest Service and the National Park Service.²²³ Similarly, the State of Virginia aids in implementation of the Plan through direct and indirect assistance providing information, guidance, planning, research, and grants-in-aid.²²⁴

3. Conclusion

Unlike many other state agencies whose activities concern the use of land, the Commission of Outdoor Recreation acts pursuant to a land use plan. Since such a preconceived plan provides an available policy resource, it obviates the need for ad hoc land use decisions which are often made without concern for their overall effect on land. The Outdoors Plan not only insures that there will be orderly programs for planning, acquisition, and development but also that government and private sectors assume complimentary roles.²²⁵

216. *Id.* at 144.

217. VA. CODE ANN. §§ 10-151 to -158 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974). *See generally* Section IX, *infra*.

218. VA. CODE ANN. § 10-152 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

219. *Id.* § 10-155.

220. *Id.* §§ 58-769.4 to .15. *See also* VA. CONST. art. X, § 2.

221. THE OUTDOORS PLAN, *supra* note 185, at 165. In 1974, six localities participated in this program. *Id.*

222. Examples of indirect assistance programs include loan programs such as the Farmer's Home Administration, outright federal grants from the Land and Water Conservation Fund, and technical assistance in the form of counseling and advice. *Id.* at 145.

223. *See* note 197 *supra*.

224. THE OUTDOORS PLAN, *supra* note 185, at 145-46.

225. *Id.* at 56.

Still lacking, however, is a state plan to harmonize the designated goals of the Outdoors Plan with those of other state agencies. As noted, the Commission of Outdoor Recreation has focused its attention on immediate acquisition rather than actual development of recreational land in recognition of soaring costs and the relative paucity of suitable land. Since revenue represents the most important tool of the Commission of Outdoor Recreation, failure to provide adequate funds for implementation of the plan will render much of the planning meaningless.

G. MARINE RESOURCES COMMISSION

The Marine Resources Commission is responsible for enforcing the Wetlands Act of 1972.²²⁶ The Commission was originally created to regulate and promote the Commonwealth's seafood industry²²⁷ but by virtue of the Act, it also functions as a source of land use control. The Act directs the Commission to promulgate guidelines to assist the localities in the preservation of the delicate ecology of the wetlands,²²⁸ investing it with regulatory and investigative powers to carry out this design.²²⁹

Land use in the wetlands areas is regulated by requiring the owner to obtain a permit before using or developing his property in a manner which is not specifically exempted by the Act.²³⁰ The permit system can be administered at the local level if the local governing body adopts the Act's wetlands zoning ordinance, otherwise permit applications must be made directly to the Commission.²³¹

When a locality adopts the wetlands zoning ordinance, a local wetlands board is created to consider applications for wetlands land use permits.²³² However, the Commissioner of Marine Resources must review all decisions of local boards and submit to the Commission any decision which he be-

226. VA. CODE ANN. §§ 62.1-13.1 to .20 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).
See Section V, *supra*.

227. VA. CODE ANN. § 28.1-1 to -36.12 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

228. *Id.* § 62.1-13.4.

229. *Id.* § 62.1-13.16.

230. *Id.* § 62.1-13.9.

231. *Id.* § 62.1-13.9. The wetlands zoning ordinance which the locality must adopt in order to have the power to issue permits for wetlands activity is set forth in VA. CODE ANN. § 62.1-13.5 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1974).

232. *Id.* § 62.1-13.6 (Repl. Vol. 1973).

lieves requires review²³³ by the full body.²³⁴ In addition, the Commission has the duty of reviewing any permit decision of a local board that is appealed by the applicant or by the city, county, or town where the wetlands are located.²³⁵ A review of a local decision is also required if twenty-five property owners in the jurisdiction petition the Commission, setting forth in a bill of particulars, alleged violations of Commission policy and rules by the local board.²³⁶ Commission decisions are subject to appeal to the circuit court having jurisdiction in the governmental subdivision in which the wetlands are located.²³⁷ Because the Commission and the local wetlands board can directly forbid a proposed use of land in a wetlands area, they are engaged in the most stringent land use control on the state level at this time.²³⁸

H. DIVISION OF STATE PLANNING AND COMMUNITY AFFAIRS

The Division of State Planning and Community Affairs is an extension of the Governor's Office.²³⁹ As its title indicates, the Division has no enforcement powers but is designed to aid in the planning and development of state policies. With the recent upsurge in interest in the state's present and possible roles in the area of land use planning and control, the Division has become actively concerned with the assessment of what state activities affect land use and the form of future state involvement. The Division's concern has centered primarily on two activities: the designation of certain portions of the state as critical environmental areas and the funding and staffing of the Land Use Council.

The critical environmental areas program represents an attempt by Virginia to create state-level land use regulation.²⁴⁰ In 1972 the program was initiated with the avowed purpose of singling out certain sections of the state which needed special attention in order to preserve and protect

233. *Id.* § 62.1-13.13.

The Commission shall modify or reverse the decision of the wetlands board:

(1) If the decision of the wetlands board will not adequately achieve the policy and standards of this chapter or will not reasonably accommodate any guidelines which may have been promulgated by the Commission hereunder, or

(2) If the substantial rights of the appellant or the applicant have been prejudiced because the findings, conclusions or decisions are

(a) In violation of constitutional provisions; or

(b) In excess of statutory authority or jurisdiction of the wetlands board; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by the evidence on the record considered as a whole; or

(f) Arbitrary, capricious, or an abuse of discretion.

234. *Id.* § 62.1-13.10.

235. *Id.* § 62.1-13.11.

236. *Id.*

237. *Id.* 62.1-13.15 (Repl. Vol. 1973).

238. See Section V, *supra*, for an analysis of the land use implications of the Wetlands Act.

239. VA. CODE ANN. § 2.1-38 (Repl. Vol. 1973).

240. *Id.* § 10-187 (Cum. Supp. 1974).

their natural, historic and scenic value. A threefold task was given to the Division. It was to develop criteria for identification of critical environmental areas²⁴¹ and designate those areas within the state.²⁴² These duties have been completed by the Division.²⁴³

The Division also had the responsibility to recommend means by which the development and use of land around critical environmental areas could be controlled.²⁴⁴ A proposal was drafted by the Division and submitted to the General Assembly but it was not enacted.²⁴⁵ Thus, Virginia has certain portions of the state designated as critical environmental areas but no regulatory measures to protect them from undesirable and harmful development. According to a spokesman for the Division, it is unlikely the proposed regulations will be passed in the future.²⁴⁶

Although the critical environmental areas program failed to materialize into state land use regulation, the Division has remained active in planning the state's land use policy. Its current efforts are directed toward funding and staffing the Land Use Council.²⁴⁷ The Council is an ad hoc body composed of representatives of state agencies, local and regional governmental organizations, and legislative commissions.²⁴⁸ Its purpose is described as "the executive arm [of state government] . . . endeavoring . . . to provide a focal point for discussion on land use questions among the . . . branches of state government and the private sector."²⁴⁹ The creation of the Land Use Council is tacit recognition of the need for a unitary effort to develop a state land use policy.

State Secretary of Commerce and Resources Earl J. Shiftet established

241. A critical environmental area is defined as "an area of natural, scenic and historic value including but not limited to wetlands, marshlands, shorelands and flood plains of rivers, lakes and streams, wilderness and wildlife habitats, historic buildings and areas." *Id.* § 10-189(b) (Cum. Supp. 1974).

242. *Id.* § 10-190, -191.

243. See DIVISION OF STATE PLANNING AND COMMUNITY AFFAIRS, A STUDY OF VIRGINIA'S CRITICAL ENVIRONMENTAL AREAS (1972) and VIRGINIA'S CRITICAL ENVIRONMENTAL AREAS, AN UPDATE (1973).

244. VA. CODE ANN. § 10-193 (Cum. Supp. 1974).

245. S.B. 219. On Feb. 7, 1974, this bill was sent back to committee and no further action was taken on it. SENATE JOURNAL 296 (Virginia 1974 Session).

246. Interview with B.C. Lynnes, Sec'y of the Land Use Council, in Richmond, Va. Nov. 22, 1974. However, Mr. Lynnes stated that some localities were considering the enactment of the proposed regulations.

247. *Id.*

248. Land Use Council, State Land Use (Memorandum on file at Division of State Planning and Community Affairs).

249. DIVISION OF STATE PLANNING AND COMMUNITY AFFAIRS, AN APPROACH TO STATE LAND USE DECISION MAKING I (1974).

the Land Use Council to serve as a clearinghouse for information and to prepare a unified policy which would represent all interests.²⁵⁰ To ensure that views of the private sector would receive consideration, the Land Use Advisory Committee was formed. This committee is composed of representatives of business, industry, and environmental groups and serves in an advisory capacity to the Secretary of Commerce and Resources.²⁵¹

The Division, operating through the Land Use Council, is currently analyzing the state role in land use and has been advising the Virginia Advisory Legislative Council (VALC) Land Use Policies Committee on the state's needs for future land use legislation. In July 1974, it recommended that VALC emphasize the critical issues in Virginia in lieu of studying additional material on approaches by other states.²⁵² Further, it proposed a three-tier process to be followed in the development of a future state position on land use planning. First, major issues would be identified.²⁵³ This would be followed by an assessment of the state interest involved in each issue.²⁵⁴ If there were an interest, an analysis of the extent and proper expression of the state role would be made.²⁵⁵

The Land Use Council has collected data from state agencies with an interest in land use and solicited their opinions regarding the identity of important state land use issues. Problems cited most often were the need to preserve prime agricultural land, stronger local land use controls, and coordination of transportation and land use planning. The most prevalent issue raised was the absence of a state policy or plan.²⁵⁶

250. The chairman of the Land Use Council, in discussing the circumstances which led to the establishment of the Land Use Council said:

. . . sixteen agencies, or divisions within agencies, assigned to the office [of Secretary of Commerce and Resources] were engaged in the study of land use or in projects directly affecting land use. There were four other state agencies outside the office . . . so involved. I also learned that seven committees and commissions of the legislature were engaged in one way or another in land use study. It was further noted that many private organizations and groups were deeply involved in the subject of land use and that all political subdivisions were either wrestling with the issue or dreading the day when they could no longer avoid it.

Statement by Earl J. Shiflet, Sec'y of Commerce and Resources, to Land Use Council, in Richmond, Va., Oct. 22, 1974.

251. State Land Use, *supra* note 248.

252. AN APPROACH TO STATE LAND USE DECISION MAKING, *supra* note 249 at 1-2.

253. *Id.* at 2-3. Examples given of issues to be considered are the siting of key facilities, preservation of prime agricultural land, and developments of greater than local impact. *Id.*

254. *Id.* at 3-4.

255. *Id.* at 4. The Land Use Council views the state role determination in the context of a sliding scale with a minimal involvement being a mere policy statement to a maximum involvement of direct state regulation. *Id.*

256. Division of State Planning and Community Affairs, Results of a Questionnaire on the Land Use Related Activities and Positions of Land Use Council Member Agencies (1974).

With increasing demand for coordinated and effective land use planning, it is highly probable that a unified state policy will soon be developed for Virginia. Because the Division and the Land Use Council are closely related to the Governor's Office and the General Assembly (through VALC), any state legislative action on land use will undoubtedly be influenced by the Division.

I. CONCLUSION

Despite the widely acknowledged need for a comprehensive state land use policy, the state response has been limited primarily to local zoning measures and the efforts of environmentally related state agencies. As the preceding text reveals, the concern of state agencies with respect to land use is often secondary to their concern with achievement of a given environmental standard. Admittedly, environmental management occupies a significant part of land use policy, however, it is submitted that the needs of Virginia dictate the formulation of a policy broader in conception.

Few state agencies escape either a direct or indirect involvement with land use. Consequently, numerous methods, such as licensing and permit requirements, have been developed either through statute or administrative regulation which are designed to regulate the use of land. Unfortunately, a recurring problem among state agencies is lack of uniformity and direction and the resulting duplication of effort. This situation stems from the fact that agency interest in land use normally manifests itself as a result of individual agency concern rather than as a response to specific state land use policies or directives. Nevertheless, it is reassuring that these agencies have acquired an impressive amount of technical expertise and judgment which will serve to ease the implementation of a state land use policy (if such is mandated), and which, in the interim, provide some means to preserve Virginia's environment.

VIII. INITIATIVES BY OTHER STATES

A. HISTORICAL PERSPECTIVE

Traditionally, state governments have had less effect upon land use than either the federal government or the localities. The use of the police power to control land use, although constitutionally the right of the states¹ has historically been turned over entirely to city and county governments. The

1. U.S. CONST. amend. X. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

states' main role has been to present the local governments with enabling legislation² which necessarily foreclosed state or regional input.

The lack of state involvement is explained by a number of factors. Of major significance is the fact that land has been viewed as an abundant commodity, one which the nation would never exhaust. The only recognized function of land was to enable its owner to make money³ thus the law favored individual property rights. The cost and complexity of any bureaucratic undertaking has also discouraged state involvement. Lastly, there has been a powerful resistance on the part of localities to relinquish exclusive control over the use of land within their jurisdictions. Controlling land use has been, and largely continues to be, viewed by local officials as primarily a local problem, best handled as a function of the local decision maker.

Since 1961, however, many states have moved to reclaim from local governments, or at least share with them, some of the control over the use of land. An increasing number of states have implemented various versions of land use control regulating major development projects, shoreline areas and other areas of environmental significance. The recent involvement by state government has led to what is being referred to as "the quiet revolution in land use control."⁴ The first state to become actively involved was Hawaii with the enactment of the "greenbelt law,"⁵ placing statewide zoning power in the state land use commission.⁶ Other states, while not as bold as Hawaii, have begun to explore new directions in statewide planning and control of land use. No longer do the states take the frontier stand that land use is a purely local affair; they have begun to assume their constitutional responsibility to set and enforce rational development patterns. The process has been neither swift nor smooth, but is gaining recognition and momentum.

2. A STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce, rev. ed. 1926); A STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce, 1928). These acts are reprinted in ALI MODEL LAND DEVELOPMENT CODE 210, 220 (Tent. Draft No. 1, 1968). Statutory citations to the jurisdictions which have adopted various versions of these acts can be found at *id.* at 206-09.

3. This attitude is exemplified by the phrase "unimproved land" to describe land in its natural condition. Many areas, such as wetlands, which were incapable of intensive development were therefore considered to be useless.

4. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) [hereinafter cited as *QUIET REVOLUTION*].

5. HAW. REV. STAT. §§ 205-1, *et seq.* (1968), *as amended*, (1974 Supp.).

6. *Id.* § 205-2 (1974 Supp.).

B. ALTERNATIVE APPROACHES

The variety of land use programs initiated thus far by several states demonstrates the complexity and individuality of state interests and needs. To a large degree, the design of a specific approach depends upon the heritage of the state and how it has influenced the current status and ability of the state to cope with land use questions. As already illustrated in the treatment of Virginia agencies and programs with land use implications,⁷ tools such as tax policy, facilities placement and control, and environmental monitoring can have significant practical application for implementing an overall land use program. The most recent and innovative efforts, however, have involved the direct exercise of the police power by the state.⁸ These efforts may be categorized into five approaches, listed from strongest state involvement to weakest: (1) statewide comprehensive land use control; (2) state control according to broad definitional criteria; (3) statewide planning; (4) selective state control according to functional criteria and specific geographical areas; and (5) state control of uncontrolled areas. These categories are not exclusive of each other. Just as no state relies solely on the exercise of the police power to control land use, no state's exercise of that power can be completely compartmentalized into any single approach. The various approaches are worthy of note in that each has distinctive characteristics, is designed to meet specific needs of the state, and places a different burden upon the state and its existing regulatory framework.

1. *Statewide Comprehensive Land Use Control*

The foundation of a comprehensive statewide approach is a system of regulation and control which resembles that envisioned by the typical zoning enabling act. Rather than rely on the plans and policies of the local authorities, the state through this system exercises direct land use control through a comprehensive plan of its own design. In this manner, the state is able to exercise the police power that had once been exclusively delegated to the local governments.

Hawaii is the only state which has adopted this approach.⁹ Pursuant to its legislation, the state land use commission is charged with classifying

7. See generally Sections VI and VII, *supra*.

8. Virginia has failed to exercise its police power in an effective manner as to land use control on a state level. Its response has been to utilize other tools, namely environmental monitoring, which affect land use indirectly and to delegate the direct exercise of the police power to the localities under the zoning enabling act.

9. HAW. REV. STAT. §§ 205-1, *et seq.* (1968), *as amended*, (1974 Supp.).

the entire state into four districts: urban, rural, agricultural and conservation. The statute provides the general description of each district and the characteristics by which land is to be classified. The state is given exclusive control over the conservation districts while local authorities continue to regulate land in the other districts, subject to restrictions detailed in the statute.¹⁰ Input by local authorities and residents is assured by a public hearing during the initial classification process and subsequently whenever classifications are challenged or reviewed. Mandatory review of the entire system is to occur every five years. A procedure whereby any state agency or any property owner or lessee may petition the commission for a change in classification is also provided.

To characterize the Hawaii legislation as a complete recapture of the zoning power would be an overstatement. Rather the statute attempts to duplicate the regulations existing at the local level without eliminating them. Local authorities continue to have power to regulate land within urban, rural and agricultural districts.¹¹ Despite urban districting by the land use commission, local authorities have no obligation to permit the land to be used for urban development. The effect of the two-level zoning power is to supersede local regulations unless they prove more restrictive than those promulgated by the state.

In enacting a state-controlled zoning program, whether or not to leave zoning power vested in the local governments presents a difficult dilemma. On one side, elimination of local land use authority is politically impractical because local governments have become entrenched in this area and have developed extensive bureaucracies to aid in administration. On the other side, the application of zoning regulations from two levels of government tends to make the controls extremely restrictive. In the case of Hawaii, protection of agricultural lands from urbanization was a major force behind enactment of statewide land use control and the restrictiveness

10. *Id.* § 205-5 (1974 Supp.). These restrictions provide that as to agricultural districts, minimum lot size shall be at least one acre, *id.* § 205-5(b), and uses are to include:

[T]he cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, and game and fish propagation; services and uses accessory to the above activities including but not limited to living quarters or dwellings, mills, storage facilities, processing facilities, and roadside stands for the sale of products grown on the premises; and open area recreational facilities. *Id.* § 205-2.

As to rural districts, minimum lot size shall be at least one-half acre with but one dwelling house per one-half acre. Permissible uses under section 205-5(c) include:

- (1) Low density residential uses;
- (2) Agricultural uses; and
- (3) Public, quasi-public, and public utility facilities.

As to urban districts, there are no restrictions other than those provided by the locality.

11. *Id.* § 205-5 (1974 Supp.).

caused by duplication serves that end. States whose economies are more dependent upon urban development than agriculture would not find the restrictive aspect of duplication as appealing.

Like most legislation enabling a governmental body to exercise zoning power, the Hawaii statute does not provide for a development or capability plan, but instead requires only a map or plat showing the existing classification system.¹² The original classification process was by existing use. The only thought to the future was the inclusion within the urban districts of a reserve of land sufficient to accommodate the urban growth expected for ten years.¹³ The Hawaiian experience has demonstrated, however, that a statewide land use control program can only be effective as a component of a comprehensive land planning policy. The early approach of the land use commission was reactive, concerned with control of existing urbanization and protection of agricultural lands. A decision on a petition for reclassification was largely made upon the basis of the present availability of other properly classified land to accommodate the proposed use. Recent developments indicate a more active role in directing a pattern and rate of urban growth rather than trying to curtail it completely.¹⁴

The emergence of a planning role for the land use commission has not solved all the problems caused by the absence of a comprehensive plan. The commission has begun to develop guidelines to be used in the decision on petitions for reclassification. The guidelines, however, have been based upon the map of existing uses rather than the developmental capability of the land.¹⁵ The lack of capability and development plan upon which to base a pattern of future growth is a defect which would prove troublesome to a more urban-oriented state.

Any statewide program of control must be accompanied by adequate powers of implementation and enforcement in order to ensure effectiveness. On this point as compared with its other provisions, the Hawaii land use law provides an uncharacteristically weak role for the state. Enforce-

12. *Id.* § 205-3 (1968).

13. *Id.* § 205-2 (1974 Supp.). The statute requires "a sufficient reserve area for foreseeable urban growth," which the Land Use Commission has interpreted to be ten years. *QUIET REVOLUTION*, *supra* note 4, at 7 n.14.

14. See Mark, *It All Began in Hawaii*, 46 STATE GOV'T 188, 192 (1973).

15. The distinction is illustrated by the land use commission's decision to allow future urbanization only within narrow limits adjoining present urban zones. While the higher densities thus created would promote more efficient use of existing public facilities, reduce the reliance on the automobile and create a more exciting urban environment, they would also inflate the cost of housing and seriously affect its availability. This deterrent to low-cost housing is further aggravated when new construction locations are selected more by adjoining use than on the capability of the land.

ment of the allowable uses within a particular classification district is left to the appropriate local officer charged with administration of the county zoning laws.¹⁶ State officials complain that it is difficult to discern whether local authorities are enforcing the classifications properly.¹⁷ In the creation of a statewide comprehensive land use program, there is a two-step procedural requirement to ensure that the goals of the program are realized. First, there must be a framework whereby the goals and policies articulated by the legislature can be translated into regulations controlling land use. Second, there must be an effective apparatus for enforcement to insure compliance with the regulations.

The adoption procedure for a comprehensive state-level zoning program usually requires that the entire system be formulated prior to implementation of any part thereof rather than make specific regulations effective as the particular tract of land is considered. In the case of Hawaii, the classification system was not ready for adoption until three years after the enactment of the land use law.¹⁸ In addition to the burdens caused by this time lag, a comprehensive classification process places an additional burden on the state for manpower and operating funds.

2. *State Control According to Broad Definitional Criteria*

Rather than attempt to develop a land use control program which encompasses the entire state, several states have chosen to exercise their police power only as to lands and developments which meet certain definitional criteria. This approach allows a state to manage land resources and control uses within specifically defined problem areas without necessarily becoming involved in a more comprehensive program of statewide control. The basic premise of the "less-than-comprehensive" state approach is the belief that most land use decisions currently being made by local government have no major effect on the state or national interest, and can best be made by people familiar with the local social, environmental and economic conditions.¹⁹ There is a balance between the need for expanded state involvement and the desire for retaining local control. The result is state participation in land use decisions only when they involve important state or regional interests. Of course, even Hawaii, whose land use law is categorized as a comprehensive state-level zoning program, leaves decision-

16. HAW. REV. STAT. § 205-12 (1968).

17. Interview with Walton Hong, Deputy Attorney General of Hawaii, April 5, 1971, reported in *QUIET REVOLUTION*, *supra* note 4, at 30-31.

18. *QUIET REVOLUTION*, *supra* note 4, at 8.

19. ALI MODEL LAND DEVELOPMENT CODE, Art. 7, Commentary at 286 (P.O.D. No. 1, 1974) [hereinafter cited as ALI MODEL CODE].

making in some areas to the sole discretion of local governments. The difference, however, is that Hawaii's program requires urban classification of an area as a condition precedent to exclusive local control, while the definitional approach uses its definitional requirements as a condition subsequent to exclusive local control.

In Vermont²⁰ and Maine,²¹ statewide controls are implemented for commercial²² and industrial developments and subdivisions above a minimum acreage.²³ In addition, these states have supplemental definitional requirements such as a minimum number of units within the development, the development's elevation, or the amount of ground space covered by structures within the development, which also provide for the exercise of state control. Florida²⁴ has chosen to adopt the terminology of the American Law Institute's Model Land Development Code.²⁵ Statewide controls are implemented only as to "areas of critical state concern"²⁶ and "developments of

20. VT. STAT. ANN. tit. 10, §§ 6001, *et seq.* (1973), *as amended*, (1974 Cum. Supp.).

21. ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973).

22. The Supreme Judicial Court of Maine has held that the term "commercial" embraces residential developments of a commercial nature, *i.e.*, residential lands subdivided and offered for re-sale to the public. *In re Spring Valley*, 300 A.2d 736, 742 (Me. 1973). The Court looked to the legislative history of the Site Location Law, ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973) and found that the term was intended to describe the motivation for the development rather than the type of activity to be performed on the property after it is developed. *In re Spring Valley*, 300 A.2d 736, 742-46 (Me. 1973). In Vermont, the term "subdivision" means partition for the purpose of resale and therefore encompasses commercial residential developments. VT. STAT. ANN. tit. 10, § 6001 (19) (1974 Cum. Supp.). It is worthy of note that both the judiciary in Maine and the legislature in Vermont have reached the developer who does not build or construct any improvements but who merely subdivides and offers the unimproved property for sale to individual owners. *See In re Spring Valley*, 300 A.2d 736, 745 (Me. 1973); VT. STAT. ANN. tit. 10, § 6081 (1973).

23. In Vermont, the minimum acreage is ten acres for lands located within a municipality which has adopted permanent zoning and subdivision by-laws and one acre if within an area not subject to such by-laws. VT. STAT. ANN. tit. 10, § 6001 (3) (1974 Cum. Supp.). In Maine, the minimum is twenty acres regardless of location. ME. REV. STAT. ANN. tit. 38, § 482-2 (Supp. 1973).

24. FLA. STAT. ANN. §§ 380.012, *et seq.* (1974).

25. ALI MODEL CODE, Art. 7.

26. FLA., STAT. ANN. § 380.05 (1974); ALI MODEL CODE § 7-201. The Florida statute states that an area of critical state concern may include:

(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 for a new community, designated in a state land development plan.

FLA. STAT. ANN. § 380.05(2). The Model Code provides essentially the same definition but adds "any land within the jurisdiction of a local government that, at any time more than 3

regional impact."²⁷

The major focus of this approach, regardless of the type of definitional criteria employed is to give the state a voice, and in most cases, overriding control in decisions concerning location of certain developments of significant potential harm. The state involvement has taken the form of a permit system.²⁸ Applications for a development permit are made to the local regulatory body which is to undertake consideration of the application in light of certain social, economic and environmental factors articulated in the statute. The action of the body is reviewable by a specially-created state-level board whose decision is binding upon both the developer and the locality. The parties are afforded a hearing at both the local and state levels with procedures ranging from an informal approach to strict adherence to rules of court. In some instances, appeal of the state board's decision may be taken to the judicial system upon points of statutory construction and intent.

The basic objective of this approach is to subject all potentially damaging developments to government examination at the state level without causing an unnecessary amount of paperwork and bureaucratic review for developments of only local significance. The reasonableness of the relation between the definitional criteria employed and the damage foreseen by unchecked development must be established. The basic assumption that there is a nexus between these two factors is subject to some challenge. Assuming the validity of this basic assumption, the choice of definitional criteria represents the varying needs of the states. In Vermont and Maine, the pressure for development was not from mounting population but from large-scale recreational and second-home projects, which threatened the basically rural character of the state. In Florida, the shortage of drinking water in 1971 clearly illustrates that the concern with development was more a matter of population than size. The different problems that the particular state hopes to meet are exemplified in its choice of definitional criteria.

The choice also illustrates a number of additional considerations. A minimum acreage requirement is definite and can be adjusted to a level

years after the effective date of this Code, has no development ordinance in effect." ALI MODEL CODE, § 7-201(3).

27. FLA. STAT. ANN. § 380.06 (1974); ALI MODEL CODE § 7-301. Both statutes provide essentially the same definition which includes "categories of development which because of the nature or magnitude of the development or the nature or magnitude of its effect on the surrounding environment, is likely . . . to present issues of state or regional significance." *Id.* § 7-301(1).

28. VT. STAT. ANN. §§ 6081-91 (1973), as amended, (1974 Cum. Supp.); ME. REV. STAT. ANN. § 483 (Supp. 1973); FLA. STAT. ANN. § 380.06 (1974); ALI MODEL CODE § 7-303.

so as to include a large number of possible proposals. As compared with the more discretionary definition of a development of regional impact, the opportunity for state involvement is increased. In Vermont and Maine, the overwhelming majority of land was subject to no local zoning and subdivision by-laws and a need for greater state involvement existed which required a more comprehensive formula to determine areas of state control. In contrast, localities in Florida have taken advantage of the state's zoning enabling act and have developed both the administrative framework and experience to deal with most land use problems. Therefore the scope of state involvement was more limited and discretionary.

The flexibility in the definitional formula employed by Florida can become a source of difficulty for a state unless accompanied by the preparation of guidelines and characteristics to assist both developers and local governments in identifying developments of regional impact. Otherwise, the flexibility becomes vagueness from the developer's point of view and can be subject to judicial scrutiny as an arbitrary exercise of the police power.²⁹

The "development of regional impact" definition is tailored to meet the problem of a single locality allowing a development in order to attract tax revenue while having the burden spread to adjoining localities.³⁰ In considering the developer's application under the existing zoning and subdivision by-laws, the locality must also consider the social, economic and environmental effects that would be felt by the surrounding region. Under the Model Code proposal,³¹ the developer is given the option to have his permit application considered under state guidelines if it qualifies as a development of regional benefit.³² This proposal is well-structured to prevent a local government from acting in its own best interest when in conflict with the interest of the region as a whole.³³

A primary advantage of the definitional criteria approach to state land

29. See *In re Spring Valley*, 300 A.2d 736 (Me. 1973).

30. The Florida statute provides state involvement as to "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." FLA. STAT. ANN. § 380.06(1) (1974).

31. ALI MODEL CODE, Art. 7.

32. *Id.* § 7-301(4).

