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Environmental Problems in Rural Development Symposium - Legal Aspects of Environmental Problems.

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ENVIRONMENTAL PROBLEMS IN RURAL DEVELOPMENT

Land has been a private possession throughout the history of the United States. Although land has always been subject to some controls by the government to protect the public welfare, a general feeling of an absolute, sacred right to control one's real property is a major premise of the American ethic and the common law.²⁷⁵ Landowners often believe they have an inherent right to develop their land in any manner they may choose regardless of the environmental consequences.²⁷⁶ From these precepts has arisen the attitude that any governmental interference with the use of privately owned land is a derogation of individual freedom.²⁷⁷

Many of our judicial precedents in the area of land use and zoning originated at a time when cities were isolated and each had its own peculiar local problems.²⁷⁸ These precedents are anachronistic in their failure to be applicable to the urban areas existing in the United States today.²⁷⁹ In 1960 urban regions covered one-twelfth of the land area of the continental United States, and by the year 2000 these regions are expected to occupy one-sixth of the land area and contain five-sixths of the population.²⁸⁰ The issue then is not whether these urban areas will continue to grow but how to control and guide their growth.²⁸¹

Thus, the historical consideration of land use and zoning control as essentially a local governmental function is under attack due to the rapid urbanization since World War II.²⁸² It is becoming apparent that local governments are incapable of coping with problems such as urban sprawl or air and water pollution. The problem is that the local governments are the weakest and most inefficient means of implementing land use controls, often lacking the technical ability to master environmental problems.²⁸³ While

275. Hansen, *A National Land Use Policy—Toward a New Land Ethic*, in SW. LEGAL FOUNDATION, 24TH INST. ON OIL & GAS LAW & TAX. 253, 262 (1973).

276. See TASK FORCE ON LAND USE AND URBAN GROWTH, *THE USE OF LAND: CITIZENS' POLICY GUIDE TO URBAN GROWTH* at 15 (1973) [hereinafter cited as *THE USE OF LAND*].

277. Hansen, *A National Land Use Policy—Toward a New Land Ethic*, in SW. LEGAL FOUNDATION, 24TH INST. ON OIL & GAS LAW & TAX. 253, 262 (1973).

278. *THE USE OF LAND* at 24 (1973); 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 18.01, at 336 (1968).

279. *THE USE OF LAND* at 24 (1973).

280. *Id.* at 82; Hartke, *Toward a National Growth Policy*, 22 *CATHOLIC U.L. REV.* 231, 232 (1973).

281. See *THE USE OF LAND* at 100 (1973).

282. Cunningham, *Land-Use Control—The State and Local Programs*, 50 *IOWA L. REV.* 367, 405-406 (1965).

283. Sussna, *Developing Land in the Midst of the Environmental, Energy, Exclusionary, and Bureaucratic Maze*, 1975 *INST. ON PLANNING, ZONING, & EMINENT DOMAIN* 1, 4-5.

decisions affecting only one local area may be made efficiently by that local government,²⁸⁴ many major problems are regional in scope and local controls will seldom be adequate.²⁸⁵

Other problems with local governmental control include local political pressures, rigid nonrepresentative control systems, conflicts among individual governments, and conflicts among the agencies within one government.²⁸⁶ This fragmentation of authority is ineffective to control air and water pollution, for it leaves each municipality or local government at the mercy of those municipalities upstream or upwind from it.²⁸⁷ The states have created the fragmentation and disjunction of land use controls through enabling statutes which delegate the state authority to control land use to the local governments.²⁸⁸ The current problem involves transferring these powers from the local governments or some type of regional control system.²⁸⁹

LACK OF AUTHORITY TO CONTROL DEVELOPMENT

A primary consideration with regard to a county's right to protect the land within its boundaries from pollution or other environmental hazards is whether the county has authority to implement a comprehensive plan or zoning regulations. While a Texas county is recognized as a body politic,²⁹⁰ it is also a subdivision of the State and has no powers or duties other than those specifically granted to it by the constitution or legislature.²⁹¹ In Texas, the county has a dual nature in that it performs those administrative functions conferred upon it by the State to advance statewide interests, while it utilizes the powers of a unit of government to apply state policies in the manner best suited to its own small area.²⁹² While municipalities operate by means of an enabling statute specifically granting them zoning authority,²⁹³ no such provision exists for Texas counties.²⁹⁴ A county has no

284. See THE USE OF LAND at 213 (1973).

285. 5 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 160.01, at 388-89 (1975); Healy, *National Land Use Proposal: Land Use Legislation of Landmark Environmental Significance*, 3 ENVIRONMENTAL AFFAIRS 355, 356-57 (1974).

286. 5 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 161.08, at 427-29 (1975).

287. *Id.* § 163.22, at 474.

288. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 18.01, at 336 (1968).