33. In Massachusetts, the use of exclusionary zoning had prevented the construction of low-income housing despite the critical need for it. The legislature enacted the Zoning Appeals Act, 40B MASS. GEN. LAWS ANN. §§ 20-23 (1973), which established a Housing Appeals Committee to hear appeals by developers who had been denied necessary local approval to build subsidized housing. The state committee was given power to overrule the decision of the locality whenever the needs of the region outweighed the considerations used in the local decision.

use control is its ability to meet immediate needs. There is no time lag required for the preparation of detailed classification systems or capability plans as exercise of state control is dependent upon neither. Action on an immediate problem is not delayed by consideration of other areas which, though potentially vulnerable, are not presently threatened. This approach is also easily implemented by the existing bureaucratic framework. Existing local regulations, if any, are not superseded but remain in force, their application subject to state-level review only as they affect the developments in question. Both Vermont and Maine have created independent regulatory agencies at the state and local level to administer their program but this is due to the absence of an existing framework, particularly at the local level, rather than the demands of this approach. Implementation of this approach in most states would resemble Florida with state review of decisions made by existing local regulatory bodies. The emphasis on a local role should encourage those localities which have not already done so to develop land use controls. This is particularly true when a higher standard for state involvement is demanded if the land in question is subject to local land use control.

In addition to the permit system for developments of regional impact, Florida has also incorporated provisions for state involvement in "areas of critical state concern."³⁴ The state land planning agency is given the authority to recommend the designation of certain areas as areas of critical state concern and to provide principles for guiding development within that area. If the recommendation is adopted, the localities involved have six months to establish development regulations governing the area. If such regulations are not established locally or those submitted do not conform with the state guidelines perviously set out, the state may act in place of the locality and order implementation of its own regulations. Unlike the Model Code, the Florida legislation limits the amount of land that can be under designation at any one time to five percent of the state's total area.³⁵

34. FLA. STAT. ANN. § 380.05 (1974). See also ALI MODEL CODE § 7-201. Virginia has adopted the same concept in the Critical Environmental Areas Act, VA. CODE ANN. §§ 10-187 to -196 (1974 Cum. Supp.). The Act directed the Division of State Planning and Community Affairs to develop criteria for identification of critical areas, select critical environmental areas within the Commonwealth, and recommend standards for development within those critical areas. Subsequent attempts to implement this concept have not been successful. Both S.B. 219 (Va. 1974 Sess.) and H.B. 420 (Va. 1974 Sess.) were defeated in committee. See Section VIII, *supra*.

35. FLA., STAT. ANN. § 380.05(17) (1974).

3. *Statewide Planning*

Colorado has chosen a passive role of involvement in land use control.³⁶ The Colorado Land Use Act "recognize[s] that the decision-making authority as to the character and use of land shall be at the lowest level of government possible consistent with the purposes of this [Act]."³⁷

The Act establishes a state land use commission which is directed to prepare a statewide planning program, classifying the state into areas of state, regional and local concern. In addition, the commission is directed to develop model resolutions for use by local governments concerning zoning, subdivision and development regulation.

The possibility for active state involvement in Colorado is limited. The commission may request from the governor a cease and desist order against any development in serious noncompliance with the state plan which has not been restrained or adequately regulated by the local government.³⁸ Upon review, the governor may direct the issuance of such an order which the commission can enforce by suit for injunction in the local district court.

This model for state participation, like the one employed by Florida, provides for state take-over of regulatory responsibility if the local authorities fail to act in accordance with the state planning guidelines. State take-over in Florida, however, is automatic upon default of the locality, not within the discretion of state officials as in the Colorado model. In its attempt to effectuate land use control "at the lowest level of government possible," the Colorado legislature has so weakened the threat of state involvement that the land use plan will have little influence, if any, upon local decision-making.

The laudable portions of the Colorado Act provide for the formulation of a statewide planning program which will provide guidelines to assist the localities. It was accompanied by legislation³⁹ providing both administrative and financial support to local governments to assist in formulation of their own land use plans. However, its inadequacies far outweigh any benefits that the localities might voluntarily choose to enjoy. The commission is given the power to utilize an advisory committee,⁴⁰ employ its own staff, and contract for services from other state agencies and private groups and individuals.⁴¹ The creation of this extra government expense and bu-

36. COLO. REV. STAT. §§ 24-65-101, *et seq.* (1973).

37. *Id.* § 24-65-104(1)(b).

38. *Id.* § 24-65-104(2)(a).

39. *Id.* §§ 24-66-101, *et seq.*

40. *Id.* § 24-65-104(1)(c).

41. *Id.* § 24-65-103(3).

reaucracy is of questionable value when the power to plan is not accompanied with the power to act. When a state creates a program for comprehensive statewide land use planning but leaves its implementation to the discretion of local authorities, with only weak threats of state involvement, the effectiveness of the planning program is seriously impaired.

4. Selective State Control According to Functional Criteria and Specific Geographical Areas

This approach represents the present attitude of most states. Regulations over specific geographical areas or specific types of developments are enacted which provide for limited state involvement. The approach is similar to the Florida model except the scope of state involvement is more narrowly defined. Rather than outline broad criteria and descriptions for areas of critical state concern and developments of regional impact, legislation using this approach seeks to identify areas of critical state concern by their specific geographical location and developments of regional impact by their functional definition.

Typical of this approach would be authority vested in a state regulatory body to approve or disapprove specific developments. Washington⁴² requires that prior to any siting or construction of a power plant, a permit be obtained from the governor based upon the recommendation of a specially-created, state-level council which considers the overall social, economic and environmental impact upon the proposed location. In West Virginia,⁴³ it is unlawful for any person to use excavating equipment for the purpose of prospecting or engage in surface mining without first having obtained a permit from the Department of Natural Resources. Other states contend that the areas requiring state involvement can be geographically rather than functionally defined. Delaware⁴⁴ has undertaken control over all uses within its coastal zone. While local regulations, if any, are still in effect, the state absolutely prohibits heavy industry and off-shore bulk product transfer facilities within the coastal zone. All other manufacturing uses are allowed only by permit from a state coastal zone control board.

The obvious advantage of this approach is the specialization that it affords the regulatory body. The regulations imposed can be specifically designed for the area and type of development involved. Each individual project can be evaluated and controlled according to its particular proposed use and the area's particular need. The function of regulation and

42. REV. CODE WASH. ANN. §§ 80.50, *et seq.* (1974 Supp.).

43. W. VA. CODE ANN. §§ 20-6-1, *et seq.* (1973 Repl. Vol.).

44. DEL. CODE ANN. tit. 7, §§ 7001, *et seq.* (1974).

review is assigned to a particular state agency or department, in most cases, one specially created for the function. The limited scope of control allows members of the regulatory body to become specialized with the area or type of development it supervises.

If a state can realistically determine that its land use problems presently fall within certain definite functional and geographical limits, and will continue to do so in the foreseeable future, this approach will prevent unnecessary state involvement in other areas which fall outside these limits. Rarely can such a determination be made. This limited approach is geared only toward meeting immediate needs and presently-identified problems; it is neither designed for nor capable of providing a means of identifying future land use concerns and developing a system to discover their solution. As future needs present themselves, there is pressure to legislate additional specifically limited solutions. With the system of piecemeal control comes an expanding framework of piecemeal bureaucracy, which further contributes to potential conflicts and a lack of coordination among the various agencies.

In a state with strong opposition by local authorities to expanded state involvement, state control limited along narrow functional or geographical lines may at first glance seem appealing. However, such a measure can provide only short-range answers to what most states are realizing is a long-range problem. Limited impact upon local authority and decision-making provides only limited control. A cost-benefit comparison for this approach, like state planning without adequate implementation, might show no state involvement as the preferred alternative.

5. *State Control of Uncontrolled Areas*

The rationale of statewide comprehensive land use control was to substitute the judgment of state officials for that exercised by local authorities. The rationale of "the uncontrolled areas" approach is to substitute state judgment for no judgment at all. When zoning or subdivision authority has been ineffectively operated or totally lacking at the local level of government, some states have chosen to create and enforce a set of minimum state standards for uncontrolled or under-controlled areas. Following this approach, a state usually administers land use controls in all or a portion of the unregulated area at least until such time as the local government enacts regulatory ordinances of its own.

In Oregon,⁴⁵ the applicable provisions require all local governments to adopt a comprehensive plan and the ordinances by which to implement

45. ORE. REV. STAT. §§ 215.505, *et seq.* (1974).

and enforce it. Both the plan and enforcement ordinances must meet minimum state guidelines. Should the locality choose not to act, the state land use commission is authorized to develop a comprehensive land use plan for the locality and the implementation tools necessary to effectuate it. The locality is then required to reimburse the state for the cost of such services.⁴⁶ In Maine,⁴⁷ this approach is taken only as to unorganized areas which have no zoning power, not to the organized localities which have the power but have chosen not to exercise it. The state exercises regulatory power over the unorganized areas and sets minimum standards for development. Once under state control, however, these standards continue to apply even after the area has been organized into a local governing unit. Municipal regulations supersede the state standards only if they are more protective than the latter.

This approach to state involvement is effective to insure that some land use regulation of previously unmanaged or under-managed areas will take place. The threat of immediate state action unless local authority is exercised usually produces the desired result. Unless related to a more encompassing program, this approach will be of only temporary and limited assistance, particularly as the state becomes more urbanized. It avoids resolving the two most basic problems confronted in the area of land use which the approaches featuring a greater degree of state involvement have sought to resolve: (1) how to regulate projects of greater than local impact, and (2) how to avoid parochial planning practices which are harmful to areas outside the local jurisdiction.

C. ISSUES IN DETERMINING A STATE LAND USE PROGRAM

Active state participation in land use control is a recent novelty in state government. The nature of the programs and policies employed vary from state to state, and sometimes even from one institution within a state to another. The decision to take an active role in land use management does not imply a preference for a specific land use policy, but is merely a decision to construct a new means or process for land use decision-making. Of course, environmentalists will seek greater input for natural and aesthetic values while developers will argue for consideration of individual property rights and economic incentives. But the decision of the state to exercise its constitutional power over land use is an implementation of means, not a commitment to a policy goal.

46. ORE. REV. STAT., Chap. 80 § 50(1) (October 5, 1973), *quoted in*, ENVIR. REP., *State Solid Waste-Land Use Laws*, 1286:2108. In addition if the locality does not make the required payment, the state treasurer is given the authority to withhold the sum from the locality's share of liquor and cigarette taxes collected on its behalf. *Id.*

47. ME. REV. STAT. ANN. tit. 12, §§ 681, *et seq.* (1974), *as amended*, (Cum. Supp. 1975).

Once a decision favoring state involvement has been made, a number of issues present themselves as to the proper approach for the state to pursue. How the individual state perceives these issues and considerations will be reflected in the approach it ultimately decides to follow.

1. *Declaration of Legislative Intent*

The legislative programs previously considered have all had one problem in common, namely, how to translate the values and considerations upon which the decision-making process is to rely into workable statutory language. The answer rests less with the problem of word choice and imaginative drafting than with the unambiguous resolution by the legislature of the policy choices before it. *Citizens to Preserve Overton Park v. Volpe*⁴⁸ demonstrates the value of a strong statement of legislative intent. Petitioners, private citizens and conservation groups, challenged the construction of an interstate highway through Overton Park as a violation of federal statutes.⁴⁹ Respondents argued that the proper role for the Secretary of Transportation was to balance competing interests for which he was given broad discretion. The Supreme Court, in holding for petitioners, rejected this position and found that Congress intended to elevate the protection of park lands to a status superior to other competing interests.⁵⁰ A clear statement of legislative intent enabled the Court to interpret the otherwise arguable statutory language in favor of petitioners. Without an equally clear statement on the part of state legislatures, states may find

48. 401 U.S. 402 (1971).

49. Department of Transportation Act of 1966 § 4(f), 49 U.S.C.A. § 1653(f) (1975 Cum. Supp.) provides:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

See also Federal-Aid Highway Act § 18(a), 23 U.S.C.A. § 138 (1975 Cum. Supp.) (same language).

50. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971).

statutory requirements such as "harmoniously fitting into the existing natural environment"⁵¹ are vulnerable to administrative abuse and judicial attack.

2. Requirement of a Land Use Plan

In the land use decision-making process, some method is required to balance the pressures and considerations for and against a specific proposal. Regulation tends to make this balancing process proceed on a case-by-case basis in a somewhat reactive manner whereas formal planning has a more comprehensive and long-range character. But this balancing process can be defined as planning regardless of whether or not it ultimately results in a formal plan.

The absence of a formal plan upon which to base state regulatory decisions is not fatal to the land use control statute so long as the statute does contain some standards and policy formulations upon which the balance can be achieved.⁵²

States have approached the utility of a land use plan in various ways. In Maine, there is no formal plan but only guidelines and considerations articulated by the legislature in the statute.⁵³ In Vermont, the statute directs the preparation of a capability and development plan⁵⁴ and a land use plan.⁵⁵ The permit system and the planning program have been en-

51. ME. REV. STAT. ANN. § 484-3 (Supp. 1973).

52. *In re Spring Valley*, 300 A.2d 736 (Me. 1973). In that case, the appellant/developer challenged the constitutionality of the Maine Site Location Law, ME. REV. STAT. ANN., tit. 38, § 481-88 (Supp. 1973), as a violation of equal protection. He argued that the absence of a development plan for the area in question made the decision on his application an arbitrary and unreasonable exercise of police power. The Maine Supreme Court rejected this argument distinguishing the Site Location Law from the typical zoning ordinance which allows the exercise of zoning power only when in accordance with a development plan. The Site Location Law was not concerned with where a development takes place in general, but only that the development take place in a manner consistent with the needs of the public. *In re Spring Valley*, 300 A.2d 736, 753 (Me. 1973). The case law makes a distinction between regulatory schemes which merely direct the pattern of growth and provide limits within which it can exist and those which seek to stop all development within a given area. Statutes which merely direct growth need only provide reasonable standards by which to make decisions while the burden on the latter requires a more formal planning program. *Id.* See also *In re Barker Sargent Corp.*, 132 Vt. 42, 313 A.2d 669, 672 (1973). Closely related to this distinction is the whole issue of how far regulation can go before it amounts to a "taking." See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973).

53. ME. REV. STAT. ANN. § 484 (Supp. 1973).

54. VT. STAT. ANN. § 6042 (1974 Cum. Supp.).

55. *Id.* § 6043 (1974 Cum. Supp.).

tirely separated. There is no reason to believe that the principles established in the regulatory system will be incorporated into the land use plan. Likewise, those involved in the regulatory process view the plans as advisory and their application to decision-making within the discretion of the regulatory body.⁵⁶ In Florida, the guidelines promulgated for areas of critical state concern become part of the planning program.⁵⁷

Regardless of whether a plan is formally developed or adopted, there is a need to balance input from opposing views in the decision-making process. Only in this manner will the policy standards which result be a reasonable exercise of the state's police power.

3. *Role of the State*

The most important dilemma in formulating a state approach to land use control is to determine the extent of state involvement desired. Any system of regulation imposes substantial costs. To be considered are the expenses of an administrative framework as well as the expenses of the developer in complying with bureaucratic red tape. Such compliance also requires time, and due to the fact that most developers are working with borrowed money during the application process, any delay is costly. Such costs imposed on developers by land use regulations are more easily absorbed by developers of expensive housing or industrial developments than by developers of housing designed for lower income groups.

In contrast to the costs involved, the state must weigh the benefit of a particular approach to its present needs and future expectations. A system of control which reaches too broadly and affects decisions which could be made just as easily and wisely at the local level wastes taxpayer dollars and is an additional source of taxpayer dissatisfaction. Every state engaging in land use regulation has employed some formula for concentrating its energies on the major decisions while leaving minor details to the localities.

Most commentators⁵⁸ now consider the states to be the logical governmental unit to make these major decisions in land use. States can take a broader approach to both planning and control rather than relying on the highly fragmented character of local decisions. The states have a broader interest in critical areas and objectives which local decisions fail to protect.

56. QUIET REVOLUTION, *supra* note 4, at 82.

57. FLA. STAT. ANN. § 380.05 (1974).

58. See ALI MODEL CODE, Art. 7, Commentary; COUNCIL OF STATE GOVERNMENTS, LAND USE PUZZLE (1974); E. HASKELL, STATE ENVIRONMENTAL MANAGEMENT 169-73 (1973); QUIET REVOLUTION, *supra* note 4, at 3-4; 46 STATE GOV'T *passim* (1973).

Many of the traditional responsibilities of the state, including highway construction, tax policy and pollution control are now being recognized for their land use implications, and only at the state level can a comprehensive and coordinated program be assembled. The most significant advantage is that states are not dependent upon the property tax as the principal revenue source and therefore, are not unduly influenced by large development interests.

A program sufficiently limited in scope provides the persons and interests affected by a major land use decision with a voice in the outcome by way of their elected state representatives. Such input is not always present in a decision at the local level alone.

4. *Role of Local Government*

Local regulation of land use has been in existence for many years at least in the urbanized areas of most states. These local systems of zoning and subdivision control have been and continue to be adequate for controlling the majority of small-scale developments taking place in urban centers. Elimination of such systems is neither advisable nor, considering the firmly entrenched local framework, possible. The state is confronted with the alternatives of merging with local regulatory bodies or duplicating their efforts.

Most states⁵⁹ have chosen to create duplicating procedures in order to eliminate the need to make any change in existing zoning and subdivision regulations at the local level. By leaving the local framework intact, the state reduces the number of potential enemies of new legislation. The motive behind the regulatory systems in most states has been to prohibit development which would otherwise occur. Such duplication serves this goal, tending to make the overall system restrictive, as it operates to prevent rather than encourage development.

As states move toward a more balanced role in land use regulation, the goals become more a matter of directing development than preventing it. The state system in these instances serves as a review of local action, not only prohibiting adverse development encouraged by local decisions, but also overruling exclusionary decisions not made in the regional or state interest. As state land controls become more sophisticated and comprehensive, the need for merger between state and local systems becomes more apparent. The ideal system in these instances would provide a single administrative framework with specific roles for both state and local govern-

59. See, e.g., HAW. REV. STAT. § 205-1, *et seq.* (1968), *as amended*, (1974 Supp.); VT. STAT. ANN. tit. 10, § 6001, *et seq.* (1973), *as amended*, (1974 Cum. Supp.).

ment with input from state, local and regional regulatory bodies at all levels.⁶⁰

D. CONCLUSION

State governments are giving increased attention to adding a more comprehensive element to their existing land planning and management activities. Such new directions have been spurred on by the possibility of federal legislation which would require statewide involvement in land use planning.⁶¹ Once the decision to become active on the state level has been made, a state is faced with a number of options. These new strategies reflect the different needs and concerns of the individual states. Active state involvement is such a recent novelty that it is impossible to tell which of the various approaches and programs outlined are the best or worst; at present each can only be considered representative.

Regardless of the approach taken, an institutional structure which will consider and reconcile the competing interests is needed to insure a rational pattern of development which protects social and environmental values while halting the detrimental use of land.

IX. FEDERAL TAXATION AFFECTING LAND USE

The progressive income tax imposed by the federal government has directive forces which interact with economic and social factors to contribute to the acquisition, use and disposition of land. By taxing, or refraining from taxing certain behavior, Congress has effected a scheme of incentives designed to meet various goals which it considers to be in the national interest. Several of these tax incentives are examined as a means of achieving these socially desirable ends.¹ It must be recognized that dollars are being spent indirectly and thus a tax expenditure occurs.

Proponents of tax incentives justify them on the basis of three major propositions: (1) tax incentives encourage the private sector to participate

60. See generally ALI MODEL CODE, Art. 7.

61. See generally Section XI, *infra*.

1. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) [hereinafter cited as Surrey]. Surrey defines a tax incentive as a "tax expenditure which induces certain activities or behavior in response to the monetary benefit available . . ." *Id.* at 711. A tax expenditure is a term "used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives." *Id.* at 706.

in social programs; (2) they involve less government supervision, detail and red tape; (3) they promote private decision-making.²

Leading tax authorities³ and economists⁴ have questioned the use of the tax structure to indirectly finance social policy. In the view of one critic, these tax incentives are inequitable, inefficient, and wasteful.⁵ Tax incentives are inequitable because they are worth more to high income taxpayers than to low income taxpayers.⁶ There is almost no incentive effect at lower levels,⁷ and to the extent that the tax benefits are an inducement to middle and upper bracket taxpayers, the incentive is an inefficient one.⁸ The waste occurs because dollars are spent to induce higher bracket taxpayers to do what they would have done anyway.⁹

If these criticisms are valid, achievement of socially desirable goals such as land use control may well be jeopardized if too much reliance is placed on tax incentives as an indirect means to this end. These considerations provide a setting to examine more closely the present use of tax incentives as a vehicle of land use control.

A. TAX INCENTIVES FOR THE DONATION OF LAND

An important goal with a tax-based incentive is the disposition of privately owned land for the public. Where land is donated to the public, deference is given to the donor's stipulated use¹⁰ and he may be entitled to a charitable contribution tax deduction under section 170 of the Internal Revenue Code.¹¹ The tax advantages of donating long term investment real estate to a public charity or the government are twofold: the capital gains are not realized and the donor receives a tax deduction based on the appre-

2. *Id.* at 715-19.

3. *Id.*

4. Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 NAT'L TAX J. 1 (1967) [hereinafter cited as Taussig].

5. Surrey, *supra* note 1, at 726.

6. *Id.* at 720.

7. *Id.* Tax incentives do not benefit those who are outside the tax system because their incomes are low or because they are exempt from tax.

8. *Id.* at 719-26.

9. *Id.*

10. In *Archbold v. United States*, 444 F.2d 1120 (Ct. Cl. 1971), the taxpayer had given land to the United States for park purposes. When this purpose was threatened by the proposed construction of a highway through the donated land, the donor was allowed to deduct legal fees. The expenditures were held to be for the use of the United States and incidental to the original gift since they were in direct response to attempts to convert the park land to highway use.

11. INT. REV. CODE OF 1954, § 170(c).

ciated value of the property.¹² The Tax Reform Act of 1969¹³ has increased the significance of the incentive to donate land to the public. The changes in the Internal Revenue Code made the holding of real estate as a tax shelter less favorable.¹⁴ The donation of long term capital gain appreciated property to the public makes it possible for the investor to withdraw from his tax shelter with favorable tax consequences.

Congress has chosen to grant deductions to induce taxpayers to donate land to the public. The justification is that the private donation of land is a socially desirable activity¹⁵ and should be encouraged by giving the taxpayer favorable treatment. Furthermore, these donations relieve the state and federal governments from the responsibility of providing these lands and facilities by direct expenditures.¹⁶ The use of the tax structure as a technique to achieve social policy has been criticized as a wasteful indirect expenditure.¹⁷ The present deduction under section 170 offers a dual benefit when long term appreciated investment property is donated to the public.¹⁸ This revenue loss is wasteful if the middle and upper bracket taxpayers would have donated the same amount of land regardless of the tax benefits. The taxpayers in these two brackets are private landowners in a financial position to donate land to the public. They are also the ones seeking to avoid adverse tax consequences upon the disposition of their investment property. If one of the tax benefits is sufficient to induce the donation, the other has failed as an inducement and is merely a windfall to the taxpayer. To accurately measure the efficiency of each tax benefit as an incentive, they must be examined both separately and as joint inducements. To the extent they operate jointly, it must be ascertained whether the retention of the less efficient is feasible in terms of dollars

12. *Id.* § 170(b)(1)(D). This charitable deduction is limited to thirty percent of the donor's adjusted gross income, rather than the usual fifty percent adjusted gross income limit. If the fair market value of the property exceeds the thirty percent limit, a five year carryover is available. *Id.*

13. Act of December 30, 1969, Pub. L. No. 91-172, 83 Stat. 526, amending INT. REV. CODE OF 1954.

14. The tax benefits were diminished by the limitation on the use of accelerated depreciation, a tightening of the rules to recapture excess depreciation upon sale of the investment, and making the untaxed half of long term capital gains a tax preference item. *Infra* notes 76-78.

15. Tracy, *Charitable Gifts of Appreciated Property*, 25 Sw. L.J. 10, 712 (1971) [hereinafter cited as Tracy].

16. *Id.* Donated park land, recreation areas, and school sites are a few examples in which the government could avoid direct expenditures for the land.

17. Surrey, *supra* note 1, at 726.

18. The donor receives the tax deduction based on the appreciated value of the donated property and there is no realization of capital gain.

spent. Maintenance of the present system is not justified "if it can be shown that the amount of giving encouraged by the tax incentives is small when compared to the revenue loss involved."¹⁹

Some of the waste and inefficiency of the charitable contributions deduction has been diminished by judicial scrutiny of the circumstances surrounding the donation. Recently the Tax Court of the United States²⁰ and the Ninth Circuit²¹ have closely scrutinized the donor's motives for the charitable contribution for which he seeks a tax deduction. "If the payment proceeds primarily from the incentive of anticipated benefit to the payer 'of an economic nature' it is not a gift."²² The congressional policy of encouraging donations²³ is inhibited by this subjective criterion if the incentive effect is operative and the scrutiny of motives creates uncertainty as to the receipt of the tax benefits sufficient to result in a reluctance to donate.²⁴ Three types of donation situations can be distinguished in this respect: (1) where the tax incentive is fully operative as a motivating force for the donation; (2) where the tax incentive is inoperative as an inducement; (3) where the tax incentive is a partial inducement and some anticipated economic benefit forms the rest of the motivation.

19. Tracy, *supra* note 15, at 712 *et seq.*

20. *Wardwell v. Commissioner*, 35 T.C. 443 (1960), *rev'd*, 301 F.2d 632 (8th Cir. 1962). The Tax Court adopted strict criteria for donative intent under section 170, citing *Commissioner v. Duberstein*, 363 U.S. 278 (1960). In that case the United States Supreme Court considered the issue of donative intent required for a gift under section 102 of the Internal Revenue Code. Critics of the Tax Court's position contend that section 102 is an exclusion from income section which should be construed narrowly, while section 170 is a deduction section designed to encourage donations, thus the same test should not apply to both sections. Despite this criticism, and the disapproval of the First Circuit, *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir.), *cert. denied*, 389 U.S. 976 (1967), and the Eighth Circuit, *Wardwell v. Commissioner*, 301 F.2d 632 (8th Cir. 1962), the Tax Court has continued to apply the *Duberstein* rationale to section 170 cases. *Karl D. Pettit*, 61 T.C. No. 67 (Feb. 7, 1974).

21. The Ninth Circuit affirmed the *Duberstein* "anticipated economic benefits" test for section 170 in *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962). In that case, which involved section 170, the court introduced another *Duberstein* test of "detached and disinterested generosity." This latter criterion as applied to section 170 has been criticized as too subjective and the Ninth Circuit has since refrained from basing its section 170 decisions on a "detached and disinterested generosity" test. The Ninth Circuit retained the "anticipated economic benefits" test. *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971); *Transamerica Corp. v. United States*, 392 F.2d 522 (9th Cir. 1958). The Tax Court recently cited both tests in *Karl D. Pettit*, 61 T.C. No. 67 (Feb. 7, 1974).

22. *Wardwell v. Commissioner*, 35 T.C. 443, 450 (1960), *rev'd*, 301 F.2d 632 (8th Cir. 1962).

23. S. REP. No. 1584, 82d Cong., 2d Sess. (1952); S. REP. No. 1567, 75th Cong., 3d Sess. 14 (1938).

24. Comment, *Disinterested Generosity: An Emerging Criteria of Deductibility Under Section 170*, 1968 UTAH L. REV. 475, 480-81.

When a tax incentive is fully operative in a land donation situation, the economic benefits test of donative intent should not inhibit the donation of land to the public. The uncertainty can be eliminated by manipulating the timing and circumstances of the donation. The taxpayer who is motivated by one or both of the previously discussed tax benefits under section 170 should be able to portray the proper charitable intent. Economists²⁵ and tax experts²⁶ contend that the tax incentive has its most potent effect on higher bracket taxpayers. The taxpayers in these brackets desire the favorable tax benefits which are so important to them that they will take steps to assure that the court will not find outside benefits amounting to a quid pro quo. The very tax advantages that induced them to donate the land will induce them to keep both their subjective motives and the objective situation void of "anticipated economic benefits."

The section 170 tax benefits are inoperative as incentives to taxpayers who are compelled to donate their land either by local ordinance or as a prerequisite to improving their economic position. Recently the Tax Court has denied charitable deductions when the donors were compelled by local ordinances or subdivision regulations to donate land prior to subdivision approval.²⁷ The "anticipated economic benefits" criterion for donative intent operated to prevent the donors from receiving possibly three benefits from the one donation under circumstances where the tax incentives were inoperative: (1) the non-realization of capital gains; (2) the charitable contribution tax deduction; (3) economic enrichment as a result of compliance with the ordinance. Thus a scrutiny of motives reveals that the donors would have donated the land anyway and under such circumstances the tax benefits, if granted, would constitute an unnecessary loss of revenue.

When land donations are induced partially by the deduction and partially by the anticipated economic benefits, the courts' close scrutiny of donor's motives would inhibit land donations by creating uncertainty as to the receipt of the tax benefits.²⁸ Thus in situations where land donations are not required to obtain the desirable economic benefits, but the court could find a reciprocal relationship between donation and the favor re-

25. Taussig, *supra* note 4.

26. S. SURREY, W. WARREN, P. McDANIEL, & H. AULT, *FEDERAL INCOME TAXATION* 612 *et seq.* (1972).

27. *Perlmutter v. Commissioner*, 45 T.C. 311 (1965). The taxpayer conveyed land for schools and recreation facilities pursuant to the subdivision regulations of the county's planning and zoning board. The Tax Court denied the deduction based on the *Duberstein* rationale and found that without the transfers, the taxpayer would have considerable difficulty obtaining approval of the subdivision plans. *Accord*, Karl D. Pettit, 61 T.C. No. 67 (Feb. 7, 1974).

28. *See* note 24 *supra*.

ceived, the prospective donor may be reluctant to donate. The subjectivity of the intent evaluation is evident in determining whether the economic motives are primary.²⁹ Any incentive effect operating would be wasted if the donor were deterred by the uncertainty. It then becomes a policy decision as to which course the law will follow when motives are a mixture of tax incentives and economic expectations. Tax benefits can be denied at the cost of a possible decrease in land donations, or any donative intent will suffice at the cost of allowing some taxpayers treble benefits.

Congress should make the decision as to the caliber of donative intent required under section 170 with a focus on the efficiency of the tax benefits as inducements. Congress should reexamine the use of the tax structure and particularly the charitable contributions deductions as a technique to achieve the goal of inducing private individuals to donate land to the public. The present system allows people to "give" land and the deduction reinforces the giving attitude. From a philosophical view this is better than the image of the government as a "taker" especially when what is taken is land with its limited quantity and revered uniqueness. Also, if the government acquires land for the public use and pays "just compensation", it would be burdened with a clumsy condemnation process and perhaps spend more money than the value of the charitable deduction. Even if these arguments in favor of the retention of the charitable contributions deduction and the non-realization of capital gains upon the donation of real estate are accepted, these tax incentives must be examined as inducements to see if the amount of giving is small compared to the dollars spent by allowing some taxpayers dual and treble benefits for their one donation. As a tax incentive these benefits have been criticized as ineffective.³⁰ If the criticisms of waste and inefficiency are valid, then the goal of obtaining more land for the public use is inhibited and could be better achieved by direct expenditures. This latter approach has the advantage of being more flexible. The government could choose the sites for the public land rather than indirectly spend funds to get parcels of land which the donors have chosen to give.

Land use is greatly affected by who owns the land and for what purpose. The federal government has used its tax system to induce the private sector to donate land to the public sector. Whether proper land use is achieved by having more public land and whether it should be acquired through tax deductions are difficult policy questions to answer. Land use is a critical issue and is affected by the indirect expenditures of the tax system. There is a danger that the effect of these latent expenditures will

29. See note 22 *supra*.

30. Surrey, *supra* note 1.

be overlooked or relied upon too heavily by those who formulate land use policy. Thus, it is a prerequisite to proper land use planning to recognize the effect and efficiency of tax incentives which encourage the donation of land to the public.

B. TAX INCENTIVES IN AGRICULTURAL LAND

Agriculture has remained a major element in Virginia's economy, with the average farm consisting of one hundred ten acres.³¹ Two provisions of the Internal Revenue Code specifically deal with land in agriculture. They are Section 175, Soil and Water Conservation Expenditures, and Section 182, Expenditures by Farmers for Clearing Land. This latter provision is of special importance to Virginia farmers since it was enacted to benefit small farmers.

Measuring the incentive effect of the deductions under sections 175 and 182 on agricultural development and conservation is extremely difficult. The tax deduction is only one factor to be considered in deciding to make the capital outlay. The utility of the expenditure as it effects farm yield and the availability of direct governmental subsidies are considerations which may over-shadow the tax benefits.³² Furthermore, these Code sections are unable to adapt the inducements to the needs of farmers in various geographical locations. This inflexibility is the result of an attempt to induce farmers to follow proper land use measures while avoiding a major revenue loss to the government through deductions. The tight drafting of these Code sections prevents unintentional tax windfalls, but it also excludes many potential beneficiaries, thus reducing the incentive effect.

1. *Soil and Water Conservation (Section 175)*

The Internal Revenue Code offers a tax incentive to farmers designed to encourage proper soil and water conservation methods, thus conserving natural resources.³³ Section 175 of the Code provides a tax deduction for expenditures incurred on land used in farming for the purpose of soil and water conservation by a taxpayer in the business of farming.³⁴ It is limited to those in the business of farming because Congress considered such expenditures by farmers to be beneficial to the whole nation.³⁵ Without this

31. 23 ENCYCLOPEDIA BRITANNICA, *Virginia* 39, 45 (1968).

32. Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600, 603-04 (1965) [hereinafter cited as *Taxation Affecting Agricultural Land Use*].

33. *Hearings on H.R. 8300 Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess., pt. 2, at 921-59 (1953) [hereinafter cited as *1953 Hearings*].

34. INT. REV. CODE OF 1954, § 175(a).

35. *1953 Hearings*, *supra* note 33, at 947.

preferential treatment, farmers would be forced to capitalize such expenditures since they are long term improvements which enhance the value of the land.³⁶ The prerequisite that expenditures be on "land used in farming" is intended to exclude expenditures during the preparatory stage, thus limiting the deduction to conservation measures implemented when the soil is either ready to receive the crop or while the crop grows.³⁷ The Code requires that the land have been used in farming by the taxpayer or his tenant before or simultaneously with the conservation expenditure.³⁸

Congress has limited the deduction granted under section 175 to a maximum of twenty-five percent of gross income from farming during the taxable year with the excess to be carried over into successive tax years.³⁹ Section 175 provides a non-exclusive list of qualifying expenditures,⁴⁰ but they must not be depreciable items.⁴¹ Expenditures for depreciable improvements to land such as those made of masonry or concrete are excluded from section 175 treatment and must be depreciated under section 167 of the Code over their useful life.⁴² Thus while an earthen dam or ditch for conservation would qualify,⁴³ one of tile or cement would not. This restriction may actually work against proper conservation methods.⁴⁴ For instance in 1954, "35 percent more water was lost when transported by earthen irrigation ditches than when transported by underground concrete pipes or by ditches lined with tile or cement."⁴⁵ Many farmers recognize the conservation and economic value of modern, permanent installations but are unable to invest in them "because of the large initial expenditure which cannot be deducted as an expense except over a lengthy depreciation period."⁴⁶

Section 175 should be amended in regard to soil conservation to include depreciable items which are more efficient than their non-depreciable counterparts.⁴⁷ Farmers would be financially able to invest in the more

36. RESEARCH INSTITUTE OF AMERICA 5 TAX COORDINATOR ¶ N-1311.1 (1975).

37. *Behring v. Commissioner*, 32 T.C. 1256 (1959).

38. Treas. Reg. § 1.175-4(a)(2) (1963).

39. INT. REV. CODE OF 1954, § 175(b).

40. *Id.* § 175(c)(1).

41. *Id.* § 175(c)(1)(A)&(B).

42. Treas. Reg. § 1.175-2(B)(1) (1968).

43. INT. REV. CODE OF 1954, § 175(c)(1).

44. Comment, *Sections 175 & 182: Farmers' Deductions for Capital Improvements to Land*, 19 HASTINGS L.J. 446, 453 (1968) [hereinafter cited as *Sections 175 & 182: Farmers' Deductions*].

45. *Id.*

46. *Hearings on H.R. 8300 Before the Senate Comm. on Finance*, 83d Cong., 2d Sess. 2114, 2348 (1954).

47. *Sections 175 & 182: Farmers' Deductions*, *supra* note 44, at 454.

efficient conservation methods. This would bring greater economic return to the farmers through increased production and the whole nation would benefit from the more efficient conservation of soil and water.

2. *Expenditures by Farmers for Clearing Land (Section 182)*

Under section 182 of the Internal Revenue Code a taxpayer engaged in the business of farming may elect to deduct expenses incurred in clearing land for the purpose of making the land suitable for use in farming.⁴⁸ An immediate deduction is allowed in lieu of capitalizing these initial preparatory expenses, thus giving farmers a present benefit. The total deduction allowable in any one taxable year under section 182 is limited to \$5000, or twenty-five percent of the taxable income derived from farming, whichever is the lesser amount.⁴⁹ Unlike section 175, no carryover to future tax years is allowed. This results in a loss of the deduction for small farmers, who lose any amount by which land-clearing expenditures exceed twenty-five percent of farm income.⁵⁰ Since the farm is in its preparatory stage, unless the farmer has other farms, there will be little or no taxable income at a time when clearing expenses are greatest.⁵¹

The purpose of section 182 is not to initiate land conservation, but rather to benefit small farmers by giving them a tax advantage equal to that enjoyed by large farmers in the clearing of land.⁵² Small farmers, unable to afford depreciable equipment, were forced to contract to have land cleared.⁵³ Under section 182 they are now able to deduct the contract price within the prescribed limits. Despite the avowed purpose of section 182, the large farmer benefits disproportionately. This restricts the tax advantage to a particular class of farmer and presumably restricts the incentive effect on agricultural land use.⁵⁴

An amendment to section 182 providing for a carryover of the excess expenditures and a percentage limitation based on gross farm income rather than taxable income would accord more fully with the purpose of section 182.⁵⁵ The class benefited would be larger and the potential for incentive effect would be increased. This is in accord with the philosophy

48. INT. REV. CODE OF 1954, § 182(a). See Section III F, *supra* n.140 and accompanying text.

49. INT. REV. CODE OF 1954, § 182(b).

50. *Taxation Affecting Agricultural Land Use*, *supra* note 32, at 606.

51. *Sections 175 & 182: Farmers' Deductions*, *supra* note 44, at 459.

52. 108 CONG. REC. 18, 126-27 (1962)(remarks of Senator Williams).

53. *Id.*

54. *Taxation Affecting Agricultural Land Use*, *supra* note 32, at 606.

55. *Sections 175 & 182: Farmers' Deductions*, *supra* note 44, at 460.

behind any tax deduction: that it should theoretically produce an incentive effect commensurate with the tax savings to the individual taxpayer.⁵⁶

C. TAX INCENTIVES IN TIMBERLAND

Timber is an important natural resource in Virginia, with two-thirds of the land under forest cover.⁵⁷ Tax incentives regarding timber are of great interest to Virginians who use or contemplate the use of land for growing trees to be sold in the ordinary course of business.⁵⁸ To benefit timber owners and to encourage good forestry practices, Congress has enacted section 631(a) and (b) of the Internal Revenue Code.⁵⁹ These sections encourage the utilization of forestland by granting capital gains treatment to certain transactions.

A taxpayer who has owned, or has held a contract right to cut timber for a period of more than six months before the beginning of the taxable year may elect under section 631(a) to consider the cutting of such timber during such year for sale or for use in the taxpayer's trade or business as a sale or exchange of the timber so cut.⁶⁰

The difference between the fair market value of the timber and the adjusted basis for depletion of such timber may be treated as a capital gain.⁶¹ Capital gain treatment is advantageous to the taxpayer because only half of the net long-term capital gain is taxed, although the other half is treated as a tax preference item.

Unlike section 631(a) which allows the taxpayer to make an election of its provisions, section 631(b) provisions are mandatory.⁶² Under that section, if the owner disposes of timber held for more than six months and retains an economic interest in the timber, it is a capital gains transaction.⁶³

The congressional purpose in enacting and retaining section 631 is to encourage the cutting and reforestation of timberland.⁶⁴ Favorable capital gain treatment promotes harvesting of trees, for without section 631, the sale of timber in the ordinary course of business would give rise to ordinary

56. *Taxation Affecting Agricultural Land Use*, *supra* note 32, at 606.

57. 19 ENCYCLOPEDIA BRITANNICA, *Virginia* 153, 154 (1974).

58. INT. REV. CODE OF 1954, § 1221(1).

59. *Taxation Affecting Agricultural Land Use*, *supra* note 32, at 606.

60. Treas. Reg. § 1.631-1(b)(1) (1975).

61. *Id.* § 1.631-1(d)(1).

62. *Id.* § 1.631-2(a).

63. INT. REV. CODE OF 1954, § 631(b); Treas. Reg. § 1.631-2(a) (1961).

64. *Hearings on H.R. 8300 Before Senate Comm. on Finance*, 83d Cong., 2d Sess. 183-86, 2226-28 (1954).

income. There is some doubt as to whether section 631 encourages reforestation. The advantageous capital gains treatment results in increased profit potential which should encourage reforestation, but there are no obligations to do so.⁶⁵ One suggestion designed to assure reforestation is to give capital gains treatment only if additional trees are planted within a specified period.⁶⁶ Under the obligation to reforest, timberland owners would be encouraged to use their land to benefit the whole nation.

D. TAX INCENTIVES IN HOUSING

Congressional policy since 1949 has been to realize "the goal of a decent home and suitable living environment for every American Family."⁶⁷ This avowed national goal has not been achieved; both public and private attempts have been ineffective.⁶⁸ One author is convinced that the failure to provide sufficient and adequate housing in part stems from incentives in tax legislation.⁶⁹ Prior to 1969, real estate speculators found the tax treatment of investment real estate to be very beneficial due to the accelerated depreciation allowed⁷⁰ and the long term capital gain treatment upon sale.⁷¹ Accelerated depreciation hindered the decent housing goal by encouraging minimum maintenance and frequent turnover of ownership of multi-family residential housing especially in low income areas.⁷² Frequent turnover in ownership results because the building's actual loss in value due to deterioration is usually less than that allowed by the Internal Revenue Code.⁷³ Thus when a building has been fully depreciated by one investor, he can sell it at a profit to another investor who is entitled to depreciate it also. The investor's gain on the sale is subject to tax but at the favorable long term capital gains rate. This vicious cycle which focuses on rapid and immediate deductions is not conducive to the more permanent capital improvements essential to housing developments.⁷⁴ An investor-landlord contemplating a sale in the immediate future will not be inclined to make capital expenditures.

65. *Taxation Affecting Agricultural Land Use*, *supra* note 32, at 608.

66. *Id.*

67. 42 U.S.C. § 1441(a) (1970).

68. 12 U.S.C. § 1701t (1970).

69. Sporn, *Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums*, 59 COLUM. L. REV. 1026, 1027 (1959) [hereinafter cited as Sporn].

70. INT. REV. CODE OF 1954, § 167.

71. *Id.* § 1231(a).

72. Comment, *Low Income Housing: Section 236 of the National Housing Act and the Tax Reform Act of 1969*, 31 U. PITT. L. REV. 443, 446 (1970) [hereinafter cited as *Low Income Housing*].

73. Sporn, *supra* note 69, at 1037.

74. *Low Income Housing*, *supra* note 72, at 446.

Congress enacted the Tax Reform Act of 1969⁷⁵ and diminished the tax benefits in investment real estate by limitations on the use of accelerated depreciation,⁷⁶ tightening of the rules to recapture excess depreciation upon the sale of the investment,⁷⁷ and making the untaxed half of long term capital gains a tax preference item.⁷⁸ Congressional intent was to induce investment in housing, particularly in moderate and low income multi-family housing. This was accomplished by allowing the double declining balance depreciation method for new residential construction,⁷⁹ and by integrating the recapture section 1250(a)(1)(C)(ii) of the Internal Revenue Code with the National Housing Act sections 221(d)(3) and 236 to effect a tax incentive scheme.

[I]n the case of section 1250 property constructed, reconstructed, or acquired by the taxpayer before January 1, 1976, with respect to which a mortgage is insured under section 221(d)(3) or 236 of the National Housing Act . . . [the applicable percentage for recapture is] . . . 100 percent minus one percentage point for each full month the property was held after the date the property was held 20 full months.⁸⁰

Section 221(d)(3) of the National Housing Act was created to insure mortgages "to assist private industry in providing housing for low and moderate income families and displaced families."⁸¹ Two important components of section 221(d)(3) are no longer available. They are the below market interest rate (BMIR) loans and rent supplements under which "the FHA actually pays to the owner of the property a portion of the rent of eligible tenants."⁸² The National Housing Act section 236 provides for government insured loans to private investors for the construction of rental housing⁸³ for lower income families or elderly or handicapped families.⁸⁴ The section 236 program also includes interest reduction payments that

75. Act of December 30, 1969, Pub. L. No. 91-172, 83 Stat. 526 *amending* INT. REV. CODE OF 1954.

76. INT. REV. CODE OF 1954, § 167(j).

77. *Id.* § 1250(a).

78. *Id.* § 57.

79. *Id.* § 167(j)(2)(B). Residential rental housing is defined as that which produces 80 percent or more of its gross rental income from residential rental units. *Id.*

80. *Id.* § 1250(a)(1)(C)(ii).

81. 12 U.S.C. § 1715L (1970).

82. *Rehabilitation Projects and Middle and Low Income Housing: A Panel Discussion*, N.Y.U. 29th INST. ON FED. TAX. 1159, 1163 (1971).

83. 12 U.S.C. § 1715z-1(j)(1) (1970).

84. "Provided, That lower income persons who are less than sixty-two years of age shall be eligible for occupancy in such a project, but not more than 10 per centum of the dwelling units in any such project shall be available for occupancy by such persons." 12 U.S.C. § 1715z-1(j)(5)(C) (1970) (emphasis in original).

reduce the effective interest rate to as low as one percent per year.⁸⁵ The purpose of the reduced borrowing rates is to induce investors to accept the risks involved and also to make lower rental charges possible. The fate of section 236 is presently in limbo. It remains a part of the National Housing Act and Congress has continued to appropriate funds. This money is being held in abeyance and the program remains inoperative as the result of an indefinite moratorium initiated by the Secretary of Housing and Urban Development, who is charged with the administration of section 236.⁸⁶

On January 8, 1973, then Secretary of HUD Romney issued orders to all regional HUD offices terminating the Section 235, 236 and 101 programs. The orders provided that as of January 5, 1973 no more applications would be accepted for projects under the programs⁸⁷

The issue of whether the Secretary of HUD has the discretion and authority in the administration of section 236 to suspend its operation was decided in favor of the Secretary by the Court of Appeals for the District of Columbia.⁸⁸ The moratorium continues and the administrators of HUD maintain that section 236 is one of several programs⁸⁹ which serves neither the purpose nor the people intended and does not return the value for the money spent.⁹⁰

Thus section 1250(a)(1)(C)(ii) of the Internal Revenue Code has been greatly limited in its potential to induce investors to build low and moderate income housing. Present investors are unable to receive any BMIR loans or rent subsidies under Section 221(d)(3) or any mortgage insurance or interest reduction payments from "moratoriumed" section 236 of the National Housing Act. Furthermore, the favorable depreciation recapture rule under section 1250(a)(1)(C)(ii), which applies to projects under sections 221(d)(3) and 236, is only available until January 1, 1976 unless Congress extends it further.⁹¹ The recapture rule is favorable to the investor

85. 12 U.S.C. § 1715z-1(c) (1970).

86. Remarks made in a telephone conversation with Mr. R. Coy Morell, Deputy Area Director of HUD, Richmond, Virginia, January 30, 1975.

87. *Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1366 (D.D.C. 1973). Some of the reasons underlying the suspension were given in "Remarks Prepared for Delivery by George Romney, Sec. U.S. Department of Housing and Urban Development, 29th Annual Convention Exposition of the National Assoc. of Home Builders, January 8, 1973." *Id.* at 1372 n.27.

88. *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974), *rev'g* 362 F. Supp. 1363 (D.D.C. 1973).

89. Sections 235 and 101 of the National Housing Act were also suspended at this time. The rent supplements under section 221(d)(3) are also moratoriumed.

90. See note 86 *supra*.

91. Congress extended the operation of § 1250(a)(1)(C) (ii) from January 1, 1975 to January 1, 1976.

because it provides that there will be no recapture of depreciation upon a sale after a ten year holding period.⁹²

The inoperative status of important parts of section 221(d)(3) and the moratorium of section 236 affects the tax incentive scheme in section 1039 of the Internal Revenue Code.⁹³ That section grants a deferral of the income tax on the realized proceeds from the sale of a qualified housing project if the proceeds are reinvested in another qualified housing project. Section 1039(b)(1)(A) defines qualified housing in terms of projects with mortgages insured under sections 221(d)(3) or 236 of the National Housing Act. Without these latter two provisions fully available the thrust of section 1039 is lost as an inducement to investors.

New residential rental property still receives more favorable tax treatment than commercial investment property.⁹⁴ Investors in new residential rental property are entitled to use the double declining balance method to compute depreciation⁹⁵ and there is no recapture after 16 years and 8 months.⁹⁶ This is in contrast to the treatment afforded investments in new non-residential real property which can only be depreciated at 150 percent of the straight line depreciation⁹⁷ and are subject to full recapture of the excess depreciation without regard to the length of the holding period.⁹⁸ Prior to 1969, an investor could avoid all recapture by holding section 1250 property for ten years.⁹⁹ The Tax Reform Act has thus extended the period for recapture by 6 years and 8 months on residential rental property. This in effect makes ownership turnover more costly and hopefully will alleviate some of the unfavorable effects upon rental housing which are engendered by rapid depreciation and frequent ownership turnover.

In 1969 Congress added section 167(k) of the Internal Revenue Code which offered a tax incentive to strike at the housing shortage from the perspective of rehabilitating previously constructed low income housing. Under section 167(k) the taxpayer can elect to depreciate his expenditures

92. INT. REV. CODE OF 1954, § 1250(a)(1)(C)(ii).

93. Section 1039(b)(2) of the Internal Revenue Code requires an approved disposition, which means a sale or disposition of the units in the project to the tenants, occupants or organizations formed for their benefit.

94. New residential real property can be depreciated at 200 percent of the straight line rate; new non-residential real property at a 150 percent rate, and used residential real property at a 125 percent rate.

95. INT. REV. CODE OF 1954, § 167(j)(2)(A).

96. *Id.* § 1250(a)(1)(C)(iii).

97. *Id.* § 167(j)(1).

98. *Id.* § 1250(a)(1)(C)(v).

99. *Id.* § 1250 (a)(2).

to rehabilitate his low income rental project under the straight line method using a useful life of 60 months and no salvage value.¹⁰⁰ This is beneficial to the taxpayer because without section 167(k) these expenditures would be chargeable to the capital account. Congress imposed limitations on section 167(k) tax savings by making recapture and tax preference rules applicable.¹⁰¹ Unlike section 1039, section 167(k) is not explicitly dependent on sections 221(d)(3) and 236 of the National Housing Act. The Internal Revenue Code provides for a definition of "low income rental housing" which would be consistent with the policies of the Housing and Urban Development Act of 1968.¹⁰² Section 167(k) was to have become inoperative as to expenditures for rehabilitation after January 1, 1975, but Congress extended the time provision so section 167(k) will remain operative to induce rehabilitation of low income rental housing until at least January 1, 1976.

As to both sections 1250(a)(1)(C)(ii) and 167(k), Congress appears to be acting very cautiously in perpetuating the tax incentives to build and rehabilitate low and moderate income housing. This is indicated by the extension of these provisions for one year only. This caution can not entirely be due to HUD's position on sections 221(d)(3) and 236 of the National Housing Act because section 167(k) is not dependent on these programs. This Congressional caution is hopefully attributable to a period of re-evaluation and re-assessment of the viability of these tax provisions as tax incentives and of the feasibility of writing tax provisions to coincide with HUD programs.

The goal of decent and adequate housing for every American family reflects an important national policy of land use. To realize this goal, a vast amount of land must be dedicated to housing. In attempting to achieve this goal, the tax incentives of the Internal Revenue Code and sections 221(d)(3) and 236 of the National Housing Act concur to induce the construction of multi-family units.¹⁰³ The Internal Revenue Code has always encouraged owner occupied housing through the failure to tax imputed income arising from home ownership and the tax deduction granted for mortgage interest.¹⁰⁴ While these latter tax incentives remain effective, inflation is putting the single family dwelling beyond the reach of many American families. Furthermore, with a limited amount of land space

100. *Id.* § 167(k) (1).

101. *Treas. Reg.* § 1-167(k)-1(a)(3) (1972).

102. *INT. REV. CODE OF 1954*, § 167(k)(3)(B).

103. The Act requires the housing project to "include five or more dwelling units . . ."

12 U.S.C. § 1715z-1(j)(5)(B) (1970).

104. *INT. REV. CODE OF 1954*, § 163(a).

available, multi-family units do provide housing for more people per acre than single family dwellings. Yet the tax provisions favoring multi-family housing for low and moderate income families are almost completely inoperative. To achieve the housing goal in light of the present economic condition, the federal government must consider what people can afford and also proper utilization of our land resources. This would point to the conclusion that the federal government should design viable multi-family HUD programs and integrate federal tax incentives to encourage private investment in these programs.

E. CONCLUSION

Congress has chosen to use its power to tax for more than revenue collection. Clearly, the taxing power may be used as a vehicle to encourage or discourage certain forms of economic and social conduct. These indirect expenditures have far-reaching effects on land use and often are more inefficient in terms of time and money spent than the programs fostered by direct expenditures. As a uniform law, the Internal Revenue Code cannot be adapted to local conditions in various parts of the United States. It can reveal laudable congressional policy and goals in land use, but it cannot mold inducements to fit particular conditions and means that are required to reach those goals. Furthermore, to fulfill its revenue collecting function, the Code must be specific, definite, and exacting, and this may inhibit the incentive effect by reducing those eligible to take advantage of the tax benefits. Of those who are eligible, many will be unable to meet the statutory requirements because other considerations may outweigh the tax benefits. Tax statutes are vulnerable to interpretation by the courts as is exemplified in the land donation cases, and to administrative policies as exemplified by the moratorium on section 236 of the National Housing Act.

Perhaps these tax expenditures serve their greatest land use function in the beliefs and attitudes they encourage. The focus on mutual giving on the part of the government and the citizen can create a sense of participation because the citizen has directly contributed to the improvement of land uses. Whether the price for cultivating this attitude is too high or the method too restrictive is a matter that deserves re-evaluation by Congress in light of the critical and complex land use and economic problems the nation must resolve.

X. FEDERAL ENVIRONMENTAL AUTHORITY AFFECTING LAND USE

Increasing concern over the degradation of our environment has led most observers to the conclusion that land use practices and environmental

problems have an exceedingly complex relationship.¹ Indeed, one observer has noted:

Ecologically irresponsible land use practice arising from generally ineffective land use control—aside from the “growth ethic”—is the basic environmental problem facing America. Land use patterns are the generators, the root causes, of the environmental degradation symptoms of polluted air, polluted waters, and other problems to which we have given infinitely more attention.²

The Environmental Protection Agency (EPA) presently administers a battery of statutes aimed at the problems of air, water, solid waste and noise pollution. Through these statutes, EPA has authority to establish land use controls, primarily through the use of an environmental standard-setting process which imposes constraints upon land use.

The initial focus of environmental protection was on technological source controls. It has become increasingly apparent that even if environmental standards can be achieved with source technology, their maintenance will require a broader program, presumably involving more extensive land use control. The purpose of the following discussion is to examine the disaggregated character of land use control provisions in the statutes administered by EPA. The most distinct problem is the limited, indirect, or implicit land use authority of the statutes themselves. They generally lack a mechanism for coordinating land use and pollution control decisions on the state and federal levels and a process for balancing competing environmental objectives. Additionally, the statutes provide no comprehensive technique for balancing environmental considerations and the pressures for economic growth and development.

The degree to which EPA will actively implement land use controls in the future is not clear. However, unless environmental-land use considerations are welded into a comprehensive planning process, the result will be haphazard and irrational growth leading to further degradation of the environment.³

1. See, e.g., ENVIRONMENTAL PROTECTION AGENCY, LAND USE AND THE ENVIRONMENT: AN ANTHOLOGY OF READINGS (1973).

2. Hansen, *A National Land Use Policy: Toward a New Land Ethic*, in ENVIRONMENTAL PROTECTION AGENCY, LAND USE AND THE ENVIRONMENT: AN ANTHOLOGY OF READINGS 119 (1973) (footnote omitted).

3. This conclusion was amplified in VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAND USE POLICIES, H.D. 26 at 11-12 (1974):

The Clean Air Act and the Federal Water Quality Improvement Act [Federal Water Pollution Control Act Amendments of 1972] in particular will have substantial impact on land use in Virginia because regulations promulgated or proposed by the Environmental Protection Agency to implement these laws will require states to have sufficient control over land use so as to prevent air and water quality standards promulgated

A. THE CLEAN AIR ACT

In response to the growing national problem of air pollution Congress enacted the Clean Air Act Amendments of 1970.⁴ Previous efforts in the area of clean air legislation had met with inconclusive results.⁵ The legislation was significant because it gave EPA the authority to enforce air quality standards, including the authority to require land use controls. Pursuant to the Act, EPA has published national primary and secondary ambient air quality standards for six air pollutants.⁶ Primary standards are designed to provide a margin of safety to the public health. The secondary standards are intended to protect the public welfare from any adverse effects associated with the presence of pollutants in the ambient air.⁷ These standards are to be achieved and maintained by means of state implementation plans approved or modified by EPA.⁸ The state implementation plans were submitted to EPA nine months after publication of the standards with the requirement that primary standards be achieved "as expeditiously as practicable" but no later than three years from the approval of the plan. Secondary standards must be achieved within a "reasonable" amount of time.⁹ By providing EPA authority to issue compliance orders

under those Acts from being violated by development within the state. While these regulations do not require states to adopt any particular land planning mechanism or, indeed, to undertake any type of land use planning at all, they do require states to have control over land use so as to prevent the construction or alteration of a source of air or water pollution when the construction or alteration would result in violation of the air or water quality standards. Such authority may be exercised by a state or local government totally apart from any type of land planning considerations, but rational and effective implementation of a variety of public policies will require state and local governments to give serious consideration to the appropriate planning of land use to assure that water and air quality standards can be met while some reasonable level of growth and development is accommodated.

4. 42 U.S.C. §§ 1857 *et seq.* (1970).

5. See Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. Both acts left the major regulatory responsibilities to the state and local governments. See generally Trumbull, *Federal Control of Stationary Source Air Pollution*, 2 *ECOLOGY L.Q.* 283 (1972).

6. Primary and secondary ambient air standards have been established for sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons and nitrogen dioxide. See 40 C.F.R. §§ 50.4 to .11 (1974).

7. 42 U.S.C. § 1857c-4(b), (1)-(2) (1970). The public welfare is broadly defined to include effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. *Id.* § 1857h (h).

8. *Id.* § 1857c-5. EPA will promulgate an implementation plan for a state if one is not submitted or is inadequate.

9. *Id.* § 1857c-5(a)(2)(A)(i).

or bring civil suit against any person violating the implementation plan,¹⁰ the Act assures more effective federal enforcement. Citizen suits are authorized to enforce provisions of the Act or demand fuller compliance by EPA.¹¹

Implementation plans submitted by the states will be approved if they include

emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.¹²

Significantly, the statutory language is not mandatory but requires land use controls as necessary to achieve the national standards. However, the land use controls may be required not only for achievement of air quality standards but also for their maintenance. The effect is to give EPA discretion regarding the timing and necessity of land use controls.

EPA has generally not required land use controls in state implementation plans. In *Delaware Citizens for Clean Air, Inc. v. EPA*,¹³ the citizens group argued that the Delaware implementation plan for meeting the nitrogen dioxide standard was not as expeditious as practicable and that the plan should include land use and transportation controls. The court refused to hold that the plan failed to carry out the "statutory mandate regarding land use and transportation controls." Noting that the statute would require such controls if they were necessary to insure maintenance of air quality standards, the court stated:

It is arguable that land-use and transportation controls are mandated by the statute both for attainment and for maintenance. The agency charged with administration of the statute, however, apparently construes it as not man-

10. *Id.* § 1857c-8.

11. *Id.* § 1857h-2. Such suits may be brought against any person (including the United States) or government agency who violates an emission standard or limitation or an order issued by EPA or the state. The EPA Administrator is also subject to suit when he fails to perform a non-discretionary duty under the legislation. The federal district courts have jurisdiction without regard to citizenship or amount in controversy. The plaintiff citizen must give sixty days notice to EPA or the state prior to commencing suit unless the action involves emission of hazardous air pollutants or violation of EPA compliance orders. The action must be brought in the judicial district where the violation occurs and the court is authorized to award reasonable expert witness and attorney's fees to successful litigants.

12. *Id.* § 1857c-5(a)(2)(B). It has been argued that technological controls are preferable to land use controls because they are more economical. *See* 5 ENV. RPTR.-CURR. DEV. 1248 (1974).

13. 480 F.2d 972 (3d Cir. 1973).

dating land-use and transportation controls for attainment if other measures will suffice. In this instance we defer to the expertise of the agency.¹⁴

A review of the regulations on approval and promulgation of implementation plans as of December 5, 1974, indicates that few states have submitted, or been required to submit, plans involving land use controls.¹⁵ It would seem that EPA has focused on technical controls, *i.e.*, pollution removal devices, for the achievement of the national standards.

As a technique to assist in achieving air quality standards the statute also provides for pre-construction review of new polluting sources. The state implementation plan must provide a procedure for review prior to construction or modification of new sources to which a federal standard of performance¹⁶ applies.¹⁷ Adequate authority is necessary to prevent construction if the state determines that attainment or maintenance of a national air standard will be jeopardized.¹⁸ The requirement will have the effect of restricting economic opportunity within air quality control regions. This may cause a conflict with local policy makers. An industry facing such a construction ban could argue that alternatives such as stricter emission requirements in other sectors or construction bans elsewhere should be utilized. The regulations issued pursuant to this section are contradictory but lead to the conclusion that a state may ban construction if air quality standards or the state's own control strategy is threatened.¹⁹

The land use mechanisms contemplated by the statute are not clear from its legislative history. The House version of the statute contained no reference to land use controls.²⁰ The Senate version provided for the control of new sources of air pollution to the extent necessary to prevent interference with the attainment and maintenance of national standards.²¹ It is

14. *Id.* at 978 n.21.

15. *See* 40 C.F.R. §§ 52.50-52.2628 (1974).

16. Standard of performance is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction . . ." 42 U.S.C. § 1857c-6(a) (1) (1970).

17. *Id.* § 1857c-5(a)(2)(D).

18. *Id.* § 1857c-5(a)(4). For an in-depth analysis of Virginia's implementation plan and pre-construction review *see* Section VII C, *supra*.

19. *Compare* 40 C.F.R. § 51.11(a)(4) (1974) dealing with interference with national standards with §§ 51.18(a)-(d) which refer to interference with the national standards or the state's control strategy. *See* Mandelker and Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 *ECOLOGICAL L.Q.* 235, 261-3 (1973) [hereinafter cited as Mandelker].

20. H.R. REP. No. 1146, 91st Cong., 2d Sess. (1971).

21. S. REP. No. 1196, 91st Cong., 2d Sess. 87 (1970). The Senate generally indicated the breadth of land use control envisioned by the Act:

apparent that Congress conceived of land use controls in general terms but there is no guidance to the states or EPA as to the types of land use controls intended.

The pre-construction review concept was significantly extended as a result of *Natural Resources Defense Council, Inc. v. EPA*.²² The court ordered EPA to disapprove state implementation plans which did not include transportation controls for the achievement and maintenance of primary air quality standards by May 31, 1975.²³ As a result EPA published regulations²⁴ designed to deal with the problem of air pollution from indi-

The Committee acknowledges that this would require each region to make difficult judgments about the siting of facilities which may emit pollution agents, including decisions to prohibit the location of new sources which . . . would contribute to a violation of a regional air quality standard. These factors would necessitate long term decisions about the growth and development of such region. *Id.* at 12-3.

22. 475 F.2d 968 (D.C. Cir. 1973).

23. The primary land use impact of transportation controls is the emphasis on mass transit as an alternative to reliance on the automobile. EPA regulations list "[m]easures to reduce motor vehicle traffic" and "[e]xpansion or promotion of the use of mass transportation facilities" as transportation controls. 40 C.F.R. §§ 51.1(n)(7), (8) (1974). Proposed measures include elimination of free parking in heavily traveled downtown areas, commuter taxes and expensive surcharges on parking areas to discourage long-term parking. The problems raised by these approaches have been described in this way:

In addition to the anticipated political reaction, the transportation control plans pose many legal and practical problems for state and local government. Local government must have the legal and constitutional bases for discriminating between free parking for residents and no free parking for non-residents. They must have the legal authority for the imposition and collection of daily parking surcharges. City merchants and minority group leaders are beginning to complain that such bans on free parking, plus high daily surcharges, may injure severely the economies of central core cities, not to mention the heavier travel and air pollution in shopping centers in outlying areas unaffected by transportation control strategies. Baliles, *Air Quality Control in the 70s: State Viewpoint*, 7 NATURAL RESOURCES LAWYER 193, 195 (1974).

Virginia is required by EPA to include in its implementation plan the construction of sixty miles of bicycle paths in Northern Virginia (National Capitol Interstate Region) as a transportation control measure. See 40 C.F.R. § 52.2442 (1974). There is serious question whether the State Highway Department has the authority to condemn land solely for the purpose of constructing bicycle paths. See VA. CODE ANN. § 33.1-89 (1970 Repl. Vol.) (Highway Department power of eminent domain). Compare *Terry v. McClung*, 104 Va. 599, 52 S.E. 355 (1905) with *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919).

24. 40 C.F.R. § 52.22 (1974). EPA will not implement indirect source regulations for at least six months as a result of an appropriations bill. The bill would prohibit EPA from using any of its funds to regulate parking facilities. The regulations were scheduled to take effect January 1, 1975. This hiatus may cause a period of hasty construction prior to full implementation. 5 ENV. RPTR.-CURR. DEV. 1295 (1974). See Comment, *Proposed Indirect Source Regulation: A Partial Integration of Land Use and Air Quality Planning*, 3 ENV. L. REP. 10178 (1973); Comment, *Litigation Under the Clean Air Act*, 3 ENV. L. REP. 10007, 10016 (1973).

rect sources, *i.e.*, those developments that attract sufficient motor vehicle activity to threaten a national air quality standard. Such sources include highways, sports arenas, shopping centers and educational facilities. This extension of authority over indirect sources, consisting of pre-construction review, carries EPA directly into the jurisdiction of local zoning authorities. The regulations do provide that the authority may eventually be delegated to a local agency other than the state air pollution board.²⁵ However, the delegation raises the problem of regional perspective which may not be within the authority of the local agency.²⁶

Each state implementation plan must contain a control strategy²⁷ to guarantee that growth and development in areas identified as having the potential for exceeding any national standard within [the next ten years will not cause air pollution levels to exceed the national ambient air quality standards.²⁸ This forces the state agency to engage in long-range land use planning with regard to projected population growth, industrial activity and motor vehicle traffic expected over a ten year period. The regulation is indicative of an incipient shift of emphasis from the achievement of national air quality standards to their maintenance.

EPA authority was further defined in *Sierra Club v. Ruckelshaus*²⁹ where the court held that the Act was based on a policy of non-degradation of existing clean air. Thus, a regulation permitting states to submit plans which allow pollution levels of clean air to rise to the secondary standard was contrary to the legislative policy of the Act and invalid. Pursuant to the ruling, EPA issued regulations³⁰ which permit the construction of a pollutant source in an area having air cleaner than the national standards only after a showing that the construction will not cause a significant

25. 40 C.F.R. § 51.18(e) (1974).

26. Mandelker, *supra* note 19, at 265-67.

27. A state's control strategy is defined as:

a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard, including but not limited to, measures such as . . . (9) [a]ny land use or transportation control measures not specifically delineated herein. 40 C.F.R. § 51.1(n) (1974).

28. The control strategy must also include:

the degree of emission reduction necessary to offset emission increases that can reasonably be expected to result from projected growth of population, industrial activity, motor vehicle traffic, or other factors that may cause or contribute to increase [sic] emissions. *Id.* § 51.12(a).

29. 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court sub. nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

30. 40 C.F.R. § 52.21 (1974). There is a possibility of relitigation of the significant deterioration issue. *Sierra Club* alleges that the regulations are still not in compliance with the Act. 5 ENV. RPT. - CURR. DEV. 1235 (1974).

deterioration of existing air quality. The preamble to the regulations rejected the argument that there should be a nationwide standard of "significant deterioration." The agency realizes that socio-economic considerations are a part of determining the deterioration increments. EPA's position is not that all growth should be precluded but that growth should occur in an environmentally acceptable manner. The scope of the regulations may undercut that position since, according to the preamble, construction of a source will not be allowed if it will violate an air quality increment either in the area where it is to be located or in any neighboring area in the state.³¹

Indirect source regulations will create problems primarily by precipitating conflicts between state agencies and local government. The localities depend upon economic development for employment, tax revenues and an indication of local political success. Placement of development according to its effect on air quality will cause complaint from local governing bodies and shift the attention of interested citizens' groups from zoning boards to the state air pollution agency. The responsibility for determining growth patterns is now placed with a state agency rather than the traditional local political process. Haphazard spurts of growth in certain areas may be encouraged by the significant deterioration concept since there is no mechanism for determining which or how many sources may use up the deterioration increments. Effects of urban sprawl must be gauged carefully to ensure non-interference with significant deterioration. In view of the energy shortage, power plants might not be built in rural areas to serve the needs of the cities due to significant deterioration problems. Since there is no mechanism for resolving conflicts between indirect source regulations and significant deterioration, growth in certain areas may come to an abrupt standstill.³²

A similar conflict exists between the pre-construction review of stationary sources of air pollution and significant deterioration. New sources will be prohibited in highly industrialized urban areas having significant air quality problems. Development will face a limited ban in more rural areas with clean air. The cross effect will be a concentration of new sources in bands between the two areas. Growth pressures will increase in suburban areas and difficult zoning problems will multiply.³³ Encouragement of

31. 39 Fed. Reg. 42510 (1974).

32. Baliles, *Air Quality Control in the 70s: State Viewpoint*, 7 NATURAL RESOURCES LAWYER 193, 196-201 (1974).

33. F. Bosselman, D. Feurer, and D. Callies, *EPA Authority Affecting Land Use* 9-13, March 12, 1974 (report prepared for EPA, available from National Technical Information Service) [hereinafter cited as EPA Authority].

growth at urban fringes runs counter to the land use objective of preventing sprawl. The conflict may frustrate other federal policy objectives by preventing job-creating development in depressed rural areas and the inner cities.³⁴

The statute's emphasis on transportation controls, primarily limitation of automobile commuting and emphasis on mass transit, will have significant land use ramifications. If reduction of private automobile travel in central business districts does not change traditional American reliance on the auto, economic activity may simply be shifted to the suburbs where air quality limitations on accessibility are less stringent.³⁵ On the other hand, development may be recentralized to create settlement patterns more amenable to bus and rail transit.³⁶ A conflict in the objectives of the Act could be reached when developments to serve the needs of commuters sprout along the right-of-way of existing mass transit.³⁷

As a result of expectations that national ambient standards will be achieved through available technology, EPA has begun to re-evaluate the relation of land use to the maintenance of air quality.³⁸ There are several suggestions as to the type of land use controls EPA could require under the Clean Air Act.³⁹ One possibility is to redefine air quality control regions which presently encompass a variety of pollution levels. A narrower delineation could take into account existing land uses, meteorological and topographic conditions, and population concentrations. Existing pollution conditions could be countered by encouraging or prohibiting certain types of sources or uses. Another technique would be to divide the regions into

34. Reilly, *National Land Use Policy*, in FEDERAL ENVIRONMENTAL LAW 1415, 1433-34 (E. Dolgin and T. Guilbert ed. 1974) [hereinafter cited as Reilly].

35. COUNCIL OF STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS NO. 1, INTER-GOVERNMENTAL RELATIONS IN STATE LAND USE PLANNING 10 (1974).

36. Reilly, *supra* note 34, at 1433. Another factor influencing the recentralization of development patterns is the present need to conserve petroleum.

37. EPA Authority, *supra* note 33, at 12.

38. Michael Glenn, an EPA spokesman, recently cited a shift in emphasis from pollution abatement to pollution prevention. The shift is prompted by a feeling in the agency that present pollution problems will be solved by current programs. More emphasis will be placed on the control of new pollution sources through land use. 5 ENV. RPTR.-CURR. DEV. 1047 (1974). However, the land use sanctions of the Act are presently under attack from another quarter. The Department of Commerce has proposed amendments which would prohibit land use and transportation controls unless "all reasonable steps" are taken to minimize the adverse economic impact of the controls. Indirect source controls would be utilized only after motor vehicle emission controls have become fully effective in an area and the use of parking surcharges would be prohibited. The proposed amendments would add that the Act does not require establishment of standards by the states more stringent than the national standards. This would strike a blow at the significant deterioration concept. *Id.* at 1263-64.

39. EPA Authority, *supra* note 33, at 39-49.

districts which are assigned allowable levels of pollution density. The emission density zoning concept would be open to attack on equal protection grounds since a handful of developers could preempt the allowed levels for a district, but the answer would be to institute a system of transferable emission rights where each parcel of land is allotted an allowable emission density. Developers could then buy up emission rights in order to construct their facility.⁴⁰

Presently implemented pre-construction review requires only that the new source not threaten ambient air quality standards or contribute to significant deterioration. The permit procedure may do little more than authorize construction on a first come, first served basis. EPA might require the state agency to identify development potential and prepare a plan designating the most appropriate sites for the expected types of development.

Arguably, air pollution control is not a viable vehicle for land use management.⁴¹ The degree to which EPA will retrench its position on land use

40. Emission density zoning has been instituted in Oregon. The procedure involves allocation of emissions to proposed new sources. Trade offs are allowed in order to acquire an increased emissions allocation. 5 ENV. RPT. - CURR. DEV. 1277 (1974).

41. On the one hand, air pollution considerations are appropriate for land use because they foster regional thinking and reinforce a movement toward state control of land use decisions having more than local significance. Moreover, they compliment an existing movement toward classification of development by performance standards rather than the use concept of zoning. See Reilly, *supra* note 34, at 1433. However, the single purpose objective of air quality has led one authority to conclude:

The Clean Air Act is directed toward the reduction of air pollution to appropriate levels, and makes this goal its single and paramount objective. A program based on attainment of a single environmental objective is ill-suited to the exercise of land use powers, which ordinarily are applied to achieve many different developmental and environmental goals. Indeed, accommodating competing and even conflicting growth and development objectives is one of the earmarks both of land-use control programs and of the comprehensive planning process which in theory they are intended to implement. Strict implementation of a single-minded approach to air pollution to the exclusion of possible land-use and development criteria thus would be inconsistent with the statutory framework under which land-use controls are usually exercised. Mandelker, *supra* note 19, at 272.

The objective of pollution control is relatively simple, and planning by states based solely on pollution impact can lead to one-sided land use reform. For example, Delaware's prohibition of heavy pollution industry from its coastal zone did not save the area from condominium and leisure home development. See DEL. CODE ANN. tit. 7, ch. 70, §§ 7001-03 (1975). Another authority has called for a separate organizational structure to balance pollution objectives and land use priorities:

A need remains for more trustworthy intermediate institutions to impose a discipline upon federal activity affecting land use and to articulate land use priorities in the light of prevailing needs and circumstances. Coherent directions cannot be expected from

controls under the Clean Air Act is not clear. It will depend heavily on the success of technological controls in achieving and maintaining the national air standards. Other significant factors will be the results of research on the complex relationship between environmental quality and land use and the form and content of any subsequent national land use policy legislation.

B. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972⁴²

1. *In General*

Federal efforts in the control of water pollution were previously unsuccessful because of inadequate enforcement procedures and the ambiguous concept of ambient water quality.⁴³ With the passage of the Federal Water Pollution Control Act Amendments on October 18, 1972, Congress put into force a statutory structure designed to achieve the goal of water quality sufficient for protection and propagation of wildlife by July 1, 1983, and elimination of discharge of pollutants into navigable waters by 1985.⁴⁴ These goals are to be implemented by a variety of research and construction grants, planning procedures and enforcement measures. The thrust of the Act is that any discharge into navigable waters is unlawful without a permit.⁴⁵ Toward this end, two sets of criteria are defined: (1) effluent limitations, which are restrictions on quality and concentration of pollutants discharged,⁴⁶ and (2) water quality standards developed by the states

special review procedures or public works priorities or pollution control policies alone. Once it is accepted that there is no clear consensus on the optimal patterns of development, it would appear necessary to pay considerable deference to those most intimately affected by land use decisions. In most instances this means local residents acting through a government that represents enough of them to see fairly to their interests (which will be varied and conflicting), and to be able to acquire some competence in dealing with the problems entrusted to it. Reilly, *supra* note 34, at 1435.

42. 33 U.S.C.A. §§ 1251-1376 (Cum. Supp. 1975).

43. See Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis. L. REV. 893. For a discussion of the political battle which led to the passage of the Amendments see Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. LEGIS. 565 (1973).

44. 33 U.S.C.A. § 1251(a) (Cum. Supp. 1975). The application of the Act was recently extended to include discharge of pollutants into non-navigable tributaries of navigable streams. *United States v. Ashland Oil & Transport. Co.*, 504 F.2d 1317 (1974).

45. 33 U.S.C.A. § 1311(a) (Cum. Supp. 1975).

46. *Id.* § 1362(11); 40 C.F.R. §§ 401-432 (1974). Effluent limitations must be achieved by 1977 which require the "application of the best practicable control technology" to point sources and secondary treatment of wastes by publicly owned treatment plants. By 1983 effluent limitations will be achieved for point sources which require application of the best technology "economically achievable" and which result in "reasonable further progress toward the goal of elimination of all pollutants." Publicly owned treatment plants must provide

based upon the uses contemplated for the waters involved.⁴⁷

In order to assist the states EPA has the duty of publishing standards of performance for named point sources of pollution,⁴⁸ effluent standards and prohibitions for toxic substances and guidelines for pretreatment of pollutants.⁴⁹ With regard to enforcement procedures, EPA may require record-keeping or installation of monitoring equipment from the owner or operator of any point source and has a right of entry to check effluents, records and monitoring equipment. If any person violates any condition or limitation in a permit, EPA has the option of issuing compliance orders or bringing a civil action.⁵⁰ Persons and governmental agencies which violate the conditions of the Act are also subject to citizen suits.⁵¹

Water quality standards adopted by the states under previous legislation are retained and the Act makes provision for non-degradation of existing clean water. Thus, the land use effect is similar to that of the Clean Air Act. New development will not be able to enter areas where it would interfere with the achievement of water quality standards and will be discouraged in areas where it would degrade clean water. Moreover, if EPA determines that discharge from point sources, even with the application of technical effluent limitations, interferes with the achievement and maintenance of water quality objectives, more stringent effluent limitations will be applied including "alternative effluent control strategies."⁵² These alternative strategies are not defined in the Act, but the legislative history indicates an interest in land disposal techniques.⁵³ EPA appears to have the authority under these circumstances to require land disposal of the pollutants through sanitary landfill or some other technique.

by 1983 the "best practicable waste treatment technology available." 33 U.S.C.A. § 1311(b) (Cum. Supp. 1975).

47. 33 U.S.C.A. § 1313(a) (Cum. Supp. 1975); 40 C.F.R. § 120.1 to .2 (1974).

48. A point source is defined as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C.A. § 1362(14) (Cum. Supp. 1975).

49. *Id.* §§ 1314, 1316-17.

50. *Id.* §§ 1318-19.

51. *Id.* § 1365. The framework for citizen suits is basically the same as that under the Clean Air Act. See note 11 *supra*. Suits by state governors against the Administrator are authorized without regard to notice limitations for failure to enforce effluent standards in another state when the failure causes adverse effects in the plaintiff state.

52. 33 U.S.C.A. § 1312(a) (Cum. Supp. 1975). Before implementation of the more stringent limitations or alternative control strategies, EPA is required to hold a public hearing to determine the socio-economic effects.

53. See H.R. REP. No. 911, 92d Cong., 2d Sess. 108 (1972).

2. *State Continuing Planning Process*

In order to enforce the water quality standards each state must submit a Section 303 continuing planning process subject to approval by EPA. The emphasis is on planning rather than required methods of control. Significant elements of the plan are a priority ranking of waste treatment works required to meet the effluent limitations and a provision for controlling the disposition of residual waste from water treatment processing. The latter will normally mean some form of land disposal for sludge.⁵⁴ There is no specific enforcement mechanism for Section 303 plans, but no permit program will be approved unless the state has such a plan.⁵⁵ The plan must also identify those waters in the state for which effluent limitations are not stringent enough to achieve the water quality standards. The state will then determine the total maximum daily pollutant and thermal load necessary to reach the required water quality standards and include the calculation in the plan.⁵⁶

The regulations issued by EPA to guide the formation of Section 303 plans reveal more clearly the relationship to land use planning. One of the goals of the process is to encourage water quality objectives which coordinate with overall state policies, including those for land use. The plans are required to identify the method by which the Section 303 plan is coordinated with land use planning.⁵⁷ This requirement integrates land use planning with environmental concerns.

A critical portion of the Section 303 plan is the designation of drainage basins within the state and the preparation of water quality management plans for those basins. The basins are divided into segments, either water quality or effluent limitation, and each segment classification must reflect an allowance for anticipated economic and population growth over a five year period.⁵⁸ A suggested possibility for land use control is a closer

54. Even though Section 303 of the Act does not contain the mandatory language of the Clean Air Act with regard to state implementation plans, Mr. Bosselman argues that EPA cannot carry out its statutory mandate without the power to control location of point and non-point sources and the location of land sites for disposal of pollutants. *See* EPA Authority, *supra* note 33, at 93-96. For Virginia's existing implementation *see* Section VII B, *supra*.

55. Lack of a state plan would mean permits issued directly by EPA. *See* 40 C.F.R. § 130.60 (1974).

56. 33 U.S.C.A. § 1313(d) (Cum. Supp. 1975). A related provision of the Act requires an annual inventory which describes the water quality of all waters in the state and a description of all non-point sources of pollution as well as the costs of programs to control them. *Id.* § 1315. Non-point source pollution is the run-off and siltation from agricultural, mining, construction and forestry activities.

57. 40 C.F.R. §§ 130.10(d), 131.309(b) (1974).

58. The required content of basin plans is contained at 40 C.F.R. §§ 131.300 to .310 (1974).

refinement of water quality segments in which the stringency of review for development is tied to existing water quality. An alternative is to require state growth control plans which provide incentives for industry and attendant population to locate where discharge will not interfere with water quality.⁵⁹

The basin plan must also establish discharge load and thermal load allocations for point and non-point sources. Each discharge load allocation must incorporate an allowance for anticipated economic and population growth for a five year period.⁶⁰ In some areas this may either stifle industrial growth, or limit development to certain light industry.

The Section 303 planning process must provide controls for non-point sources of pollution if the governor of the state determines they are necessary.⁶¹ A recent study⁶² concluded that non-point source pollution is in many areas the major contributor to degradation of water quality. The study recommended dealing with non-point problems by application of land management practices that prevent the generation and run-off of water pollutants. Although the Section 303 plan is not specifically required to contain land use controls for non-point sources, it is conceivable that such controls could be required in the future. This would demand comprehensive land use planning by the state. EPA could require a discharge permit system for those developments or activities likely to result in non-point source pollution.⁶³

3. *National Pollutant Discharge Elimination System (NPDES)*

After a public hearing, EPA may issue a permit for the discharge of pollutants into navigable waters upon the condition that the discharge meet all applicable requirements of the Act.⁶⁴ After promulgation of guide-

All basin plans must be submitted by July 1, 1975. Any segment where water quality standards will not be reached even after application of effluent limitations is a water quality segment. A segment where the water quality meets or is expected to meet water quality standards after application of effluent limitations is an effluent limitations segment. *Id.* § 130.11. Basin plans must also assess present municipal needs and forecast the growth or decline of population over a twenty year period. *Id.* § 131.303.

59. EPA Authority, *supra* note 33, at 97-99.

60. 40 C.F.R. § 131.305 (1974).

61. *Id.* § 130.23. EPA is required to publish guidelines for the control of non-point source pollution. 33 U.S.C.A. § 1314(e) (Cum. Supp. 1975). The guidelines were expected by January, 1975. 5 ENV. RPTR.-CURR. DEV. 1170 (1974).

62. 5 ENV. RPTR.-CURR. DEV. 1170 (1974).

63. EPA Authority, *supra* note 33, at 101-04.

64. 33 U.S.C.A. § 1342(a) (Cum. Supp. 1975). Environmental impact statements must be filed prior to the issuance of such permits. *Id.* § 1371(c)(1). As of January 8, 1975, no citizen

lines for the monitoring and reporting of discharge applications, EPA will approve state permit programs if the state has adequate enforcement authority. However, even after approval, EPA must receive a copy of each application for a permit and may object to its issuance. Applicants for a permit must provide a certification from the state that the discharge will comply with the standards of the Act.⁶⁵

The critical section of the system with regard to land use provides that if conditions of a permit for a publicly owned treatment plant are violated, the state or EPA may initiate a court action to restrict or prohibit the introduction of new pollutants into the treatment plant.⁶⁶ The dramatic consequence would be an abrupt halt to development in the area of the treatment plant. Rather than await this eventuality, EPA could attach as a condition to issuance of a permit a ceiling on the wastewater capacity of treatment plants or require a building permit program which limits new construction to those buildings which can meet standards of performance for disposal of sewage.⁶⁷

4. Grants

EPA is authorized to make grants to any state, municipality, or inter-state agency for the construction of publicly owned waste treatment works.⁶⁸ The primary land use effect is the accommodation or perhaps even encouragement of new development. The grants are conditioned on inclusion in and conformity with the state Section 303 and areawide waste treatment management plans. The planned treatment works must show a direct relation of size and capacity, including sufficient reserve capacity, to the needs to be served. Additionally, industrial users of the publicly

suits had been filed against dischargers who were not issued NPDES permits by the statutory deadline of December 31, 1974. EPA expects all NPDES permits, approximately 65,000, to be issued by July, 1975. 5 ENV. RPT. - CURR. DEV. 1395 (1975).

65. 33 U.S.C.A. § 1341(a) (Cum. Supp. 1975).

66. *Id.* § 1342(h); 40 C.F.R. § 124.71(d) (1974).

67. EPA Authority, *supra* note 33, at 114-18. Admitting the problem of EPA's authority to actually require a broad plan, Mr. Bosselman suggests:

As there are so many aspects of residential, commercial, industrial, and other kinds of development and activities which affect water quality . . . one of the most effective ways EPA could deal with the overall problems is to condition the issuance of NPDES permits for municipal treatment plants on a requirement that the municipality not only control issuance of permits for new development . . . but that the municipality also undertake a program to study patterns of growth and development within their jurisdiction for the purpose of establishing policies and guidelines to determine what optimum levels and kinds of growth and development can and ought to be allowed. *Id.* at 117-18.

68. 33 U.S.C.A. § 1281(g)(1) (Cum. Supp. 1975).

owned treatment works must pay both a share of the construction costs and user charges.⁶⁹ This requirement may have an indirect land use effect by encouraging industry to locate elsewhere due to the economic cost.

Before approval of the grant the applicant must demonstrate to EPA that "alternative waste management techniques" have been studied and evaluated.⁷⁰ A recent memorandum from EPA indicates that applicants must consider land application as an alternative waste management system. If it can be shown that land treatment is the most cost-effective alternative, proposals for other systems will be rejected.⁷¹ EPA is in a position, then, to require applicants to have sufficient land use authority to designate areas for the disposal of sludge.

The requirement that the size and capacity of the proposed plant relate to the needs to be served has caused problems. It has been suggested that this gives EPA authority to require applicants to furnish information about present development and projected growth in the area and perhaps have authority to enforce a growth control plan.⁷² This may well be the answer since a recent Council of Environmental Quality study concluded that EPA may be funding the future development of vacant land. Interceptor sewer lines with huge excess capacity to serve dense populations anticipated for vacant but developable land are frequently designed in response to local development pressure. To forestall this situation, the study recommended that the excess capacity costs of municipal treatment works be financed solely by local funds.⁷³

5. *Areawide Waste Treatment Management Plans*

Section 208⁷⁴ of the Act provides a level of planning and enforcement which holds the most promise for state land use consistent with environmental objectives. The thrust is two-fold, to commence by planning for areas with serious water problems and eventually have the state oversee the same comprehensive planning on a state-wide level. Each state is required to identify and designate areas which as a result of urban-industrial concentrations have substantial water quality control problems.⁷⁵ A representative organization, including elected officials from local

69. *Id.* § 1284(a)(1)-(6), (b)(1).

70. *Id.* § 1281(g)(2)(A).

71. 5 ENV. RPT.-CURR. DEV. 1180 (1974).

72. EPA Authority, *supra* note 33, at 65-68. The requirement of a growth control plan would be indirect, through the requirement for an NPDES permit. See discussion in note 67 *supra*.

73. 5 ENV. RPT.-CURR. DEV. 877 (1974). For reactions to the study see *id.* at 1133.

74. 33 U.S.C.A. § 1288 (Cum. Supp. 1975).

75. *Id.* An urban-industrial concentration is an area which because of substantial concen-

governments, capable of developing an effective waste treatment management plan for the area is then designated.⁷⁶ Existing regional agencies may also be designated to carry out the plan. If an area is not designated, the local elected officials may choose any agency and have it develop and implement an areawide plan. The state is required to implement the requirements of the areawide planning process in all areas not designated.⁷⁷

The plan developed for the area must include an identification of treatment works necessary to meet anticipated municipal and industrial waste treatment needs over a twenty year period, including an analysis of alternative waste treatment systems. Construction priorities for these treatment works should be established. A program must be established to regulate the location, modification and construction of any facilities which may result in any discharge in the area. The plan must also include a process to identify non-point sources of pollution such as farming, timber-cutting, mining and construction activity, and procedures (including land use requirements) to control them.⁷⁸ After approval of the plan by EPA there will be no grants for construction of municipal treatment works or issuance of permits under NPDES unless in conformity with the plan. Federal funding is available for the development and operation of the areawide plan.

trations of population, manufacturing production or other factors has a substantial water quality problem. 40 C.F.R. § 126.10 (1974). Senator Muskie has declared that EPA is departing from the intent of the Act by limiting Section 208 to areas with substantial water quality problems. Muskie claims that area wide planning must be implemented wherever the 1983 goals of the Act are not attainable or wherever the goals appear to be threatened. 5 ENV. RPTR.-CURR. DEV. 1381 (1975). The designation of Section 208 planning areas is proceeding slowly. One of the reasons was suggested by a speaker at a meeting of the Association of State and Interstate Water Pollution Control Administrators on January 15, 1975: "It is now evident that the complex political issues in the truly large metropolitan urban industrial areas are impeding designation and development of Section 208 planning and management agencies." 5 ENV. RPTR.-CURR. DEV. 1483 (1975).

76. 33 U.S.C.A. § 1288 (a)(2)(B)(Cum. Supp. 1975); 40 C.F.R. § 126.11 (1974). In designating the agency the Governor must consider (1) the coordination of the agency's legal authority with land use planning, and (2) the relationship of the agency with other regulatory agencies which possess zoning and subdivision controls.

77. 33 U.S.C.A. § 1288(a)(4), (6) (Cum. Supp. 1975).

78. *Id.* § 1288(b)(2)(A)-(K). The importance of Section 208 planning is evident from the legislative history:

Adjacent communities and industries are under no mandate to coordinate land use or water quality planning activities. This results in poor overall performance and the proliferation of many direct and indirect discharge sources into receiving waters. Such diffuse and divergent problems not only intensify pollution problems but they prevent the use of economies of scale, efficiency of treatment methods, and, most importantly, coherent, integrated and comprehensive land use management. S. REP. No. 414, 92d Cong., 1st Sess. 36-37 (1971).

Two critical connections to land use in the areawide plan are the projected treatment works analysis and the regulatory mechanism for the location of facilities which result in any discharge. "Facilities" are not defined in the Act but presumably they may range from an industrial plant to a parking lot storm drain.⁷⁹ This gives the areawide agency substantial control over the tempo of growth and development in the area. In deciding where sewers will be located the agency will, to a large extent, determine where industry will locate. Industry in turn affects the distribution of housing and other related activities.⁸⁰ It has been suggested that the agency could seek coordination with the zoning structure and limit the amount of development in the area so as not to overload the treatment works. An alternative method would involve the assignment of a limit on the amount of effluents permissably discharged from any parcel of land.⁸¹

The problem of non-point source pollution is pervasive but guidelines for control have not yet been issued by EPA. Suggested approaches are to establish either standards of performance for various types of non-point sources or a permit procedure. EPA could also establish guidelines which designate areas not suitable for non-point sources, for example, certain slopes which are off-limits to strip mining.⁸²

The total scope of planning under Section 208 areawide plans is not clear,⁸³ but it will presumably become more concrete in order to meet the objectives and deadlines of the Act. A recent EPA draft strategy paper indicates that funding has been set for the implementation of state-wide

79. EPA Authority, *supra* note 33, at 79-80.

80. COUNCIL OF STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS NO. 1, INTER-GOVERNMENTAL RELATIONS IN STATE LAND USE PLANNING 8-9 (1974).

81. EPA Authority, *supra* note 33, at 80-83. Relating growth to the capacity of the sewage treatment plant has been held constitutional. In *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972) the town implemented a "phased growth" plan by which residential development was to proceed according to the availability of adequate municipal facilities. The plan was adopted for the purpose of preventing premature subdivision and urban sprawl. For an excellent analysis see Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973).

82. EPA Authority, *supra* note 33, at 84-85.

83. One commentator has evaluated the problem in this way:

It is difficult to imagine how a successful water pollution control strategy of this magnitude could be effective without extensive reforms in the state land use guidance system, or apart from other conservation, social, and economic objectives. In fact, the statewide and areawide planning efforts directed pursuant to § 208 are not tied solely to water quality standards, but could include a variety of economic and social considerations. In any event, current EPA policy minimizes the land use requirements of water pollution control, although the planning process directed by the Act is both statewide in scope and susceptible of broad-gauge application. Reilly, *supra* note 34, at 1431.

Section 208 plans, including the acquisition of additional legislative authority to deal with non-point sources, by 1981.⁸⁴

C. OTHER LEGISLATION

1. *Solid Waste Disposal Act*

The 1965 Solid Waste Disposal Act,⁸⁵ as amended by the Resource Recovery Act of 1970, resulted from a finding that the economic and population growth of the nation had led to a "rising tide of scrap, discarded, and waste materials."⁸⁶ The legislation provides for a national research and development program for improved waste management techniques and technical and financial assistance to state and local governments. Congress recognized that the problem of solid waste disposal is primarily a state concern but the Act specifically encourages interstate, intermunicipal and regional cooperation.⁸⁷

EPA is authorized to make planning grants to state, regional and local agencies for the development of solid waste disposal plans and the study of waste disposal practices in adjacent areas. Applying agencies must prove that they will consider all factors in developing a comprehensive areawide plan; moreover, EPA must be assured that the planning will not duplicate related state and local planning activities.⁸⁸ Grants for demonstration of resource recovery systems and construction of new solid waste disposal facilities are also authorized. The grants are conditioned on the existence of an areawide plan for solid waste disposal and consistency of the facility with the plan and EPA guidelines issued pursuant to the legislation.⁸⁹ EPA could use its grant conditioning authority to require a comprehensive land use plan for the area served by the waste disposal facility.⁹⁰

EPA is required to issue guidelines for solid waste disposal and recovery systems which are "consistent with public health and welfare, and air and

84. 5 ENV. RPT. - CURR. DEV. 1515 (1975).

85. 42 U.S.C. §§ 3251 et seq. (1970).

86. *Id.* § 3251(a)(2).

87. *Id.* § 3254. Interstate, intermunicipal and regional cooperation is also encouraged by the different funding amounts under the legislation. Planning grants encompass two-thirds of the cost for one municipality but three-fourths of the cost if the applicant area is larger. *Id.* § 3254a. Construction grants provide a federal share of one half the cost for one municipality but three-fourths if the applicant agency controls an interstate or intermunicipal area. *Id.* § 3254b.

88. The factors to be considered include "population growth, urban and metropolitan development, land use planning, water pollution control, air pollution control, and the feasibility of regional disposal and resource recovery programs." *Id.* § 3254a (b)(2), (c).

89. *Id.* § 3254b.

90. EPA Authority, *supra* note 33, at 130.

water quality standards and adaptable to appropriate land use plans."⁹¹ This requirement has been seen as the source of a federal regulatory system for solid waste disposal with unknown land use ramifications.⁹² Since the statute provides no enforcement provisions for the guidelines, EPA has questionable authority for requiring comprehensive land use planning except with regard to construction grants for solid waste disposal facilities.⁹³

2. Noise Control Act

The Noise Control Act⁹⁴ is primarily aimed at the study of noise control and the setting of technical emission standards by EPA for construction and transportation equipment and other machinery. Additionally, EPA must identify major sources of noise, evaluate techniques for control and publish information on the levels of noise necessary to protect the public health and welfare.⁹⁵ Arguably, this requirement could enable EPA to control the siting of industry through buffer zones and minimum acreage requirements.⁹⁶

EPA has more substantial authority over the noise created by aircraft

91. 42 U.S.C. § 3254c(a) (1970) (commonly called § 209 guidelines). Guidelines have been issued dealing with sanitary landfill and incineration. 39 Fed. Reg. 29333-37 (1974). The guidelines, even if they required more comprehensive land use planning, are mandatory only for federal agencies and those agencies seeking solid waste disposal grants. 42 U.S.C. § 3254e (a)(1) (1970).

92. See 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW 4-49 (1973). See generally Bryson, *Solid Waste and Resource Recovery in FEDERAL ENVIRONMENTAL LAW* 1290, 1294-99 (E. Dolgin and T. Guilbert ed. 1974).

93. Problems may still arise by conditioning construction grants on adherence to the guidelines:

If EPA seeks to impose guidelines which require substantial planning efforts directed not only at solid waste recovery and disposal systems but also at sources of solid wastes, state and local agencies may refrain from seeking grants to avoid what may be viewed as onerous guidelines.

However, where EPA can tailor Section 209 guidelines with land use requirements which may be imposed under the Clean Air Act or Water Pollution Control Act, there is a better chance that local governments, which would be required to comply with Air and Water Act requirements, could be persuaded to adopt Solid Waste Act guidelines. EPA Authority, *supra* note 33, at 122.

94. 42 U.S.C.A. §§ 4901-18 (1973).

95. *Id.* § 4904.

96. EPA Authority, *supra* note 33, at 122. However, the authority of EPA under section 4904 is merely advisory and there is no mechanism for compelling the states to adopt EPA guidelines on major sources of noise pollution. New York has proposed regulations which would limit the noise emitted by various classifications of land use. 4 ENV. RPTR.-CURR. DEV. 841 (1973).

and airports.⁹⁷ In conjunction with the Federal Aviation Administration⁹⁸ the agency is required to study the technical aspects of aircraft noise caused by their flight pattern or design. Moreover, EPA must study the levels of cumulative noise exposure around airports and recommend measures available to airport owners and municipal governments to control the effects of aircraft noise.⁹⁹ It is difficult to predict the ultimate scope of this interagency requirement; however, proposed regulations by EPA have involved airport zoning which would limit the amount of development near future airports and place building requirements on present adjacent development.¹⁰⁰ Other suggested measures are limiting airport siting to rural areas and setting minimum acreage requirements.¹⁰¹

Another related statute, the Airport and Airway Development Act of 1970,¹⁰² administered by the Department of Transportation, requires appli-

97. The Federal Aviation Administration in conjunction with EPA has full control over aircraft noise, pre-empting state and local control. Therefore, a city ordinance cannot prohibit jet traffic during certain hours of the day. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

98. The Administrator of the FAA is required to consult EPA for regulations concerning the control of aircraft noise and sonic boom to carry out his responsibilities for the certification of airports and aircraft. Federal Aviation Act of 1958, 49 U.S.C.A. § 1431 (Cum. Supp. 1975). Citizen suits are authorized under the same requirements as the Clean Air Act and the Federal Water Pollution Control Act Amendments to enforce regulations issued pursuant to the Noise Control Act and jointly issued by EPA and FAA. 42 U.S.C.A. § 4911 (1973).

99. 42 U.S.C.A. § 4906 (1973).

100. 39 Fed. Reg. 6142 (1974). The text of the proposed regulations indicates an extensive program:

The achievement and maintenance of noise exposure limits for communities around airports will require a comprehensive program:

. . . .

(b) To design or modify the total operating plan of the airport so as to minimize the extent of the airport noise impact zone and tailor its shape to avoid existing noise-sensitive land uses.

(c) To prevent buildup of new housing or other noise-sensitive land uses in present and anticipated future noise impact zones and, where necessary, resolve by land use measures (soundproofing or conversion) those few impacted areas where the noise exposure cannot be adequately decreased by other means. *Id.*

101. Some form of airport zoning rather than minimum acreage requirements is recommended because:

Minimum acreage requirements may have very limited usefulness for noise problems arise not only from movement of aircraft within an airport itself but also from aircraft approaching or leaving airports along particular flight paths. It would not be feasible to impose minimum acreage standards sufficient to require an airport authority to include adequate land along runway approach paths so development could not occur until planes were high enough that noise would not longer be a problem. EPA Authority, *supra* note 33, at 126-27.

102. 49 U.S.C.A. § 1701 *et seq.* (Cum. Supp. 1975). See *Citizen's Airport Comm. v. Volpe*,

cants for airport planning and construction grants to take appropriate action to restrict the use of land in the area of the planned airport.¹⁰³

3. *Coastal Zone Management Act of 1972*

As a result of pressing concern over the ecological devastation of the nation's coastal areas, Congress enacted the Coastal Zone Management Act of 1972,¹⁰⁴ to be administered by the Department of Commerce. The legislation is a prime example of the "carrot and stick" principle by which a comprehensive land use plan for the coastal zone is urged upon states through the enticement of federal funding. For coastal states¹⁰⁵ which apply, the Act provides grants for two-thirds of the cost of development and implementation of comprehensive coastal zone management plans. The planning grants require the applicant state to identify the boundaries of its coastal zone and define permissible land and water uses within the zone which impact on coastal waters.¹⁰⁶ The thrust of the Act is revealed

351 F. Supp. 52, 58-63 (1972) where the Secretary's approval under the Act of a county airport was challenged for failure to evaluate adequately adverse environmental and land use effects.

103. 14 C.F.R. § 151.26 (1974):

The [applicant's] statement must include information on—

(1) Any property interests (such as airspace easements or title to airspace) acquired by the sponsor to assure compatible land use, or to protect or control aerial approaches;

(2) Any zoning laws enacted or in force restricting the use of land adjacent to or in the vicinity of the airport, or assuring protection or control of aerial approaches, whether or not enacted by the sponsor; and

(3) Any action taken by the sponsor to induce the appropriate government authority to enact zoning laws restricting the use of land adjacent to or in the vicinity of the airport, or assuring protection or control of aerial approaches, when the sponsor lacks the power to zone the land.

104. 16 U.S.C.A. § 1451-64 (1974). Responsibility for administration of the grants has been delegated to the National Oceanic and Atmospheric Administration (NOAA). The Congressional purpose of placing at the state level decisions presently under local control is revealed in the language of the Act:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance. *Id.* § 1451(h).

105. "Coastal state means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes." *Id.* § 1453(c).

106. *Id.* § 1454(b)(1)-(2). The Act defines the coastal zone as:

[T]he coastal waters . . . and the adjacent shorelands . . . strongly influenced by

through a further requirement that the management program include "an identification of the means by which the state proposes to exert control over . . . land and water uses. . . ." ¹⁰⁷ This assumption of authority by the state in the coastal zone will conflict directly with the land use control of municipalities and localities. However, the legislative history indicates a desire for such state level assumption of land use power motivated in part by developmental abuses in coastal zones under local control. ¹⁰⁸ It is questionable whether state control will terminate the abuses since local officials may actually administer the program. ¹⁰⁹ On the other hand, performance under the program is continually reviewed by the Department of Commerce and funding will be cut off if states deviate from the conditions of the Act. ¹¹⁰

The administrative grants, which amount to two-thirds of the cost of administering the state program, also carry conditions for a comprehensive land use program. After public hearings and approval by the governor, the state must designate a single agency to carry out the plan insuring that sufficient coordination exists with local governments, state and regional agencies. The agency must have sufficient legal authority:

- (1) to administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and
- (2) to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program. ¹¹¹

The state has three choices of techniques for the control of land and water uses: (1) state established criteria locally implemented, but subject to review and enforced compliance; (2) direct state land and water use planning and regulation; and (3) state review of proposed developments, agency projects, or land and water use regulations for compliance with the management plan. Moreover, the state must insure that local land use

each other and in proximity to the shorelines of the several coastal states, and includes transitional and intertidal areas, salt marshes, wetlands, and beaches. . . . The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. *Id.* § 1453 (a).

For more detail on boundary setting and permissible uses see 40 Fed. Reg. 1683 (1975).

107. 16 U.S.C.A. § 1454(b)(4) (1974).

108. S. REP. No. 753, 92d Cong., 2d Sess. 5-6 (1972).

109. See Comment, *Environmental Land Use Control: Common Law and Statutory Approaches*, 28 U. MIAMI L. REV. 135, 188 (1973) [hereinafter cited as Comment].

110. 16 U.S.C.A. § 1458 (1974).

111. *Id.* § 1455(d).

regulations do not unreasonably restrict uses of benefit to the region.¹¹²

Management programs must also provide for "adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature."¹¹³ This requirement has been evaluated as a subsidiary purpose of the Act, to discourage parochialism by the states in the use of their coastal zones.¹¹⁴ For example, if a state prohibits new industry in its coastal zone, the industrial development which requires a coastal environment will eventually spill over into the coastal areas of adjacent states. Presumably the requirement would also apply to a planned development which promises substantial multi-state benefit.

As a further stimulus the state will gain substantial control of federal activities in the coastal zone through the management program. Federal agencies conducting activities or development in the coastal zone must insure consistency with the state management program. Additionally, applicants for federal licenses or permits to conduct activity affecting land use in the coastal zone must obtain state certification. The requirements of the Clean Air Act and the Federal Water Pollution Control Act Amendments are to be incorporated into the plan.¹¹⁵ This has been interpreted to mean that state air quality control agencies could preempt local land use powers in the coastal zone.¹¹⁶

Virginia has applied for and received a federal planning grant under the Act. The Division of State Planning and Community Affairs (DSPCA) has been designated the responsible agency for receipt and administration of the grant, with the Virginia Institute of Marine Science (VIMS) acting in an advisory capacity.¹¹⁷ The planning program has two broad objectives:

- (1) to provide a broad assessment of existing conditions in the Common-

112. *Id.* § 1455(e).

113. *Id.* § 1455(c) (8).

114. Power, *The Federal Role in Coastal Development*, in *FEDERAL ENVIRONMENTAL LAW* 792, 834 (E. Dolgin and T. Guilbert ed. 1974).

115. 16 U.S.C.A. § 1456(c)-(f) (1974). A federal activity which threatens to conflict with state management programs developed under the Act is offshore oil leasing under the Outer Continental Shelf program. Proposed amendments would require state approval of the federal permits for such leases. 5 *ENV. RPTR.-CURR. DEV.* 1274-75 (1974). See notes 128-33 and accompanying text *infra*.

116. Mandelker, *supra* note 19, at 271.

117. Virginia Division of State Planning and Community Affairs and Virginia Institute of Marine Science, *Final Application for Initial Development Grant, Coastal Zone Management Program*, May, 1974 (mimeographed, available from DSPCA) [hereinafter cited as *Final Application*].

wealth's coastal zone, including potential problems and public viewpoints; and,

(2) to stress the importance of involving local governments in the Coastal Zone Management Program.¹¹⁸

Within this framework the plan sets forth more concrete objectives directed toward specific problem areas.¹¹⁹

Citizen participation in the development of the management program will be encouraged through the existing regional planning district commissions (PDCs).¹²⁰ The PDCs in the nine planning districts comprising the coastal zone planning area will appoint regional advisory committees (RACs) representing major governmental, commercial and citizen interests.¹²¹ These committees will be the linchpin of the planning process as they are responsible for articulating the land policy goals of their respective districts.¹²² Additionally, they will participate in a series of seminars arranged for public education and comment.¹²³ One member of each RAC will serve with representatives of eight state agencies on Virginia's Coastal

118. Haulman, *Virginia's Coastal Zone Management Program*, LAND: ISSUES AND PROBLEMS (VPI Extension Service No. 3 March, 1975).

119. The objectives are: (1) to progressively improve and maintain the water quality of the estuarine waters, bays, and seas; (2) to identify and protect groundwater sources and supplies; (3) to preserve, to the maximum extent possible, the coastal wetlands; (4) to improve and maintain commercial and sport life; (5) to utilize marine resources at or below a level of maximum sustainable yield; (6) to identify and manage areas vital to wildlife; (7) to minimize the irreversible use of non-replenishable natural resources; (8) to identify and protect the significant aspects of the social heritage of the Commonwealth; (9) to enhance public and private recreational opportunities; (10) to locate new development in an orderly pattern that allows for efficient utilization of land and water resources; (11) to provide efficient mobility within and through the coastal zone; (12) to maintain channels for marine transport while providing positive solutions to the removal of dredged spoil; (13) to develop an efficient, yet environmentally safe, means for cargo transport within major ports; and (14) to encourage economic growth while safeguarding and maintaining use options to the maximum extent possible. Final Application, *supra* note 117, at 23-24.

120. *Id.* at 5, 51-56. See VA. CODE ANN. § 2.1-63.5 (Cum. Supp. 1974), §§ 15.1-1403 to -1405 (Cum. Supp. 1974).

121. Final Application, *supra* note 117, at 51-52.

122. More specifically, the RAC's duties are:

[To be] responsible for reviewing base data generated at either the state, regional, or local levels for inclusion into the overall planning program; for articulating any existing policies and procedures that now exist within their area dealing with resource utilization; for scheduling meetings with other officials and citizens where information can be exchanged; and for reviewing and commenting upon all material that is correlated into what will evolve into the overall plan and program. *Id.* at 65.

At the same time VIMS and DSPCA will be compiling technical baseline data on the coastal zone.

123. *Id.* at 53-55.

Zone Advisory Committee.¹²⁴ This committee will meet at least semi-annually to evaluate progress and formulate policy.

At present, DSPCA is directing its efforts toward five major problem areas.¹²⁵ The primary concern is the increasing demand for commercial, industrial, residential and recreational development in the limited area of the coastal zone. These pressures are particularly acute in the urban crescent of Washington-Richmond-Norfolk. Related problem areas are the maximization of water quality, increasing demand for recreation areas caused by expanded leisure time and the achievement of "maximum non-conflicting simultaneous development" of the entire resource pool of the coastal zone.¹²⁶ The problems are inter-related to a great degree. For example, if wetlands are preserved to protect fisheries, a limitation is placed on residential development and profits from waterfront acreage. Tourism could be increased in water recreation areas if stinging nettles were brought under control. However, the Mnemiopsis, a jellyfish preyed on by nettles, would increase and make inroads on the population of larval oysters, a staple of the area's commercial fishing interests.¹²⁷

An evolving problem of pressing concern is the possibility of oil and gas discoveries off the Virginia coastline. In such an event substantial financial benefits would accrue to the state, jobs being created not only by the oil industry but also by secondary supporting development. These benefits must be balanced against concerns for serious environmental damage caused by oil development in the outer continental shelf (OCS). DSPCA has included as part of the planning program a study on optimum siting of key activities for OCS development.¹²⁸ The rationale for developing a state control mechanism is to take such key decisions away from narrowly conceived local interests.

A recent contingency study of OCS development for Virginia identified expected problems for the area from the three mile limit inland.¹²⁹ Primary concerns are the effects of large scale dredging, wetlands destruction and oil spills, air and water pollution from industrial and secondary development, and uncontrolled development (especially on the Eastern Shore).¹³⁰

124. *Id.* at 53.

125. *Id.* at 15-20.

126. *Id.* at 18.

127. *Id.* at 15.

128. *Id.* Appendix B at 5-9. One such problem has already arisen with the siting of a major manufacturer of oil drilling platforms in Cape Charles on the Eastern Shore.

129. REPORT OF THE OUTER CONTINENTAL SHELF ADVISORY COMMITTEE, VIRGINIA AND THE OUTER CONTINENTAL SHELF: PROBLEMS, POSSIBILITIES AND POSTURE, (November 1974).

130. *Id.* at 4.

The study recommended compatibility between OCS development and the Coastal Zone Management Plan and opposition to drilling until an effective oil spill cleanup association has been formed. More specific recommendations included the restructuring of the Wetlands Act on a planning basis rather than case-by-case reaction, and control of pipeline access to keep the number of corridors to a minimum.¹³¹ The United States Supreme Court has ruled that OCS lands (*i. e.*, lands seaward of the three mile limit) are owned and may be leased by the federal government.¹³² The study, anticipating this result, recommended creation of an office to coordinate contacts between state and federal agencies and industry in the OCS area. Moreover, the study supports federal legislation that would require sharing of monies received from OCS leasing.¹³³

Virginia's Coastal Zone Management Plan is still in a nebulous, formative stage. The ultimate degree of state land use control in the coastal zone is difficult to foresee. There has been no unequivocal commitment from the legislature for strong state control.¹³⁴ Moreover, it is not clear whether the planning program is aimed at eventual federal funding of a strong management program complying with requirements of the Act or a state funded program with politically acceptable controls.¹³⁵ Finally, prediction of the extent of public reaction to encroachment on private property rights and local political boundaries would be premature. One thing is certain—Virginia will require a more extensive program of control in the coastal zone due to increasing development pressures and the exploration of the outer continental shelf.¹³⁶

D. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

1. *Background*

By enacting NEPA¹³⁷ Congress established a national policy for the protection and restoration of the environment, recognizing that federal agency decisions have a substantial effect on the relationship between environmental quality and the national welfare. The legislation specifically modified historical American ideology that virgin land may be developed with-

131. *Id.* at 5-6.

132. *United States v. Maine*, 43 U.S.L.W. 4363 (U.S. Mar. 17, 1975).

133. REPORT, *supra* note 129, at 6.

134. See Haulman, *supra* note 118.

135. Interview with Keith Buttleman, Senior Environmental Planner, Commerce and Resources Section, DSPCA, in Richmond, Virginia, March 15, 1975.

136. See Haulman, *supra* note 118.

137. 42 U.S.C. § 4321 *et seq.* (1970).

out regard to environmental consequence.¹³⁸ Section 102(2)(C)¹³⁹ which has prompted voluminous litigation,¹⁴⁰ requires that all federal agencies evaluate the environmental costs of a proposed project before it is begun. Before making a detailed statement, the agency must confer with federal or state agencies having environmental expertise on the probable impact of the project. Copies of the environmental impact statement and statements from the commenting agencies are then made available to the Council on Environmental Quality (CEQ) and the public. Copies of the environmental impact statement are appended to agency material relating to the proposed project and accompany it through the "existing agency review process."¹⁴¹

Both the procedural and substantive requirements of NEPA have occasioned active judicial review. Indeed, the skeleton of a relatively simple statute has been fleshed out through the courts rather than by administrative or legislative action. The courts have recognized that the environmental impact statement analysis is not simply a bureaucratic exercise. It is a full disclosure device for insuring that federal agencies consider environmental factors in good faith and allow for public commentary on a proposed agency action. In the seminal case of *Calvert Cliffs' Coordinating Comm., Inc., v. AEC*,¹⁴² Judge Wright criticized the Atomic Energy Commission for formulating an agency review plan which provided for accompaniment of impact statements but did not mandate their consideration:

We believe the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102

138. See generally Redding and Parry, *Land Use: A Vital Link to Environmental Quality* in *LAND USE AND THE ENVIRONMENT: AN ANTHOLOGY OF READINGS* 3 (1973).

139. 42 U.S.C. § 4332(2) (1970) states:

[T]o the fullest extent possible . . .

(2) all agencies of the Federal Government shall— . . .

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

140. See F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973) [hereinafter cited as ANDERSON].

141. 42 U.S.C. § 4332(2)(C) (1970).

142. 449 F.2d 1109 (D.C. Cir. 1971).

(2)(C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity—mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? . . . NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102 (2)(C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors . . . be *considered* through agency review processes.¹⁴³

Thus the procedural requirements of NEPA mean not only that the impact statement should be prepared but that it should be functionally used in the decision-making process.

Having fulfilled the procedural requirements, the final agency decision may still be open to review under the substantive requirements of NEPA. Previous opinion negated the proposition of a citizen's right to a clean environment¹⁴⁴ but recent case law has shown a tendency to review agency decisions on the merits.¹⁴⁵ This trend opens a fertile field for challenge of developments and agency actions which threaten existing land use or evidence inadequate consideration of land use ramifications.

2. *Environmental Impact Statements*

a. Necessary Federal Involvement

Impact statements are required for "major Federal actions significantly affecting the quality of the human environment . . ." ¹⁴⁶ This calls for an initial determination of sufficient federal involvement. Generally, federal actions are considered to be those directly undertaken by federal agencies, dependent upon federal funding assistance, or hinging on a federal permit or license.¹⁴⁷ The courts have interpreted the requirement broadly to encourage environmental analysis.

143. 449 F.2d at 1117-18 (emphasis in original).

144. See, e.g., *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972) where Judge Bryan said at 578: "I do not interpret . . . [NEPA] as creating any substantive private right." *Accord*, *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

145. See *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972); and discussion accompanying notes 174-83 *infra*.

146. 42 U.S.C. § 4332(2)(C) (1970).

147. The CEQ guidelines provide

"Actions" include but are not limited to . . . [n]ew and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance . . . ; or involving a Federal lease, permit, license certificate or other entitlement for use. 40 C.F.R. § 1500.5(a) (1974).

Once there is a finding of federal involvement the courts generally apply a two-pronged test to determine (1) whether the federal action is "major" and (2) whether it significantly affects the human environment. Arguably, NEPA analysis should be triggered if either requirement is met.¹⁴⁸ As an aid to potential litigants, either developers or those seeking to challenge development, it has been suggested that the threshold for the test be cast in terms of a dollar amount. Cases which exceed a certain cost would automatically trigger NEPA requirements while those below the threshold would shift the burden of proof to the complaining party. The procedure would have the advantage of injecting certainty into the decision-making

But see Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973) where the Fourth Circuit refused to enjoin the granting of a permit by the Corps of Engineers for construction of fishing piers and a boat basin on part of North Carolina's outer banks. No impact statement would be required, the court said, because: (1) impact was limited to the immediate area; (2) marshlands or shellfish beds were not threatened; and (3) since there were several other fishing piers, no introduction of a previously non-existing use into the area. Judge Craven dissented, focusing on Corps regulations effective three days after the permit's issuance which required a written environmental analysis. He stated:

I do not know how many fishing piers are too many, but I think that too many may substantially alter the environment of North Carolina's priceless Outer Banks. It is, of course, true that the issuance of a permit by the Corps to construct a boat dock on an inland waterway for a private homeowner is not major federal action requiring the preparation of an impact statement. But what about the 500th such permit, or the 10,000th one? At some point "zoning" and environmental impact merge. Ecology is largely a matter of land use. *Id.* at 164.

148. Compare ANDERSON, *supra* note 140, at 89-90:

Courts that have specifically considered this issue are divided but favor a two-test standard. Numerous cases implicitly resolve the question, however, by simply assuming that Congress intended NEPA to cover *all* pending federal actions that may cause significant environmental effects. Thus the use of both "major" and "significantly affecting" appears to have been for emphasis. On the one hand, federal action does not technically become "major" just because it may be accompanied by significant environmental effects; on the other, it makes little sense to find a project minor when its effects are significant. (footnotes omitted)

with the view expressed in Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295, 302 n.41 (1973):

Superficially, it seems unlikely that a nonmajor action could have a significant effect on the environment. This assumption fails to recognize the possibility of minor federal participation in projects having a significant environmental impact—a federal research grant of a few thousand dollars to study erosion control during the construction of a major state or municipally funded facility. This example may be analyzed either by reasoning that the *federal action* does not *significantly* affect the environment or by making the simpler determination that the action is not major. The 2-tiered level of NEPA inquiry simplifies the decision-making process by requiring no agency action for nonmajor actions, negative declarations for major actions without significant effects, and a full-scale statement only for major actions with significant effects.

For a lengthy analysis of the case law interpretation *see* ANDERSON, *supra* note 140, at 73-96.

process.¹⁴⁹ To make such a plan more comprehensive, perhaps an environmental court system could be established to deal initially with agency decisions to file or not file environmental statements. Minimum standing requirements and court costs would encourage citizen challenges and honor more broadly the environmental mandate of NEPA.¹⁵⁰ In time, the body of environmental litigation could be shifted to such courts.

Specific situations have arisen around the question of timing of federal involvement. For example, should an impact statement be filed when the state, local, or private agency is taking environmentally harmful action prior to federal funding? In *Thompson v. Fugate*¹⁵¹ the plaintiffs sought to enjoin the condemnation by the Virginia State Highway Department of Tuckahoe Plantation, a registered national historical landmark. The condemnation was for an 8.3 mile segment, completing a 75 mile circumferential beltway for the City of Richmond. Defendant Highway Department argued that environmental impact analysis was not required because federal approval and funding for the project had not yet been sought. Judge Robert Merhige responded:

The meeting of federal requirements for 21 miles of a 29.2-mile highway project in order to partake of the federal financial allotments for that 21-mile segment, and at the same time circumvent the need to protect the national environment to the fullest extent possible on the remaining 8.3-mile segment by labeling it as a separate project, is to engage in a bureaucratic exercise which, if it is to succeed, must do so without the imprimatur of this Court—a task which is doomed to failure unless and until a superior court deems otherwise.¹⁵²

149. Comment, *supra* note 109, at 170-71.

150. It may be objected that such a requirement would encourage spurious suits. See *Izaak Walton League v. Macchia*, 329 F. Supp. 504, 513 D. N.J. 1971) where the court stated:

We do not share the fear of some earlier decisions that liberalized concepts of "standing to sue" will flood the Courts with litigation. However, if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it. But such seems most improbable. Courts can always control the obviously frivolous suitor.

Section 9 of the Federal Water Pollution Control Act Amendments of 1972 requires that the President, acting through the Attorney General, report to Congress on the feasibility of a separate environmental court system. Attorney General Elliot Richardson on October 11, 1973, submitted this report and recommended that no action be taken. The report was based on a consensus of federal agencies and environmental protection groups. See Comment, *Attorney General's Report Rejects Establishing An Environmental Court*, 4 ENV. L. REP. 10019 (1974). But see Whitney, *The Case for Creating A Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973).

151. 347 F. Supp. 120 (E.D. Va. 1972).

152. *Id.* at 124. But see *James River & Kanawha Canal Parks, Inc. v. RMA*, 359 F. Supp. 611 (E.D. Va. 1973) where an expressway was originally financed by local bonds. A later

The court enjoined federal approval, funding or condemnation until the environmental impact analysis requirement was satisfied.

Restriction on agency action was carried a step further in *Arlington Coalition on Transportation v. Volpe*¹⁵³ where the Fourth Circuit Court of Appeals held that an interstate highway project in the Arlington area should be enjoined for reconsideration of environmental impact even though funded and partially complete prior to the effective date of NEPA. The Virginia State Highway Department argued that it should be allowed to continue the project during the environmental assessment by the Secretary of Transportation. The court rejected the argument on this rationale:

If we were to find—as we do—that federal law requires that the proposed route for Arlington I-66 be reconsidered, acquisition by the state of right-of-way along the proposed route during the reconsideration would make proceeding with the proposed route increasingly easier and, therefore, a decision to alter or abandon the route increasingly undesirable. Thus the challenged activities of the state highway department would make a sham of the reconsideration required by federal law.¹⁵⁴

Thus, the restriction on environmentally harmful action extends from apprehension of federal involvement through preparation of the impact statement.

Not only will state action be enjoined pending environmental impact analysis but the requirement extends to private development. In *Silva v. Romney*,¹⁵⁵ the Department of Housing and Urban Development had approved a mortgage guarantee of \$4,000,000 and an interest grant of \$156,000 for a private developer of low and medium income housing units.

request for federal funds due to the rising costs was not considered sufficient federal involvement.

153. 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

154. 458 F.2d at 1329 (footnote omitted). *But see* *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (Ely I) where a block grant from the Law Enforcement Assistance Administration for construction of a prison facility in the Green Springs area of Virginia was held to be federal involvement warranting environmental analysis. However, the state agency was not enjoined from continuing further with the plan. This was not the end of the Green Springs litigation. The impact statement revealed that further construction delays were inevitable because of adverse comments. The state agencies decided to withdraw their request for federal funds but kept funds allocated for use on other projects. This action was challenged as a juggling of funds to avoid NEPA requirements. In *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974) (Ely II) the Fourth Circuit reversed the district court and found such state action a circumvention of congressional policy. The decision left the state agencies with a choice. They could proceed with construction regardless of environmental requirements, but return all federal funds originally allocated for the project. Or, the state could keep the funds and await final environmental analysis before proceeding.

155. 342 F. Supp. 783 (D. Mass. 1972).

When challenged in the district court HUD was enjoined from participation pending environmental analysis, but the court refused to further enjoin the developer from cutting down trees in preparation for the project. The First Circuit reversed and enjoined the developer on the rationale that once there is a partnership between federal and non-federal entities, all parties are subject to injunction.¹⁵⁶

Moreover, the court called for "status quo" regulations which would define what action may be taken on a project while an impact statement is being prepared, preferably forbidding those which would cause environmental harm. Basing its plea upon the substantive mandate of NEPA, the court dismissed temporary restriction of private action as the price of federal regulation. Lack of such regulations would present the following spectre:

Given the important goals of protecting the environment and providing adequate housing for many lower and middle class Americans, status quo regulations in a situation like the one before us could prevent the irony which might occur where a partially built project which went ahead with little concern for the environment could not be completed because federal funds were denied to avoid subsidizing environmental harm, the twin results being no housing and an impaired environment.¹⁵⁷

Status quo regulations would benefit the government by reassurance that expensive environmental analysis would not be faulty because of further actions of the developer. The developer, according to the court, would be encouraged to undertake his own environmental studies, thus increasing the chances of final approval.¹⁵⁸ As a practical matter, the primary benefit of such regulations to the developer would be a more realistic planning framework for costs, the availability of materials and deadlines.

The highway cases and *Silva* indicate that NEPA can serve as a challenging device to state action and private development which poses the threat of harmful environmental or land use impact. The problem is to find

156. *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

157. *Id.* at 291.

158. *Id.* The litigation did not end with the injunction from the First Circuit. In *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973), HUD and the developer were further enjoined because the submitted impact statement was inadequate. Chief Judge Coffin, now noticeably disgusted, stated:

HUD has had nearly a year to prepare a satisfactory [impact statement] on a relatively small project In the meantime, the developer, since earlier argument before us, has stayed his hand. Now, with costs of construction rising, and costs of delay accumulating, he faces further delay. And the appellants, sometimes excessive in their demands, have nevertheless served the public purpose in pursuing this cause. 482 F.2d at 1287.

a sufficient nexus between the state or private activity and federal action. If the private citizen can pass the dual barriers of "federal action" and standing, he can force observance of NEPA procedural requirements. However, unless the court adopts a standard of substantive review he may not be able to stop the eventual completion of the project. Conversely, private developers should be aware that federal licenses, permits or regulatory activity carry the possible requirement of environmental impact analysis. Failure by the relevant federal agency to comply with NEPA will mean increased costs and delay for the proposed private action.

b. Adequacy

The contents of an adequate environmental impact statement are set out in the CEQ guidelines.¹⁵⁹ Adequacy of the statement has been further described in this way:

- (1) The statement must not contain unsupported conclusions. Any conclusions in the statement must be supported by facts from which a reasonable objective observer would reach the same results;
- (2) the reasonable alternative presented may not be deemphasized by the agency in an attempt to justify its course of action. The statement must contain a text of *reasonable* alternatives with an accompanying discussion of the environmental impact of each one. The depth of the discussion is governed by a "rule of reason" which weighs the depth of evaluation in proportion to the degree of impact.¹⁶⁰

Attacks on environmental impact statements have generally been prompted by the agency's failure to discuss adequately reasonable alternatives to the proposed action or to give all the pertinent facts.¹⁶¹

Agencies are required by the guidelines to assess the land use effects of proposed action. In describing the action agencies are cautioned to identify the existing population and growth characteristics of the affected area as well as any secondary growth impacts resulting from the proposed action. When evaluating the relationship of the action to land use plans in the affected area (including those developed pursuant to the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972) the agency must identify inconsistencies and proposals for reconciliation.¹⁶²

159. 40 C.F.R. § 1500.8 (1974).

160. Comment, *supra* note 109, at 182. For analysis of the case law see ANDERSON, *supra* note 140, at 200-23.

161. See, e.g., National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (failure to discuss alternatives).

162. 40 C.F.R. § 1500.8(a)(1),(2) (1974).

The guidelines recognize that major federal actions (e.g., highways, airports and sewer systems) often induce secondary effects of associated investment and altered patterns of social and economic activity. These effects are often more profound than the primary impacts of proposed federal action and must be included in the impact statement.¹⁶³ In *Keith v. Volpe*,¹⁶⁴ the court cautioned federal officials to include in their impact statement an analysis of the land use effect of an interstate highway in the Los Angeles Basin. Even though the basin was already highly developed, the court noted that construction of the freeway could *conceivably* lead to attendant commercial and industrial development which would increase automobile-created air and noise pollution.

3. *Standing and Substantive Review*

The recognition of private citizens' standing to sue has been the primary reason for judicial review of agency action under NEPA. The basic issue of standing is "what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared."¹⁶⁵ To obtain judicial review of federal agency action, the plaintiff must allege that he was "adversely affected or aggrieved by agency action within the meaning of the relevant statute."¹⁶⁶

In *Sierra Club v. Morton*,¹⁶⁷ a case not involving suit under NEPA, the Supreme Court developed a test for the sufficiency of allegations to obtain review of federal actions. The United States Forest Service and the Department of the Interior had approved plans for recreational development of Mineral King Valley and access road construction in the Sequoia National Park. The Sierra Club sought to enjoin the federal agency action claiming that it had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country."¹⁶⁸

163. *Id.* § 1500.8(a)(3)(ii).

164. 352 F. Supp. 1324, 1335 (C.D. Cal. 1972). It is generally held that the federal agency must prepare the impact statement. *See Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972). *But see Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 (8th Cir. 1973) (permissible for state highway department to prepare statement for federal-aid highway project). Under the Housing and Community Development Act of 1974, 42 U.S.C.A. §§ 5301 et seq. (Cum. Supp. 1975), as amended, Pub. L. No. 93-383, HUD has shifted the responsibility for environmental analysis to local agency applicants for federal funds. *See Comment, Controversial NEPA Implementation at HUD: Shifting Environmental Review Responsibilities to Local Grant Applicants*, 4 ENV. L. REP. 10193 (1974).

165. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (footnote omitted).

166. Administrative Procedure Act § 10, 5 U.S.C. § 702 (1970).

167. 405 U.S. 727 (1972).

168. *Id.* at 730.

The Court applied a two-pronged test: (1) was there injury in fact, and (2) was the injury to an interest arguably within the zone of interests protected by the violated statute. The Court held that Sierra Club's claim to standing must fail because there was no specific claim of injury to individual members of the club. The "zone of interests test" was not dealt with. However, it is generally recognized that the public right to participate in the Section 102 (2)(C) review process and comment on proposed agency actions is violated by failure to file an environmental impact statement.¹⁶⁹ Thus, NEPA satisfies one level of the standing inquiry.

The Court in *Sierra Club* did not define what would be a sufficient allegation of "injury in fact."¹⁷⁰ This question was dealt with in *James River & Kanawha Canal Parks, Inc. v. RMA*.¹⁷¹ The plaintiffs, a Virginia non-profit corporation interested in the preservation and restoration of the James River and an individual group member, sought to enjoin the proposed construction of a limited access expressway into the downtown area of Richmond pending environmental analysis. The court stated that the corporation did not have standing on its own because it had "no more than a public interest in the development of the area."¹⁷² The individual plaintiff, the court noted, did have sufficient standing and the corporation could represent his interests. The court reasoned:

Deaton alleges that he is a resident of the City of Richmond and that he has used and enjoyed the James River and Kanawha Canal for recreational activities and for its aesthetics and that he intends to do so to an even greater extent in the future if the acts of the defendants do not make this impossible. As unspecific as this allegation may be, it shows a personal involvement with the area affected by the Downtown Expressway and thus states an injury in fact sufficient to support standing.¹⁷³

Thus, in order to force federal compliance with NEPA it is probably best to allege adjacent property ownership or recreational use of the affected area.

The public does have standing to force agencies to file an impact statement prior to commencing a project. However, once a reasonably sufficient

169. ANDERSON, *supra* note 140, at 36-39.

170. In *United States v. SCRAP*, 412 U.S. 669 (1973) the Court held that a group of law students had standing to challenge an increase in freight rates by the ICC which would indirectly result in discrimination against recyclable goods. The students argued that the increased freight rates adversely affected the environmental quality of the surrounding recreational areas of which they were frequent users.

171. 359 F. Supp. 611 (E.D. Va. 1973).

172. *Id.* at 625.

173. *Id.*

impact statement has been filed, will the public have standing to request judicial review of the agency decision to continue with the project? The basic question is whether Section 101 (b)¹⁷⁴ of NEPA creates substantive rights to a clean environment, conferring upon the courts a duty to examine agency decisions. In *Citizen's Airport Committee v. Volpe*,¹⁷⁵ the plaintiffs challenged approval by the Secretary of Transportation of the construction of a county airport. Rejecting the argument that NEPA places substantive duties on agencies, the court stated that NEPA is simply a procedural statute "designed to ensure that environmental factors are considered by agencies in all of their acts."¹⁷⁶ However, the court went on to examine the impact statement and the agency decision under the requirements of the Airport and Airway Development Act of 1970. The Court concluded that the Secretary had not acted in an arbitrary and capricious manner and that the decision to continue the project was supported by valid reasons.¹⁷⁷

The Fourth Circuit squarely confronted the issue of whether a court can discharge its function merely by determining that the agency had acted in a procedurally correct manner by filing a reasonably sufficient impact statement. In *Conservation Council v. Froehlke*,¹⁷⁸ involving the challenged construction of a dam in North Carolina, the court held:

. . . District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA.

174. 42 U.S.C. § 4331(b) (1970) provides:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

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

175. 351 F. Supp. 52 (E.D. Va. 1972).

176. 351 F. Supp. at 58.

177. See note 102 and accompanying discussion *supra*.

178. 340 F. Supp. 222 (M.D. N.C. 1972), *rev'd per curiam*, 473 F.2d. 664 (4th Cir. 1973).

The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors.¹⁷⁹

In the Fourth Circuit, then, the courts must engage in "substantial inquiry" into the agency analysis and the merits of its decision.

The view of the Fourth Circuit was followed in *Cape Henry Bird Club v. Laird*.¹⁸⁰ The plaintiffs challenged further construction on the Gathright Dam project in western Virginia even though an environmental impact statement had been filed. The court engaged in a searching analysis of the agency's decision-making process "to determine if the agency's decision was arbitrary and capricious when viewed in terms of the data and information supplied and set forth in the [impact statement]."¹⁸¹ The court held that there had been no arbitrary or capricious action but that the impact statement must be supplemented in various respects.

Therefore, it seems that the "zone of interests" test for standing can also be satisfied under Section 101 of NEPA. There is a public interest in agency decisions to go forward with a project after procedural requirements are met and the courts will engage in substantive review of those decisions. It is significant to note that the Cape Henry dam project was also challenged under provisions of the Federal Water Pollution Control Act Amendments of 1972.¹⁸² There is no question of standing under the substantive rights created by the pollution control acts. Thus, a citizen can buttress a challenge to ongoing agency action by claiming violations of both NEPA and the pollution control statutes. It should be emphasized that substantive review does not insure denial of a project's eventual completion. However, the doctrine has been heralded as the harbinger of a second generation of NEPA cases in which the courts will decide whether the Act is a bureaucratic tool or a true commitment to national environmental quality.¹⁸³

179. 473 F.2d at 665, quoting *Environmental Defense Fund, Inc. v. Froehke*, 473 F.2d 346, 353 (1972). The Eighth, Seventh, and possibly the District of Columbia Circuits have also adopted the doctrine of substantive review. For an excellent analysis of the principle cases, the circuits and their reasoning see Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D.L. REV. 279 (1974).

180. 359 F. Supp. 404 (W.D. Va. 1973), *aff'd*, 484 F.2d 453 (4th Cir. 1973).

181. 359 F. Supp. at 410.

182. See *Ohio ex rel. Brown v. Calloway*, 497 F.2d 1235 (6th Cir. 1974) (FWPCA give standing to intervene in a dam construction project).

183. See Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Genera-*

4. NEPA As A Land Use Planning Device

Although NEPA has been lauded as the best available land use planning mechanism,¹⁸⁴ its viability as a framework for a national land use-environmental plan is open to serious doubt. Primarily NEPA is a reactive statute. It provides relief from profound environmental harm but public commentary and the impact analysis is invited when the project has been selected and probably funded. Opposing factions of biased agencies and enraged environmentalists do not create the atmosphere of contemplation necessary to define a comprehensive land use plan. Consideration of community, economic and conservation needs should be a condition precedent to good land use planning. Such is not provided by NEPA's reactions to agency initiatives.

Moreover, NEPA applies only to "federal actions." Although the courts are prone to interpret the term broadly, many state and local developmental activities which dramatically affect land use are not subject to NEPA requirements. This leaves a breach which must be filled by a more intermediate, state-level decision-making process.¹⁸⁵

Lastly, the present controversy over substantive review of agency decisions leaves the national commitment to environmental quality in some doubt. If courts do not engage in substantive review, it has been argued that NEPA is little more than a rubber stamp for federal agency decisions.¹⁸⁶ The Fourth Circuit has decided in favor of substantive review. While such judicial analysis will certainly prevent environmental catastrophes, it will not provide the security and stability of long-range land use planning.

E. CONCLUSION

The nexus between land use and environmental quality is extremely complex. Land use decisions inevitably effect the environment; constraints placed on land, based on environmental considerations, can have far-reaching economic and social effects. Land use regulation is normally the

tion of Cases Under the National Environmental Policy Act, 19 S.D.L. Rev. 279 (1974). The author concludes:

If Section 101 (b) creates no judicially enforceable obligations on the part of federal agencies that are enforceable by the judiciary, then Congress created a national policy that nobody has the power to enforce. Such a result defies logic, and it would in many ways render NEPA a meaningless statute. *Id.* at 294.

184. See ROCKEFELLER TASK FORCE, *THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH*, 195-99 (W. Reilly ed. 1973).

185. See generally Section VIII, *supra*.

186. Comment, *supra* note 109, at 184.

product of various unrelated state and local institutions whose authority is constricted to certain policy objectives. EPA has the authority, either directly or indirectly, to require the states to consider land use control measures as additional means to reach and maintain environmental standards. However, the injection of pollution abatement concern as the primary factor in the land use decision-making process will not provide an adequate fulcrum to appropriately balance the factors of economic growth and social concern. The need remains for encouragement of comprehensive planning on the state level which considers all factors affecting land use.¹⁸⁷

EPA's statutory authority raises the possibility of a national environmental land use plan without the benefit of further federal legislation. However, there is no existing viable framework on the federal level, other than the agency itself, to coordinate the various pollution statutes.¹⁸⁸ Moreover, the implementation of the statutes through single purpose state agencies provides for little coordination of different environmental concerns at the state level. For Virginians this could mean a significant narrowing of land use options and development possibilities.

EPA has the authority, either through statutory mandate or the "carrot and stick" approach of federal funding, to require comprehensive land use planning based on environmental objectives. A coordinating mechanism for such planning at the state or local level is still not present. Also, the federal funding approach is inherently limited by the states' freedom to reject the funds and the conditions attached. Due to manpower/funding constraints and the probability of national land use regulation in the future, it is foreseeable that EPA will limit its role to a research assistance and planning agency.¹⁸⁹ However, EPA is taxed with the ultimate responsibility of achieving and maintaining a clean environment. As the statutory deadlines approach, it may become necessary to consider national land use control by means of the existing environmental legislation.

187. An EPA official recently stated that the agency is "increasingly counting on" state planning efforts to help carry out the pollution mandates and that federal land use legislation would strengthen these efforts. EPA feels the legislation should include criteria requiring the states to consider environmental criteria in their planning. EPA also desires review power over federal guidelines for state land use programs. 5 ENV. RPT. - CURR. DEV. 1330 (1975).

188. Other suggested coordinating frameworks are NEPA, the A-95 Clearinghouse Process, and the Integrated Grant Administration Program. For a review of the marked limitations of these procedures see EPA Authority, *supra* note 33, at 166-74.

189. See EPA Draft Strategy Paper, Land Use Implications and Requirements of EPA Programs (1974). This paper encourages an evaluation by EPA regional offices and state implementing agencies of the relationship between environmental programs and land use. However, EPA reserves the right to challenge state land use decisions which threaten environmental standards.

XI. PROSPECTIVE FEDERAL LAND USE LEGISLATION

To encourage state-level regulation of land, several measures establishing grant-in-aid programs to assist the states have been introduced in both the Senate and the House of Representatives.¹ The most recent, the Land Use Policy and Planning Assistance Act,² (commonly referred to as S. 168), was introduced by Senator Jackson during the Ninety-third Congress on January 9, 1973. The majority of the Senate Committee on Interior and Insular Affairs reacted favorably to this measure. The Committee Report asserts that legislation is "critically needed to assist local, State and the Federal government to move from an era of chaotic, *ad hoc*, short-term, case-by-case, crisis-to-crisis land use decision-making to an era of long-range planning and management which is based on democratic processes and a full appreciation of all legitimate private and public aspirations and needs."³ The Committee concluded that it would be impossible for most states to institute a state land use program in less than five to ten years.⁴ S. 268 would provide the financial and technical assistance to the states that would enable them to develop land use programs more rapidly than they could if forced to go it alone.⁵

1. Many of our elected representatives in Congress have recognized that our advanced technology and expanding population are placing unprecedented demands on our land base and have attempted to expedite this trend toward state-level land use planning and regulation. One of the prime movers of federal legislation to encourage this state-level control is Senator Henry M. Jackson of Washington.

Senator Jackson cites a startling array of facts in support of his position:

Over the next 30 years, the pressures upon our finite land resources will result in the dedication of an additional 18 million acres or 28 thousand square miles of undeveloped land to urban use. Urban sprawl will consume an area of land approximately equal to all the urbanized land within our major cities, the equivalent of the total area of the States of New Hampshire, Vermont, Massachusetts, and Rhode Island. Each decade, new urban growth will absorb an area greater than the entire State of New Jersey. Vast areas of land are required to meet plans for industrial expansion. In the next two decades, one industry alone—the electrical power industry—will need three million acres of new rights-of-way for additional high voltage transmission lines and more than 140,000 acres of potential prime industrial sites for over two hundred new major generating stations, and will require immense acreages of land to be disturbed by strip mining for coal. In short, between now and the year 2000, we must build again all that we have built before. We must build as many homes, schools, and hospitals in the next three decades as we built in the previous three centuries. Letter from Senator Henry M. Jackson, November 13, 1974.

For a comprehensive legislative history of congressional proposals concerning land use see S. REP. No. 197, 93d Cong., 1st Sess. 84-85 (1973).

2. S. 268, 93d Cong., 1st Sess. (1973).

3. S. REP. No. 197, 93d Cong., 1st Sess. 37 (1973).

4. *Id.* at 37.

5. *Id.* at 38.

The Land Use Policy and Planning Assistance Act passed the Senate on June 21, 1973, by a vote of 64 to 21.⁶ The House counterpart to S. 268, H.R. 10294, was reported out by the House Interior and Insular Affairs Committee on January 22, 1974⁷ only to be defeated on a procedural motion in the House on June 11, 1974.⁸

A similar version of the Land Use Policy and Planning Assistance Act will be introduced by Senator Jackson in the Senate and Representative Morris Udall in the House during the Ninety-fourth Congress.⁹ The fact that S. 268 passed the Senate so handily combined with a larger Democratic majority in the Ninety-fourth Congress leads to speculation that federal land use legislation is forthcoming. Those connected with land use planning and management should be aware of this likelihood and its probable consequences. The final version of any land use measure should closely resemble S. 268; therefore, this discussion will examine its provisions and probable effects.

A. SUMMARY OF THE MAJOR PROVISIONS OF THE LAND USE POLICY AND PLANNING ASSISTANCE ACT

The Act declares that there is a national interest in a more efficient system of land use planning. Land use decisions of wide concern have often been made "on the basis of expediency, tradition, short-term economic considerations, and other factors which too frequently are unrelated or contradictory to sound environmental, economic, and social land use considerations."¹⁰ The purpose of the Act is to provide federal technical assistance and a grant-in-aid program to the states to assist in developing their capacity for land use planning and management.¹¹ The Secretary of the Interior is granted authority to administer the aid to states which meet the

6. 119 CONG. REC. 11,663 (daily ed. June 21, 1973). Virginia Senators Byrd and Scott voted against the measure.

7. The provisions of H.R. 10294 do not differ in any major area from the provisions contained in S. 268. H.R. 10294 was drafted by the Environment Subcommittee under the leadership of Congressman Morris K. Udall of Arizona.

8. 120 CONG. REC. 5041 (daily ed. June 11, 1974). The Nixon Administration, at one time a staunch advocate of land use legislation, had withdrawn its support of the bill. The White House reversal brought charges of "impeachment politics" from Senator Jackson and Representative Udall. They asserted that Nixon, desperately needing conservative backing in his struggle to stay in office, was exchanging his support of land use for conservative support on the impeachment issue. See *The Washington Post*, June 13, 1974, at 2, col. 1.

9. Letter from Senator Henry M. Jackson, November 13, 1974; Letter from Representative Morris K. Udall, November 19, 1974; to the *University of Richmond Law Review*, on file T.C. Williams Law Library.

10. S. 268, 93d Cong., 1st Sess. § 101(a) (1973).

11. *Id.* § 102(b). The Act authorizes \$100 million a year for eight fiscal years to assist states in developing land use programs. *Id.* § 608(a).

requirements of the Act.¹² The administration of the program is in the hands of the newly created Office of Land Use Policy Administration. This office is established within the Department of the Interior.¹³ To maintain their eligibility for funding, the states must establish both a land use planning process and a land use planning program.

1. *Statewide Land Use Planning Process*

To remain eligible for grants under the Act, each state must develop "an adequate statewide land use planning process" within three fiscal years from enactment.¹⁴ "The process is designed to ensure that the State land use program required by the fifth fiscal year and the policies it will contain are developed in a systematic, rational and democratic manner and upon a base of professional expertise and useful data and information."¹⁵

There are four major components of the process: (1) an inventory of state economic, environmental and social requirements to serve as a data base for informed land use decision making;¹⁶ (2) establishment of a single state agency having authority to develop and administer the state land use program;¹⁷ (3) establishment of methods to identify those areas of more than local significance which will be subject to the land use program;¹⁸ (4) formulation of a program to regulate land sales or development projects.¹⁹ As a result of this process, the states will have a real knowledge of their available resources and an awareness of the demands that will be made upon them in the future.

12. *Id.* § 201(a).

13. *Id.* § 304(a). The choice of the Department of the Interior as the parent organization is criticized because of the Department's lack of experience in land use planning in Note, *The Land Use Policy and Planning Assistance Act of 1973: Legislating a National Land Use Policy*, 41 GEO. WASH. L. REV. 604, 613 (1973).

14. S. 268, 93d Cong., 1st Sess. § 202(a) (1973).

15. S. REP. NO. 197, 93d Cong., 1st Sess. 91 (1973).

16. S. 268, 93d Cong., 1st Sess. §§ 202(a)(1)-(7) (1973).

17. *Id.* § 202(b). Section 202(c) grants to the states the authority to designate the agency "participating in programs pursuant to Section 701 of the Housing Act of 1954, as amended, and, where such State is a coastal State, the planning agency participating in programs pursuant to the Coastal Zone Management Act of 1972, as the eligible State Land use planning agency required by subsection (b) of this section."

18. *Id.* § 202(a)(8).

19. *Id.* § 202(d). Each state is asked to develop a program of regulation in this area within three years. Decision-making concerning the other four categories of critical areas and uses of more than local concern is not required until the fifth year when the state land use program is due to be completed.

2. *Statewide Land Use Program*

To remain eligible for further funding, each state must have "developed an adequate State land use program" within five years of the enactment of S. 268.²⁰ Five critical areas of statewide significance must be regulated under a state's program.²¹ The Act defines these areas and uses as: (1) areas of critical environmental concern;²² (2) key facilities;²³ (3) development of public facilities or utilities of regional benefit;²⁴ (4) large scale development;²⁵ (5) land sales or development projects.²⁶ These areas are of more than local significance "because decisions concerning them have impacts on citizens, the environment, and the economy totally out of proportion to the jurisdiction and the interests of the local decisionmaker."²⁷

The majority of the Committee asserts that the Act will not force a local government to make "sweeping changes" in its "traditional responsibility" of land use regulation. Decisions of local significance will still be made at the local level. Only on occasions when the land use decision has an impact beyond the boundaries of the locality, as designated in the five areas above, will state review under the Act be required.²⁸

To insure state flexibility in developing procedures and methods, the Act

20. *Id.* § 203(a).

21. S. REP. NO. 197, 93d Cong., 1st Sess. 65 (1973).

22. S. 268, 93d Cong., 1st Sess. § 203(a)(3)(A) (1973). Section 601(i) of the Act defines "areas of critical environmental concern" as areas designated by the states where "incompatible development could result in damage to the environment, life or property, or the long term public interest which is of more than local significance." Specific examples include shorelands of rivers, lakes and streams; significant wildlife habitats; areas of unstable geological ice or snow formations; watershed areas; and, significant agricultural and grazing lands and forest lands.

23. *Id.* § 203(a)(3)(B). Section 601(j)(1) of the Act defines "key facilities" as "public facilities, as determined by the State, or non-Federal lands which tend to induce development and urbanization of more than local impact." Examples are major airports, highway interchanges and frontage access streets, major recreational lands and facilities, and facilities for the development, generation and transmission of energy.

24. *Id.* § 203(a)(3)(C).

25. *Id.* § 203(a)(3)(E). § 601(k) of the Act defines "large scale development" as "private development on non-Federal lands which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance in the judgment of the State." Examples are industrial facilities or major subdivisions where large vehicular traffic and population densities are expected.

26. See note 2, *supra*. Section 601(1) requires the state to regulate the "sale and improvement" of subdivisions of fifty or more lots which are located more than ten miles beyond the boundaries of any general purpose local government possessing the authority to regulate land sales and development activities.

27. S. REP. NO. 197, 93d Cong., 1st Sess. 39 (1973).

28. *Id.* at 40.

establishes two techniques for implementing the land use planning program: (1) direct state planning; or (2) local government planning subject to guidelines and review by the state.²⁹ Under the latter method, the localities "continue to exercise all their land use powers and, through guidelines, criteria, and an appeals process," the state "would exercise guidance and oversight over the local efforts."³⁰ Whichever technique is chosen, the state retains the power to prohibit the use of land within the five areas or uses of more than local concern.³¹ The method of implementation must include an appeals process to resolve conflicts over a decision of a locality regarding any area or use under the state land use program. This appeals process is also available for the resolution of conflicts caused by decisions of the state land use planning agency.³²

3. *Administration of the Act*

The Act establishes the Office of Land Use Policy Administration³³ and provides that the President appoint a Director of the Office.³⁴ The function of the office is to administer the grant-in-aid program;³⁵ maintain studies of land resources and their use, and of methods employed by state and local government to implement the requirements of the Act;³⁶ cooperate with the states in developing standard methods for collection, classification and dissemination of data;³⁷ and to establish and operate a Federal Land Use Information Data Center.³⁸

The Act further directs the Secretary of the Interior to establish an Interagency Advisory Board on Land Use Policy.³⁹ The principal functions of the Board are to facilitate communication among agencies on land use impacts of federal activities;⁴⁰ render advice to the Secretary concerning

29. S. 268, 93d Cong., 1st Sess. § 203(c) (1973).

30. S. REP. No. 197, 93d Cong., 1st Sess. 100 (1973).

31. S. 268, 93d Cong., 1st Sess. § 203(d) (1973).

32. *Id.* § 203(e).

33. *Id.* § 304(a).

34. *Id.* § 304(b). The President must secure the advice and consent of the Senate.

35. *Id.* § 304(c)(7).

36. *Id.* § 304(c)(2).

37. *Id.* § 304(c)(3).

38. *Id.* § 304(c)(4).

39. *Id.* § 305(a). Section 305(b)(2) requires representatives from the Departments of Agriculture, Commerce, Defense, Health, Education and Welfare, Housing and Urban Development, Treasury, Transportation, and Atomic Energy Commission, Environmental Protection Agency, Council on Environmental Quality, Council of Economic Advisors, and Office of Management and Budget to sit on the Board.

40. *Id.* § 305(c)(1).

his duties under the Act;⁴¹ and assist the Secretary and the heads of the participating agencies in the review of the statewide land use processes and programs.⁴²

4. *The Federal Role*

For the most part, the federal review of state programs for developing a "planning process" and a "land use program" does not invite scrutiny of the substance of that process or program. Under the Act, "the Federal review would be concerned primarily with whether an adequate statewide planning process is being developed" within five fiscal years.⁴³ After this initial period, federal review consists of determining whether the state is demonstrating "good faith efforts to implement the purposes, policies and requirements of the State land use program."⁴⁴ The program must also be reviewed and approved by the Governor.⁴⁵ The statewide land use planning process requirement compels the state to coordinate its planning with other governmental planning activities and programs. The state must implement those methods necessary to insure coordination with the state land use program. This implementation is subject to federal review.⁴⁶

The procedure for reviewing the state land use process and program is administered through an interagency procedure coordinated by the Secretary of the Interior. The heads of federal agencies having programs with significant land use impact are represented on the Interagency Advisory Board on Land Use Policy and review state processes and programs.⁴⁷

The Secretary of Housing and Urban Development is directed to study the large-scale development and key facilities components of the state land use programs and certify that the various states are participating in the programs established under Section 701 of the Housing Act of 1954.⁴⁸ The Administrator of the Environmental Protection Agency is required to determine whether the state land use programs are compatible with the Federal Water Pollution Control Act Amendments of 1972, the Clean Air Act, and other pollution abatement statutes and whether "those portions

41. *Id.* § 305(c)(2).

42. *Id.* § 305(c)(3).

43. S. REP. No. 197, 93d Cong., 1st Sess. 66 (1973).

44. S. 268, 93d Cong., 1st Sess. § 204(2) (1973).

45. *Id.* § 204(4).

46. *Id.* § 204(5).

47. *Id.* § 306(a).

48. *Id.* § 306(c). Section 204(6) states that to be eligible for grants under the Act, a state must be "participating on its own behalf in the programs established pursuant to Section 701 of the Housing Act of 1954 (68 Stat. 590, 640), as amended," and, if applicable, "the Coastal Zone Management Act of 1972 (86 Stat. 1280)"

of the State land use program which will effect any change in land use within the next annual review period are in compliance with and will not cause violation of the standards, criteria, emission or effluent limitations, monitoring requirements, or implementation plans required by such laws."⁴⁹ The Secretary of the Interior has the duty to insure that the state has not omitted from its program any areas of critical environmental concern of more than statewide significance.⁵⁰ These are the principal exceptions to the procedural rather than substantive nature of review requirements.

Should the Secretary of the Interior, as a result of the interagency review, determine that a state is ineligible for grants under the Act, an appeals process is provided for the state. An ad hoc hearing board is appointed by the President.⁵¹ The board is composed of "one knowledgeable, impartial Federal official,"⁵² a governor of a neutral state,⁵³ and "one knowledgeable, impartial private citizen, selected by the other two members."⁵⁴ This hearing board then determines the correctness of the Secretary's finding.⁵⁵

5. *Other Considerations Embodied in the Act*

Title IV of the Act is concerned with federal-state coordination in the land use planning of federal and adjacent non-federal lands.⁵⁶ Joint federal-state committees, composed of representatives of affected federal agencies, state agencies, local governments, private property owners, and user groups, are to be established by the Secretary of the Interior to study and make recommendations for the solution of conflicts between uses of federal lands and uses of adjacent non-federal lands.⁵⁷

Indian land imposes a barrier to effective land use programs. This land remains largely unplanned because state and local governments lack the authority to develop land use programs for it, and the Indian people lack the financial resources to accomplish the task themselves. The Act provides a grant-in-aid program to assist Indian tribes in developing land use

49. *Id.* § 306(b)(2).

50. *Id.* § 204(1).

51. *Id.* § 306(f)(1).

52. *Id.* § 306(f)(1)(A).

53. *Id.* § 306(f)(1)(B).

54. *Id.* § 306(f)(1)(C).

55. *Id.* § 306(f)(2).

56. *Id.* § 401(a).

57. *Id.* § 403.

programs, similar to the state land use programs, for reservation and other tribal lands.⁵⁸

The Act authorizes over \$1 billion to carry out its purposes during the eight years following its enactment⁵⁹ with \$800 million of that total to be allocated as grants to the states.⁶⁰ The federal government pays 90 percent of each eligible state's cost of developing a land use program during the first five years.⁶¹ Federal funding for the next three years amounts to two-thirds of the cost of administering the program.⁶²

6. *The Issue of Crossover Sanctions*

During debate on the Senate floor, Senator Jackson introduced an amendment to S. 268. This amendment would have imposed "crossover sanctions" against states which refuse to implement state planning programs that comply with the Act. These crossover sanctions would reduce federal grants to recalcitrant states in other areas of federal financial assistance.⁶³

The proposed amendment to S. 268 contained the same sanctions as a previous land use bill, S. 632, which passed the Senate during the Ninety-second Congress.⁶⁴ These sanctions also appear in a land use bill introduced by the Nixon Administration in the Ninety-third Congress.⁶⁵ However, the amendment to S. 268 was rejected by a 44 to 52 vote.⁶⁶ The attempt to reinstate these sanctions was the most debated topic during the Senate's four day discussion of S. 268.⁶⁷

Thus, there is nothing compulsory in S. 268.⁶⁸ It is a completely voluntary measure. As long as a state does not accept any grants authorized by the Act, it is not required to comply with the Act's provisions. It is perfectly acceptable for a state to participate for a short period of time and then

58. *Id.* §§ 501-10.

59. *Id.* § 608.

60. *Id.* § 608(a).

61. *Id.* § 606(a).

62. *Id.*

63. See S. REP. No. 197, 93d Cong., 1st Sess. 105 (1973) for a history of crossover sanctions contained in previous land use bills. The proposed amendment to S. 268 provided that if a state did not comply with its provisions, funds from the Airport and Airway Development Act, the Federal Highway Act and the Land and Water Conservation Fund would be withheld.

64. S. 632, 92d Cong., 1st Sess. § 307(c)-(e) (1973). See note 63 *supra*.

65. S. 924, 93d Cong., 1st Sess. § 205(c)-(e) (1973).

66. See 119 CONG. REC. 11518 (daily ed. June 20, 1973).

67. *Id.* at 11506-18.

68. See 120 CONG. REC. 5030 (daily ed. June 11, 1947) (remarks of Representative Udall).

withdraw after determining that it no longer wishes to adhere to the regulations set forth in the Act.

B. OPPOSITION TO S. 268 AND H.R. 10294

The introduction of the Land Use Policy and Planning Assistance Act evoked passionate debate in Congress. Although there were many arguments voiced in opposition to this measure, they may be narrowed into four major objections.

The first objection is that the Act preempts state and local control over land use planning. Opponents argued that S. 268 "would shift the traditional responsibilities from the local and state governments to the federal government."⁶⁹ The Act, it was claimed, would "alter and destroy the historic right of the state and local government to zone and regulate land use within their own jurisdictions."⁷⁰ To qualify for a grant under the Act, each state must establish a statewide planning process and a statewide planning program and develop substantive policies to guide land use. This process is subject to review by the Department of the Interior. If the state's progress is deemed inadequate by the Department, it loses its eligibility for further funding. Thus, it is argued, by participating under the Act, a state is relinquishing to the federal government the right "to direct and affect the State planning process and its implementation."⁷¹ For these reasons, opponents declare that the Act is merely the first step to more public control over the use of private property.

Another objection to the Act centers around its effect on private property.⁷² The argument is as follows: the Act grants the power to regulate private property to the state, but there is no provision detailing to what extent the use of property may be restricted without compensating the owner for loss of value. In other words, when does the regulation of private property become a "taking"?⁷³ The fifth and fourteenth amendments to the Constitution provide that "private property" shall not "be taken for public use, without just compensation."⁷⁴ Against this backdrop, the Act

69. S. REP. No. 197, 93d Cong., 1st Sess. 154 (1973).

70. *Id.*

71. 120 CONG. REC. 5020 (daily ed. June 11, 1974) (remarks of Representative Clawson). See 120 CONG. REC. 5021 (daily ed. June 11, 1974) (remarks of Representative Broyhill).

72. S. 268, 93d Cong., 1st Sess. § 203(f) (1973) states:

Nothing in this Act shall be construed as enhancing or diminishing the rights of owners of property as provided by the Constitution of the United States or the constitution of the State in which the property is located.

73. S. REP. No. 197, 93d Cong., 1st Sess. 155 (1973).

74. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

requires the state to control the use of land which is critical or of more than local concern. This regulation, opponents argue, could "entail restriction of use of private land to the point that no use or no economic use would be allowed."⁷⁵

The third major argument in opposition to the Act concerns the scope of authority granted to the states. The Act delineates the five categories of areas which are of more than local concern and requires that these areas be included in the state's land use program. Although the state must control the use and development of only these five areas, opponents assert that the categories are so broadly defined that "every square foot" of many states could fall within the definitions.⁷⁶ To illustrate the total extent of federal pre-emption, opponents point to the definition of areas of "critical environmental concern."⁷⁷ As defined in the Act, this definition encompasses all fragile or historic lands.⁷⁸ Also included are all so-called natural hazard lands, such as flood plains and areas subject to weather disasters.⁷⁹ Finally, all agricultural lands, forest lands, grazing lands, and watershed lands are subject to state control.⁸⁰ Opponents of the Act argue that "[t]he breadth and scope of such a definition is impossible to accurately calculate."⁸¹

A final argument voiced concerns the economic ramifications of enactment of S. 268. The Act would establish large bureaucracies at both the state and federal level. The state land use agency is required to employ an adequate staff of trained professionals as well as individuals possessing the technical skills needed to operate the agency in an efficient manner.⁸² Proposed development on any lands mentioned in the Act cannot proceed until it is deemed to be in compliance with the state program. In the meantime, the local community is "forced to sit idly by, as housing becomes scarce, employment opportunities decline, and the local tax base is undermined."⁸³ The Act, declare its opponents, places a lid on future economic development.

75. H.R. REP. NO. 798, 93d Cong., 2d Sess. 74 (1974). For example, if a locality desires open space in an area and the land in question is privately owned, the landowner would bear the cost of the open space and not the locality.

76. S. REP. NO. 197, 93d Cong., 1st Sess. 158 (1973).

77. See note 22 *supra*.

78. S. 268, 93d Cong., 1st Sess. § 601(i)(1) (1973).

79. *Id.* § 601(i)(2).

80. *Id.* § 601(i)(3).

81. S. REP. NO. 197, 93d Cong., 1st Sess. 158 (1973).

82. 120 CONG. REC. 5022 (daily ed. June 11, 1974) (remarks of Representative Broyhill).

83. *Id.*

C. CONCLUSION

A prediction that some type of land use legislation will be forthcoming from Congress is not bold speculation. Even some of the most vocal opponents of the Land Use Policy and Planning Assistance Act recognize the importance of a more intensive regulatory scheme over the use of land.⁸⁴ Just how the plan should be implemented is the question before Congress. One can venture a guess on what provisions of the Act are susceptible to change and whether any new considerations will be embodied in future legislation.

Nowhere in S. 268 is the federal government required to establish a land use program for federal lands. In the western states, anywhere from 29 percent to 95 percent of each state's land mass is held in trust or owned by the federal government.⁸⁵ Nationwide, one-third of all land is federally owned.⁸⁶ It seems illogical to require state and local governments to exert control over areas of critical environmental concern when the owner of one-third of all the land is subject to no regulation. This vital omission should be remedied in future land use legislation.

In the formulation of any new land use initiative, a strong drive by proponents to institute crossover sanctions can be expected. If a voluntary bill such as S. 268 were enacted, many states would not participate, thus frustrating efforts for a national policy. Crossover sanctions would virtually require adherence to the legislation.

The broad definitional standards set forth in the Act are susceptible to change. These definitions are likely to be narrowed and made more certain. An alternative suggestion is that the definitions be made discretionary rather than obligatory.⁸⁷ Also subject to change is the provision authorizing the Secretary of the Interior to determine if a state has omitted from its program an area of critical environmental concern of more than statewide significance.⁸⁸ This is the only substantive review power granted to the Secretary under the Act and it was subjected to strong criticism from opponents.

No matter what the specific provisions of future land use legislation, there is one certainty that will pervade any action. The complexities of modern society will pressure the states to play a larger role in the regula-

84. See 120 CONG. REC. 5023 (daily ed. June 11, 1974) (remarks of Representative Clawson).

85. S. REP. No. 197, 93d Cong., 1st Sess. 80 (1973).

86. *Id.*

87. *Id.* at 162.

88. See note 50 *supra*.

tion of land which is critical or of more than local concern. It seems likely that congressional initiative will require this expanded role in the near future.

XII. CONCLUSION

The growing pressures generated by an ever increasing population, skyrocketing land and building costs, dwindling energy supplies, environmental and social concerns, evidence the urgent need to define our land use problems and work toward a comprehensive and coordinated resolution. This note has endeavored to explore the level of progress Virginia and the nation have achieved toward this goal.

Many valid questions have been raised; however, satisfactory solutions are not forthcoming. Part of the reason is confusion and overlap as to specific responsibilities. Governmental responses to land use problems come from so many different levels and directions that too often cross purposes are at work; inconsistent policy and duplication of effort results. The complicated web of governing bodies with land use related responsibilities in Virginia is a prime example. The Commonwealth must expeditiously re-evaluate its land use policy with uniformity of purpose and efficiency of administration in mind.

A. CONSIDERATIONS

Ideally, the individual property owner should be able to resolve land use problems through private mechanisms. Unfortunately, the personal concerns of the private landholder often conflict with the broader considerations most beneficial to society at large. In addition, lack of funds and expertise would likely present insurmountable obstacles to successful land use control through private volition.

Another alternative is local control, the predominant situation in Virginia. The strongest argument in its favor is that the day-to-day problems encountered in land use require the peculiar knowledge which only local officials possess. However, numerous arguments have been advanced against local control. The major criticism concerns the high potential for bias and self-serving attitudes which may guide the actions taken by local officials. For example, a strong factor influencing local land use decisions is the tax base, which frequently dictates that a high percentage of land be zoned for industrial use. Although such zoning may not be fatal to comfortable and safe living standards in the particular community, the impact on neighboring communities is usually overlooked. Indeed there are many land use decisions that have no critical ramifications beyond the

boundaries of the locality and are best left to local officials to decide. But for those problems that have broader consequences some input from outside the locality is necessary.

Those who favor local land use control, but recognize that certain problem areas require a broader perspective, would probably support some form of regional land use planning. A flaw in the regional approaches attempted thus far is that regional planning agencies are comprised mostly of representatives from localities, who tend to act with the best interests of their local constituents in mind. Analogous to the problem of local control, bordering regions frequently will not be consulted or considered in the decision-making process. Another impediment is that the typical enabling statute authorizes local governments to operate regional planning agencies *only* with the consent of all the governmental units within the region. Therefore each locality can withdraw from and refuse to recognize any regional board.

Considering all the complex issues involved the state may be the lowest level at which any constructive land use policy can be formulated for problems that have greater than local significance. The essential benefit in having land use policy determined at this level is the relatively unbiased role the state could play. With its broader political base of operation, it need not concern itself as much with the pressures inherent in a locally operated system. Freedom from exclusive accountability to constituents of a particular locality allows more objective decision-making. Proper consideration can be given to individual localities, distinct regions or areas and the state as a whole, before undertaking a particular course of action.

Virginia, however, has failed to establish any form of administrative framework with even a minimal program guided by generally stated policy goals. There is no centralization of policy among the individual agencies that affect land use, so each unit follows a course of action best suited to its limited sphere of concern. A general policy-making body should be instituted to aid the agencies identifying and preventing potential problems, rather than merely reacting to and remedying existing ones. In adopting a statewide approach for this limited purpose, neither regional nor local control would be ousted, but would merely be integrated into a single unified system insofar as broad-based policy considerations are concerned.

B. FEDERAL INVOLVEMENT

The highest level of government involvement would naturally be the federal government. It is already involved in the land use area, at least indirectly, with numerous acts dealing with pollution of the environment.

In addition, new incentives have appeared to help the state develop their own capacity for land use planning and management in the form of proposed federal legislation. If the proposal becomes law, in order to receive technical and financial assistance, the participating states will be required to establish both a land use planning process and program. There would be nothing compulsory about this legislation; it would be entirely up to the individual states to determine whether they want to participate or not. However, due to the carrot and stick nature of the legislation, substantial pressure will indirectly be brought to bear on the state governments to participate.

Although on its face the proposed federal legislation appears unintrusive, opponents object to an increased federal role in the resolution of land use problems since it would ultimately lead to more federal control over the use of private property. Another criticism concerning instituting a federal land use program is that the federal government is too far removed from the areas of activity to provide anything more than a very general set of guidelines for dealing with problems. However, countervailing pressures that have been felt in Congress insure that it is only a matter of time before a reasonable facsimile of the above mentioned federal legislation becomes a reality; therefore Virginia will have an additional incentive to establish a statewide land use plan.

C. ROLE OF THE STATE AS A POLICY MAKING BODY

Outlining the specific functions of a statewide land use policy-making body is beyond the scope of this conclusion, but some suggestions may be worthy of consideration. The problems of land use planning should be defined at the outset. Then each problem should be matched with that level of governmental involvement that can most effectively and equitably structure and implement a solution. The state's primary function should be to organize and coordinate the land use activities at the various levels within its boundaries. The idea is not to have one all powerful land use legislator, but rather to have a director who is close enough to the problems to recognize them, but far enough removed to provide an unbiased plan of attack. When a regional plan contains unfavorable repercussions, the state should make suggestions for change. If these suggestions go unheeded, the state should step in and see that the situation is rectified. Besides acting as a clearinghouse for ideas, the state should provide the necessary guidance and means to implement its policy when appropriate.

Whether or not the above suggestions are adopted, Virginia must recognize the gravity of the situation in the land use area and set about establishing some form of plan before the federal government forces a more restrictive plan on the state. And, in light of the conflicting interests and

complicated issues involved, it is inevitable that the courts will be called on to play an increasingly important role in the land use area. In a recent New Jersey case the court's decision effectively banned restrictive zoning throughout the state. The court, in reaching its decision, paid little attention to the defendant's claim that the legislature, not the courtroom, was the proper forum for the issue. A strong argument can be made against the courts legislating through their decisions in this area, especially considering pressures on their time and lack of expertise. Whether the encroachment is by the federal government in name of the national interest or by the courts for the protection of constitutional rights, Virginia must realize it is on the brink of losing its regulatory power over land. Whatever system is undertaken, the most important thing now is that the state and local governments respond to existing pressures and work within some orderly state-controlled land use program before they are harnessed with a more drastic and irreversible federal alternative.

LAND USE APPENDIX

	<i>Page</i>
A. INTRODUCTION	726
B. ZONING AND BUILDING PERMIT REQUIREMENTS	726
1. Zoning	726
2. Special Use Permits	727
3. Building Permits and their Requirements	727
4. Uniform Statewide Building Code	728
5. Noteworthy Sections of the Existing Virginia Uniform Statewide Building Code (VUSBC)	729
C. RESIDENTIAL LAND USE	729
1. General Provisions	729
2. Compliance with Zoning Laws	730
3. Owners Desiring to Subdivide and Develop	730
4. Compliance with Uniform Statewide Building Code and Building Permit Requirements	730
5. Virginia Housing Development Authority Act	730
6. Virginia Fair Housing Law	731
7. Tax Incentives	731
8. Condominium Act	731
9. Mobile Homes	731
D. COMMERCIAL—AND INDUSTRIAL LAND USES ..	732
1. Local Planning Generally	732
2. Land	732
3. Water	734
4. Air	736
5. State Corporation Commission	737
E. AGRICULTURAL LAND USE	738
1. Environmental Checklist	738
2. Tax Incentives	738
F. MISCELLANEOUS	739
1. Historical Landmarks	739
2. Parks and Recreational Land Uses	740
3. State Department of Highways and Transportation	741
G. STATE AND FEDERAL—ACTS DEALING WITH POLLUTION	741
1. State	741
2. Federal	747

A. INTRODUCTION

The Appendix is not intended to be a comprehensive study of land-use law. Its purpose is to provide an inventory of pertinent Virginia and Federal legislation and, in a brief manner, comment on their effect upon land use. The discussion of the various statutes has been limited to literal interpretations. In some instances an overview of a group of statutes has been attempted, followed by specific interpretations of individual statutes deemed of practical importance to the Virginia attorney. The categories in which the Appendix has been divided were chosen in an effort to facilitate the legal practitioner's initial examination of a particular area.

Much of the land-use legislation, both state and federal, affects all three of the major categories in which the Appendix is divided: Residential, Commercial & Industrial, and Agricultural. The sections on Zoning and Building Permit Requirements (section B), and State and Federal Acts Dealing With Pollution (section G), bear upon all categories of land-use. Therefore it is advised that special attention be paid to these sections regardless of the type of land-use in which you are interested. It must also be noted that all references to statute sections or titles are made to the Code of Virginia, unless specifically designated as federal law, Virginia Uniform Statewide Building Code (VUSBC) or local ordinance.

B. ZONING AND BUILDING PERMIT REQUIREMENTS

1. Zoning—§§ 15.1-486 to -498

§ 15.1-486—permits the governing body of any county or municipality to divide the land by districts and may regulate, restrict, permit, prohibit and determine the use therein.

§ 15.1-487—requires in the case that no local planning commission exists, that the governing body appoint a zoning commission to carry out the functions mentioned in § 15.1-486.

§§ 15.1-494 to -495—requires that a board of zoning appeals be appointed in each locality that has enacted zoning ordinances. This board hears and decides appeals from determinations made by administrative officers in carrying out the zoning ordinances. Vari-

ances are allowed in special cases. The board also has the power to decide the district boundary where any dispute exists.

- § 15.1-496—explains the procedures for making applications to the board of zoning appeals for special exceptions, for appeals of decisions, and for the prevention of construction of a building in violation of a zoning ordinance. Special attention should be made to the varying time limits set out in this section for each of the above proceedings.
- § 15.1-497—permits an appeal from the board of zoning appeals if made within 30 days of that board's decision. This is accomplished by filing a petition within such 30 days in the circuit court of the city or county. The circuit court "may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

2. Special Use Permits

- § 15.1-430(i)—defines a "'special exception' or a 'special use,' as a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinance adopted herewith."
- § 15.1-491(c)—provides that the governing body of any city, county or town may reserve to itself the right to issue, upon application, a special exception or use permit.

3. Building Permits and their Requirements

- §§ 55-765, -766, -766.1—require building permits for any construction, improvement or repairs where the cost equals or exceeds particular dollar amounts as set out under these sections. The amount is \$250.00 in certain localities and \$500.00 in others. Permits can be obtained from the commissioner of revenue or director of finance in the locality.
- §§ 32-9, -9.1—empowers the State Board of Health to regulate and prescribe standards for sewage disposal and

solid waste disposal and prohibits any county, city or town from issuing building permits until compliance with such standards is assured.

§§ 32-406 to -410—authorizes the State Board of Health and localities to adopt and enforce regulations dealing with plumbing.

4. Uniform Statewide Building Code—§§ 36-97 to -119

§ 36-99—requires that the Building Code prescribe construction standards in order to promote health, safety and welfare. Where practical, the Code should require certain levels of performance facilitating the use of new building materials and methods. Only where generally recognized standards are not available will the Building Code require the use of specific materials or building methods.

§ 36-103—exempts any building for which a permit was issued, or construction commenced or completed, or for which working drawings were prepared in the year prior to the effective date of the Building Code (Sept. 1, 1973).

§ 36-104—makes available to the public copies of the Building Code which may be obtained from the State Board of Housing.

§ 36-105—requires local enforcement of the Building Code. If the county or municipality has no building department, it must enter into an agreement with another municipality or a State agency for Code enforcement.

§ 36-106—makes violation of the Building Code a misdemeanor with a fine up to \$500.

§ 36-114—requires the State Building Code Technical Review Board to rule on appeals.

§ 36-116—requires that an appeal from the Review Board be to the State Supreme Court.

§ 36-119—exempts from the operation of the Building Code regulations pertaining to mobile homes or industrial housing prescribed by the State Corporation Commission; see § 36-73.

5. Noteworthy Sections of the Existing Virginia Uniform Statewide Building Code (VUSBC) (available in pamphlet form on request to the State Board of Housing)

VUSBC § 100.1—makes this Code applicable to “the construction, alteration, addition, repair, removal, demolition, use, location and occupancy and maintenance of all buildings and structures . . . in the State of Virginia.”

VUSBC § 200.2—provides that this Code will not override any local zoning ordinances or provisions of the Virginia Code.

VUSBC § 318.0—does not exempt historic buildings per se, but does require that they receive special consideration and need not comply with the Code if found to be safe by a building official.

VUSBC §§ 106.0 to 106.2—provides that buildings existing before the Code’s enactment but to which alterations or repairs are made after the enactment may come under the VUSBC. If the repairs or alterations exceed 50% of the value of the building prior to such repairs or alterations, then they must comply fully with the VUSBC.

VUSBC § 106.3—provides that where repair costs are between 25% to 50% of the value of the building, it is left to the building official’s discretion as to what extent the VUSBC provisions must be met.

VUSBC § 106.4—provides that where repair costs are less than 25% of the value of the building, the VUSBC does not have to be complied with if the structure is safe.

VUSBC §§ 106.5, 106.6—require full compliance with the VUSBC where the building’s floor space is increased or number of stories increased, or where its occupancy or use is changed.

C. RESIDENTIAL LAND USE

1. General Provisions

§ 15.1-427—requires the governing body of any county or municipality to create a local or regional planning

commission to assist it.

§ 15.1-465—requires the governing body to adopt ordinances regulating subdivision development of land.

§ 15.1-466—sets out the provisions for such ordinances.

2. Compliance with Zoning Laws

See section on Zoning and Building Permits.

3. Owners Desiring to Subdivide and Develop—§§ 15.1-465 to -485

§ 15.1-475—requires that owners of the land desiring to subdivide submit a plat for approval to the local governmental body—usually the local or regional planning commission if one exists. There is a right to appeal to the circuit court of the area when no response is received within 60 days or where a disapproval is “arbitrary or capricious.” Such appeal must be preceded with 10 days written notice to the local commission or body.

§ 15.1-476—See this section for the plat requirements.

§ 15.1-480—requires that plans and specifications for gas, water, sewer or electric light or power works, pipes, wires, fixtures or systems to be constructed under streets or alleys be submitted to the local governing body for approval.

§§ 15.1-481 to -485—cover procedures for the vacation of the plat or any part thereof.

4. Compliance with Uniform Statewide Building Code and Building Permit Requirements

See section on Zoning and Building Permits

5. Virginia Housing Development Authority Act—§§ 36-55.24 to -55.52

§ 36-55.25—declares that this Act was passed to promote the construction of or rehabilitation of “sanitary and safe residential housing at prices or rentals which families of low and moderate income can afford.”

§§ 36-55.31, -55.32, -55.33—give the HDA authority to

make mortgage loans and temporary construction loans.

§ 36-55.39—sets out the requirements of qualifying for the loans.

6. Virginia Fair Housing Law—§§ 36-86 to -96—set out Virginia's policy on fair housing. It controls such unlawful practices as discrimination, unenforceable restrictive covenants based on public policy, and unfair practices of lending institutions.
7. Tax Incentives—Int. Rev. Code of 1954, § 1250—affords favorable treatment to new residential construction by allowing Double Declining Balance depreciation on such construction. Residential construction is defined here as housing which produces 80% of its income from residential rental units.
8. Condominium Act—§§ 55-79.39 to -79.103—covers everything from creation to termination of condominiums, including recordation of the instruments, ownership interests, and management provisions.
 - § 55-79.58—explains the required contents of plats and plans and their recordation.
9. Mobile Homes
 - a) Industrialized Building Unit and Mobile Home Safety Law—§§ 36-70 to -85.
 - §§ 36-76, -77—make available to the public from the State Corporation Commission in pamphlet form all of the rules and regulations prescribing standards for mobile homes.
 - b) Special Permits Required
 - § 58-766.2—requires a permit before locating a mobile home permanently on any lot.
 - § 58-766.3—requires compliance with certain health restrictions and that a permit be obtained from the

local commissioner of revenue or director of finance before a mobile home be located on a lot as a residence. No mobile home may be moved until the local property tax assessed against such mobile home is paid.

D. COMMERCIAL AND INDUSTRIAL LAND USES

1. Local Planning Generally—§§ 15.1-427 to -503.2—specifically designate the powers and procedures which local governments may exercise while acting under their zoning authority. Some specific highlights are:

§ 15.1-427—requires the local governments to create local and regional planning commissions.

§ 15.1-446—confers upon local governments the responsibility for creating a comprehensive land use plan in the city, county or town in question.

§ 15.1-465—requires counties and other municipalities to adopt ordinances regulating subdivision and development of land.

§ 15.1-475—commands owners of land wishing to subdivide to submit a plat of the proposed subdivision to the local planning commission.

§ 15.1-480—calls for owners of land desiring to construct gas, water, sewer, electric light or power works to present such plans to the local governing body.

§ 15.1-486—confers zoning powers on local governments and permits the local governments to regulate non-agricultural sedimentation and erosion.

2. Land

- a) General—§§ 10-1 to -17—vest the power over the supervision, use and preservation of natural resources in the Department of Conservation and Economic Development.

- b) Forestry—§§10-32 to -90.29—include all statutory provisions in the area of forestry reserves, reforestation and preservation of timber. Specific highlights include:

- §§ 10-46 to -50—provide for local municipalities to acquire land for timber growth and provide for payment of fire protection.
 - §§ 10-51 to -54.1—allow the State Forester to render technical assistance to any local government or person for the preservation or replacement of trees.
 - §§ 10-74.1 to -83.01—include specific requirements as to seeding and reforestation on property which has been significantly lumbered.
 - §§ 10-90.2 to -90.29—enunciate the public policy of this State to encourage reforestation and in furtherance of this objective allow the Division of Forestry to reforest private land at reduced costs.
- c) Tax Incentive—INT. REV. CODE of 1954, § 631—encourages good forestry practices by granting capital gains treatment to certain transactions involving the cutting and use of timber land.
- d) Mining—§§45.1-180 to -225—provide extensive statutory coverage in this area of land use.
- §§ 45.1-181 to -182—extensively set out the information which must be provided by each operator before he will be issued a permit.
 - §§ 45.1-180 to -197.2—regulate surface mining in general, while §§ 45.1-198 to -225 deal with coal mining operations specifically. Both areas have the same requirements, *e.g.*, requirement of a permit to mine, a reclamation plan, a bond to ensure performance of the reclamation plan, and provisions for construction and examination of refuse piles, water and silt retaining dams.
 - §§ 21-2 to -112.20:1—deals with the designation by localities of Soil Conservation Districts and formulate the Erosion and Sediment Control laws and should be read together with mining legislation. (See Agricultural Use, *infra*.)

- e) Mining (Federal)
 - i) National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970).
 - ii) Wilderness Act, 16 U.S.C. §§ 1131-36 (1970).
 - iii) National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (1970).

3. Water

- a) Industrial Water Pollution Highlights—§§ 62.1-44.2 to -44.34—embody the basic provisions for the protection of the State's waters; the State Water Control Board has powers to create rules, regulations and orders which directly concern the quality of water. Some specific statutory highlights:
 - § 62.1-44.3—defines pollution broadly, enabling the Water Control Board to exercise equally broad powers over activities conducted on land.
 - § 62.1-44.15—gives to the Board the power to issue special orders to "owners" to: construct facilities in accordance with approval plans and to conduct studies in furtherance of water quality; force compliance with a certificate for waste discharge; force compliance with Board directives; cease and desist water pollution.
 - §§ 62.1-44.16, 62.1-44.17, and 62.1-44.19—designate the procedures by which an "owner" may obtain licensing in regard to "industrial waste," "other wastes," and "sewage," respectively.
 - §§ 62.1-44.83 to -44.107—encompass the Board's power to control, with the Department of Health, the construction of wells and to designate an area where the groundwater levels are in jeopardy as "critical groundwater areas." (Underground water preservation).
 - § 62.1-44.100—requires an application for a permit in an area designated "critical groundwater area," and within this section the Board has broad powers to

issue or deny the permit where the application reveals a wasteful use or a significant potential for adversely affecting present uses in these areas. Substantial control over commercial and industrial uses is inherent.

b) Wetlands

- § 62.1-13.9—requires the owner of “wetlands”—riparian owners and owners of subaqueous land—to obtain a permit before using or developing this property. If the local government has adopted § 62.1-13.5 (Wetland Zoning Ordinance) they will administer the permit; otherwise, applications must be made to Virginia Marine Resources Commission, 2401 West Avenue, P.O. Box 756, Newport News, Virginia 23607, Telephone No. 804-245-2811.
- § 28.1-108—provides for the delegation of subaqueous land to riparian owners for their personal oyster grounds.
- § 28.1-109—provides that all subaqueous beds not assigned to riparian owners are to be held for the State and leased by the Commission to commercial diggers.
- § 62.1-3—requires a permit to be obtained from the Commission for any major disturbance of subaqueous lands.
- § 62.1-4—gives the Commission the power to lease the State’s subaqueous lands for mineral exploration and extraction. (But not on the Continental Shelf).
- §§ 62.1-13.1 to -13.20—include provisions which: (a) define wetlands; (b) sets the standards of development; (c) empowers the Marine Resources Commission to reverse the ruling of a local Wetland Municipality Board.
- § 62.1-116—requires an application to build a dam, cut canals, piers, etc. The Army Corps of Engineers exercises concurrent jurisdiction over Wetlands with State boards, especially in regard to any encroachments into the water by man-made structures.
- §§ 62.1-190 to -193—apply to dredging sand and gravel.

§§ 62.1-194 to -196—govern such offenses as: throwing garbage into waters; discharge of oil into waters; obstructing or contaminating state waters.

- c) Wetland and Water Use (Federal)
 - i) Refuse Act of 1899, 33 U.S.C. § 407 (1970).
 - ii) Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1175 (1970); concurrent jurisdiction with State Water Control Board. 33 U.S.C. §§ 1251 *et seq.* (Supp. 1975).
 - iii) River and Harbor Appropriation Act, 33 U.S.C. § 403 (1970) (requiring consent for activities which may result in any discharge into navigable waters).
 - iv) Solid Waste Disposal Act, 42 U.S.C. §§ 3251 *et seq.* (1970) (providing for research and development programs for improved waste management; no enforcement provisions).
 - v) Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451 *et seq.* (providing funds or grants for for those states who initiate such plans over land and water use).

4. Air

- a) Industrial Air Pollution—§§ 10.17.9:1 to -17.30—allow the State Air Pollution Control Board to require that “owners” cease and desist pollution; to comply with construction permits (whether new facilities or alterations of existing facilities); and to comply with air quality standards. The term “owners” is broad enough to include local governments and corporations as well as individuals.
- b) Air (Federal)

- i) National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (1970).
 - ii) Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1970)—provides that the EPA publish air quality standards. While the EPA is given authority to enforce its regulations, state implementation plans are encouraged and where in existence are to be used (*See VA. CODE ANN. §§ 10-17.9:1 to 10-17.30*).
 - iii) Noise Control Act, 42 U.S.C.A. §§ 4901 *et seq.* (1973)—the significance of this Act is its possible impact in the area of industrial zoning.
5. State Corporation Commission—gains its source of power from the Virginia Constitution, with a review of its decisions only by the Virginia Supreme Court. Besides having charter powers over all corporations in Virginia, it exercises stringent regulatory control over the railroad companies and utility companies, especially in regard to electric utilities. VA. CODE ANN. §§ 56-265.1(b), -265.3, -46.1. §§ 62.1-81 to -83—empower the State Corporation Commission with licensing and governing authority over hydroelectric dams on waters of the state and within the state. By definition, waters of the state are those which affect interstate commerce, while waters *within* the state are those which do not.
- §§ 36-70 to -85—empower the SCC to exercise regulatory authority over industrialized building units and mobile homes. Such authority is similar to that exercised by the State Board of Housing over buildings in general.
- §§ 36-81 to -83—authorize the SCC to establish health and safety standards and places the enforcement responsibility upon the SCC and local building officials. Violation of any regulations is a misdemeanor and carries with it a fine of up to \$500.00. Regulations are embodied in a booklet entitled *Virginia Industrial*

Building Unit and Mobile Home Regulations which is available from the Commission or local building departments.

- § 12.1_____ (The Outer Continental Shelf Act of Virginia) over which the SCC had regulatory powers will not go into effect as a result of the March 17, 1975 decision by the United States Supreme Court that the individual states do not have control over their continental shelf. The Department of the Interior will designate regulations and guidelines for oil and gas drilling on the United States' continental shelf off the coast of Virginia.

E. AGRICULTURAL LAND USE

1. Environmental Checklist

- §§ 62.1-44.2 to -44.3—provide for the protection of the State's waters, and under these sections the State Water Control Board has the potential power to proceed against farmers for any activity which results in any form of water pollution, *e.g.*, spraying, run-off, etc.
- §§ 21-2 to -112.20:1—embody the statutory provisions for implementing erosion and sediment control through the Soil and Water Conservation Commission.
- §§ 21-2 to -89—provide for the administration of conservation and flood control areas; set up the procedural aspects of the Conservation Commission; and formulate a framework whereby a particular district acquires substantial land use regulatory powers, including control over various agricultural practices.
- §§ 21-89 to -89.15—formulate the mechanism for enforcing any "land disturbing activity" (grading, clearing, excavation). Certain owners are required to apply for permits. Activities such as farming, surface mining and small construction projects are exempt from these statutory provisions.

2. Tax Incentives

- a) State—§§ 58-769.4 to -769.15:1—provide for “special assessments” for property devoted to agricultural, horticultural, forest and open-space uses. The various localities can pass ordinances directing the taxing official to base his assessment solely on the qualified land’s *use* and not upon a possible higher market value when used for other purposes.
- b) Federal
 - i) Int. Rev. Code of 1954, § 175—provides a tax deduction for expenditures, incurred on land used in farming, for the purpose of soil and water conservation by a taxpayer *in the business of farming*.
 - ii) Int. Rev. Code of 1954, § 182—allows one engaged in the business of farming to elect whether to deduct currently or capitalize the expenses incurred in clearing land for the purpose of making the land suitable for use.

F. MISCELLANEOUS

1. Historical Landmarks

- §§ 10-135 to -138.1—create the Virginia Historic Landmarks Commission with its concomitant powers and duties, and explains the membership, appointments, terms, vacancies, compensation and expenses of the Commission.
- § 10-139—requires that when a site or building has been designated as a certified landmark, notice of this fact will be given by the Commission to the local tax-assessing official as *prima facie* evidence that the value of such property for commercial, residential or other purposes is reduced by reason of its designation.
- § 10-140—requires that when the Commission establishes a historic district, it shall notify the local tax-assessing official of this establishment together with restrictions which are applicable to properties located

in the local district and of the fact that commercial, industrial and certain other uses within such district are restricted. The tax assessing official shall take these factors into consideration in assessing the properties.

- § 10-141—limits the authority of the Commission to designate historic landmarks where the local officials have failed to make any such designation.
- § 10-142—when the Commission, with the consent of the landowner, designates a historic landmark, it may seek and obtain from the landowner reasonable restrictions on the property to preserve its historic features. The agreement between the Commission and the landowner as to restrictions must be in writing and recorded in the local clerk's office.

2. Parks and Recreational Land Uses

- §§ 10-21.4 to -21.11—establish the Commission of Outdoor Recreation and explain its purpose. The preceding sections also specify the members, appointment, terms, vacancies, compensation and expenses of the Commission. §§ 10-21.8 and 10-21.9 specify the powers and duties of the Commission.
- § 10-21.12—expressly authorizes the Commission to acquire fee simple title to tracts and to acquire by gift or purchase (1) fee simple title to land to use such land for farming or to reserve the timber rights thereon or, (2) easements in gross or other such interests in real estate to maintain the character of such land as open-space land.
- §§ 10-167 to -173—enumerate the declaration of policy and purpose of the "Scenic Rivers Act."
- § 10-174—states that whenever a river or section of a river is designated as a scenic river, no dam or other structure impeding the river's natural flow shall be constructed or operated in or near the river without specific authorization by an act of the General Assembly.
- § 10-175—enables the Commission of Outdoor Recrea-

tion to acquire either by gift or purchase any real property or interest therein which the Commission considers necessary or desirable for the protection of any scenic river.

3. State Department of Highways and Transportation

§§ 33.1-62 to -65—empower the State Highway Commission to designate any highway as a scenic highway or as a Virginia byway and define these terms.

§ 33.1-66—empowers the Commission to purchase or acquire by gift such land or interest in order to maintain the preservation of natural beauty adjacent to scenic highways.

G. STATE AND FEDERAL ACTS DEALING WITH POLLUTION

1. State

a) Air—§§ 10-17.9:1 to -17.30—set forth a policy to regulate air pollution in the Commonwealth.

§§ 10-17.9:1 to -17.17—set forth the public policy of achieving and maintaining levels of air quality that will protect human health and define the terms to be used in the chapter. The State Air Pollution Control Board is the focal point of this regulatory system under the preceding sections which specify the membership, terms, vacancies, qualifications, compensation and expenses of the Board members.

§ 10-17.18—delegates to the Board the power to regulate sources of air pollution and gives the Board power to promulgate rules and regulations to affect air pollution control.

§ 10-17.18:1—confers on the Board the power to issue special orders to owners (1) to cease and desist pollution; (2) to construct facilities in accordance with approved plans and specifications; (3) to comply with all terms and provisions promulgated by the Board.

These special orders, with the exception of enumerated emergency situations, are to be issued after a

- hearing with reasonable notice to the affected owners of the time, place and purpose of the hearing and will become effective not less than five days after service.
- § 10-17.18:2—decisions of the Board pursuant to hearings are in writing and shall contain explicit findings of facts and conclusions.
- § 10-17.19—allows the Board to create local air pollution control districts to augment its regulatory power.
- § 10-17.21—requires that any owner who is causing or may cause air pollution problems shall on request furnish the Board with plans, specifications and information required by the Board.
- § 10-17.22—requires that any person authorized by the Board may at reasonable times enter any establishment or upon any property, public or private, for the gathering of information.
- § 10-17.23—enables the Board to seek compliance of its rules by injunction, mandamus or other appropriate remedies.
- §§ 10-17.23:1 to -17.28—deal with procedures for judicial review of Board regulation, appeals from Board decisions and stays of special orders pending appeal.
- § 10-17.29—requires that any person convicted of violating a Board rule, regulation or order is guilty of a misdemeanor and liable to a fine of not more than \$1,000 for each violation. Each day of continued violation after conviction is considered a separate offense.

This section does not affect the right of a person to claim property damages or other relief.

b) Water

i) Wetlands Act—§§ 62.1-13.1 to -13.20

§§ 62.1-13.1 to -13.20—declare that the policy of Virginia is to preserve the unique character of the wetlands and establish the Virginia Marine Resources Commission to promulgate standards.

- § 62.1-13.5—a model wetlands zoning ordinance which any county, city or town may adopt. This ordinance specifies the permitted uses of and activities on wetlands if an application for such use or activity is forwarded to the Commission and the Virginia Institute of Marine Science along with a non-refundable processing fee. Not later than 60 days after receipt of the application, the wetlands board will hold a public hearing on the application. A notice of this hearing is to be published by the Board at least once a week for two weeks prior to the hearing. The applicant will receive notice of the meeting by mail not less than 20 days prior to the hearing. The Board will make its determination within 30 days of the hearing and the Board may require a reasonable surety bond to secure compliance with the permit.
- §§ 62.1-13.11 to -13.15—deal with procedures for an appeal from a decision of the wetlands board.
- § 62.1-13.18—states that any person who willfully or negligently violates any order, rule or regulation of the Commission or board shall be guilty of a misdemeanor. Following conviction, every day the violation continues is a separate offense.
- § 62.1-13.20—declares that this chapter does not affect any project commenced prior to July 1, 1972. However, any project which, although commenced before July 1, 1972, is suspended or delayed does come within the provisions of this section. Also exempted from this section are projects whose plans were filed with the appropriate agency before July 1, 1972.

ii) State Water Control Board—§§ 62.1-44.2 to -44.34

§§ 62.1-44.2 to -44.3—declare the policy of the Commonwealth to (1) protect existing high quality State waters; (2) safeguard the clean waters of the State from pollution; (3) prevent any increase in pollution and (4) reduce existing pollutants. These sections establish the State Water Control Board and define the terms used in this chapter.

§ 62.1-44.4—states that the right to continue polluting the waters is not gained through prior conduct. Waters whose existing quality is better than the established standard will be maintained at the higher quality level.

§ 62.1-44.5—states that an owner, without a Board-issued certificate, is violating public policy if that owner (1) discharges into State waters inadequately treated sewage, industrial wastes, or other wastes, or any noxious or deleterious substances; or (2) otherwise pollutes the waters.

§ 62.1-44.15—enumerates the powers and duties of the Board as to the issuance of certificates, cease and desist orders and other administrative functions.

§ 62.1-44.15:1—limits the power of the Board to require construction of sewerage systems or sewage treatment works.

§ 62.1-44.16—requires that any owner who operates any establishment where there is a potential for, or where there is actual discharge of industrial waste, shall provide facilities approved by the Board to control these wastes. This section sets forth the procedures for applying for a permit to discharge such wastes.

- § 62.1-44.17—applies to all other wastes and sets forth administrative procedures.
- § 62.1-44.18—notes that all sewerage systems are under the joint supervision of the State Department of Health and the Board. All owners of any such sewerage systems or sewage treatment works from which sewage is discharged into State waters are required to furnish, when requested by the Board, certain information concerning their operation.
- § 62.1-44.19—requires that approval of plans and specifications must be received by the “owner” from the Board before any owner erects, constructs, opens, expands or operates a sewerage system or sewage treatment works designed to serve more than 400 persons and which will have a potential or actual discharge into State waters. This section specifies the procedure for review of the plans and specifications.
- § 62.1-44.20—states that any person authorized by the Board may, at reasonable times and under reasonable circumstances, enter any establishment to gain information in the enforcement of the provisions of this chapter.
- § 62.1-44.21—demands that an owner supply the Board, upon request, with information to determine the effect of his discharge wastes in State waters.
- §§ 62.1-44.22 to -44.30—deal with enforcement and appeal procedures.
- § 62.1-44.32—requires that any owner who violates any provision of this chapter be subject to certain fines. Each day of continued violation is a separate offense.
- §§ 62.1-3 to -5—deal with the authority required for use of subaqueous lands and the procedure for applying for such use.

§§ 62.1-116 to -127—deal with applications for leave to build a dam, cut canals, etc., and the procedure for applying for such use.

§§ 62.1-190 to -193—make it unlawful to remove, in any manner, sand or gravel from any lands which abut any of the waters of the Commonwealth. Violation is a misdemeanor. Exemptions from this chapter are given in § 62.1-193.

iii) The Groundwater Act of 1973—§§ 62.1-44.83 to -44.107—declare the public policy that right of reasonable control of all ground-water resources within Virginia belongs to the state and specify the regulations on Virginia's groundwater resources.

c) Land (Erosion)

i) Soil Conservation Districts Law—§§ 21-1 to -112.20:1

§ 21-2—provides that land use practices contributing to soil waste and erosion be discouraged and discontinued and that appropriate soil conservation practices be developed.

§ 21-6—establishes Virginia Soil and Water Conservation Commission.

§ 21-10—enumerates the duties of the Commission.

§ 21-12 to -52—deals with procedures for establishing soil conservation districts and their supervision.

§§ 21-53 to -65—enumerate the powers of the soil conservation districts and supervisors.

§§ 21-66 to -89—empower and establish guidelines for land use regulations formulated by the supervisors of the district.

§§ 21-90 to -112—provide for a board of adjustment to be established under the supervisors of any district with authority to adopt any ordinance prescribing land use regulations in accordance with the provisions of §§ 21-66 to -81.

ii) Erosion and Sediment Control Law—§§ 21-89.1 to -89.15—acknowledge that the rapid shift in land use from agricultural to non-agricultural uses has accelerated the processes of soil erosion and sedimentation making it necessary to establish a statewide coordinated erosion and sediment control program. The above sections detail the function of the program.

iii) Open Space Land Act—§§ 10-151 to -158

§ 10-152—authorizes the acquisition or designation of property for use as open-space land.

§ 10-158—authorizes acquisition of fee simple title by any public body subject to preservation of farming or timber rights.

2. Federal

a) Noise Control Act—42 U.S.C.A. §§ 4901, *et seq.* (1973)

§ 4901—declares the policy of the United States to promote an environment free from noise that jeopardizes health and welfare.

§ 4903(b)—Presidential authority to exempt certain executive activities or facilities from compliance with regulations.

b) Clean Air Act—42 U.S.C. §§ 1857-1858

§ 1857—states Congressional findings of the growing danger that air pollution presents to our society and states the purposes of the Act which are: (1) to pro-

tect and enhance the Nation's air resources; (2) to provide technical and financial assistance to control air pollution; (3) to initiate and accelerate a research program to prevent and control air pollution; and (4) to encourage and assist the development and operation of regional air pollution control programs.

- § 1857c-5—provides that the Environmental Protection Agency will promulgate an implementation program to control national primary and secondary air quality standards for a state if one is not submitted to the Administrator or is inadequate.
- § 1857c-5(a)(2)(A)(i)—states that implementation plans to control secondary standards of air quality must be implemented within a reasonable time after approval of plans. Primary standard plans must be implemented not later than three years from approval of the plan.
- § 1857c-8—grants authority to EPA to issue compliance orders or bring civil suits against any person violating the implementation plan.
- § 1857h-2—authorizes citizen suits to enforce provisions of the Act.
- § 1857c-5(a)(2)(B)—sets forth requirements for approval of state implementation plans.
- § 1857c-5(a)(2)(D)—requires that the state implementation plan provide a review procedure prior to construction or modification of new sources.
- § 1857c-5(a)(4)—permits a state to prevent construction if it determines that national air standard will be jeopardized.
- 40 C.F.R. § 52.22 (1974)—applies regulations published by EPA to air pollution from indirect sources.
- 40 C.F.R. § 51.12(a) (1974)—requires that each state's plan contain a strategy to control areas with the potential of exceeding air control standards.

c) Water

- i) Federal Water Pollution Control Amendments of 1972—33 U.S.C.A. §§ 1251 *et seq.* (Supp. 1975)

- § 1251(a)—enunciates the public determination to achieve the goal of a water quality sufficient for protection and propagation of wildlife by July 1, 1983, and to eliminate the discharge of pollutants into navigable waters by 1985.
- § 1311(a)—makes any discharge into navigable waters unlawful without a permit.
- §§ 1362(11) and 1363(a) define two sets of criteria toward the achievement of clean water.
- § 1362—provides definitions of pertinent terms used in the new water pollution amendments.
- §§ 1314, 1316-17—requires EPA to publish effluent standards and prohibitions for toxic substances and guidelines for pretreatment of pollutants.
- § 1318-9—permits EPA to issue a compliance order or bring a civil suit to remedy a permit violation.
- 40 C.F.R. § 130.22 (1974)—provides that no permit will be approved unless a state submits a planning process subject to EPA approval.
- 33 U.S.C. §1313—requires that the states planning process include a determination of the total maximum daily pollutant and thermal load necessary to assure reaching the required water quality standards.
- 40 C.F.R. §§ 131.100 *et seq.* (1974)—contain the requirements for plans for drainage basins.
- 40 C.F.R. § 131.305 (1974)—requires that each discharge load and thermal load allocation incorporate an allowance for anticipated economic and population growth for a five year period.
- 33 U.S.C. § 1342(a)—permits EPA to issue a permit for the discharge of pollutants into

navigable waters if all applicable requirements of the Act are met.

§ 1341(a)—makes state certification as to compliance with the Act necessary for approval of permits.

§ 1342(h)—permits civil action to be initiated by EPA or the State if conditions of a permit for a publicly owned treatment plant are violated.

§ 1281(g)(1)—notes that EPA is authorized to make grants to any state, municipality or interstate agency for the construction of publicly owned waste treatment works.

§ 1288—requires designation by each state of urban industrial concentrations that have substantial water quality control problems.

ii) Solid Waste Disposal Act—42 U.S.C. §§ 3251 *et seq.* (1970).

§ 3254(b)—provides for grants to state, regional and local agencies for development of solid waste disposal plans conditioned on existence of federally approved plans consistent with EPA guidelines.

iii) Refuse Act of 1899—33 U.S.C. § 407 (1970)—makes it unlawful to discharge from any wharf, manufacturing establishment or mill of any kind any refuse matter other than that which flows from streets and sewers which passes into a liquid state into any navigable waters of the United States.

iv) River and Harbor Appropriation Act—33 U.S.C. § 403 (1970)—makes Congressional authorization necessary for the construction of any obstruction to the navigable waters of the United States.

- d) Land—Coastal Zone Management Act of 1972—16 U.S.C.A. § 1451 *et seq.* (1974).
- § 1454—provides for grants for two-thirds of the cost of developing and implementing coastal zone management plans for coastal states that apply.
 - §§ 1454(b)(1)-(2)—require that applicant for grant identify the boundaries of its coastal zone and define permissible land and water uses within the zone which border on coastal waters.
 - § 1454(b)(4)—requires that management program include an identification of the means by which the state proposes to exert control over land and water uses.
 - § 1458—requires funds to be terminated if states deviate from the conditions of the Act.
 - § 1455(d)—establishes administrative proceedings for implementation of the land use control plan.
 - § 1455(e)(2)—requires that local land use regulations not unreasonably restrict uses of benefit to the region.
 - § 1455(c)—requires management programs to provide for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are more than local in nature.
 - §§ 1456(c)-(f)—demand that requirements of Clean Air Act and Federal Water Pollution Control be incorporated into the plan.