289. Sussna, *Developing Land in the Midst of the Environmental, Energy, Exclusionary, and Bureaucratic Maze*, 1975 INST. ON PLANNING, ZONING, AND EMINENT DOMAIN 1, 5.

290. TEX. REV. CIV. STAT. ANN. art. 1572 (1962).

291. *Harrison County v. City of Marshall*, 253 S.W.2d 67, 69 (Tex. Civ. App.—Fort Worth 1952, writ ref'd).

292. TEX. CONST. art. V, § 18, comment. This provision of the constitution provides for the division of the county into precincts and the establishment of the commissioners court. *Id.* § 18.

293. TEX. REV. CIV. STAT. ANN. art. 1011a (1963).

294. Other states have provided for both municipal and county zoning authority. See,

inherent right to zone since this power is vested solely in the state and must be expressly granted in order to endow either a municipality or a county with zoning authority.²⁹⁵ Having neither express nor inherent authority, the county thus has no general zoning power.²⁹⁶

Another factor which illustrates the county's lack of zoning authority in contrast to the municipality's express right to zone is the absence of a home rule provision for counties. Municipalities which adopt a home rule charter pursuant to article 1169²⁹⁷ have certain enumerated powers granted to them, among which is the right to zone.²⁹⁸ Texas once had both a constitutional provision for county home rule²⁹⁹ and an enabling statute providing for implementation of a home rule charter for counties;³⁰⁰ the constitutional provision was repealed in 1969, leaving the enabling statute without any force of law.³⁰¹ The situation would be no different had the home rule provision for counties remained in effect; the right to zone was not expressly stated in either the constitutional provision or the enabling statute, unlike the specific home rule provision applicable to municipalities.³⁰²

The commissioners court is the governing body of the county,³⁰³ controlling county affairs, and it should be empowered to zone and institute land use measures to protect unincorporated land which is not governed by municipal ordinances. Although the powers and duties of the commissioners court are set out in detail,³⁰⁴ none of the provisions in the statute specifically authorizes zoning or other land use controls to protect the public health, welfare, safety, or morals. The county may, of course, regulate land use indirectly by the building of roads or bridges³⁰⁵ and through exercise of

e.g., FLA. STAT. ANN. § 125.01(h) (1972), § 166.021 (Supp. 1976); MD. ANN. CODE art. 66B, § 4.01(a) (1970).

295. The lack of any inherent right through which municipalities may zone becomes apparent upon a reading of both *Spann v. City of Dallas*, 111 Tex. 350, 361, 235 S.W. 513, 517-18 (1921) and *Lombardo v. City of Dallas*, 124 Tex. 1, 8-9, 73 S.W.2d 475, 478 (1934). *Spann* failed to uphold a zoning ordinance enacted by Dallas prior to the passage of the enabling statute, and *Lombardo* upheld zoning provisions passed pursuant to article 1011a.

296. *See* *Luse v. City of Dallas*, 131 S.W.2d 1079, 1084 (Tex. Civ. App.—Dallas 1939, writ ref'd); *accord*, *Crozier v. County Comm'rs*, 97 A.2d 296, 297 (Md. 1953); *Jackson v. Guilford County Bd. of Adjustment*, 166 S.E.2d 78, 83 (N.C. 1969); *Fairfax County v. Parker*, 44 S.E.2d 9, 11 (Va. 1947).

297. TEX. REV. CIV. STAT. ANN. art. 1169 (1963).

298. *Id.* art. 1175 (1963). The statute specifically authorizes the regulation of building height, size, location, and use in any zones which the home rule city may wish to designate. *Id.* § 26.

299. Tex. Laws 1933, S.J.R. No. 3, at 983.

300. TEX. REV. CIV. STAT. ANN. art. 1606a (1962).

301. Tex. Laws 1933, S.J.R. No. 3, at 983.

302. *Compare* TEX. REV. CIV. STAT. ANN. art. 1169, art. 1175, § 26 (1963) *with id.* art. 1606a (1962) *and* Tex. Laws 1933, S.J.R. No. 3, at 983.

303. TEX. CONST. art. V, § 18.

304. TEX. REV. CIV. STAT. ANN. art. 2351 (1971).

305. *Id.* § 4.

other statutory authority,³⁰⁶ but this is an inefficient and haphazard manner in which to establish any type of planning or coordination between the county and the municipalities within it.

The problem of any type of coordination or city-county planning is also increased by the extraterritorial authority of municipalities. A city with a population of more than 100,000 inhabitants has the power to annex any contiguous land within five miles of its corporate limit, provided that land does not lie within the extraterritorial or corporate limits of another city.³⁰⁷ Thus, the city and county both have an interest in how land in such an area is used. The city, however, has dominant authority in that it may annex the land and zone it for any authorized municipal purpose regardless of the effect on the surrounding county lands.³⁰⁸ Even if the county had authority to zone, the result would be the same under the city's power of annexation. The county is thus powerless to employ land use techniques or zoning restrictions to promote the public welfare and is forced to deal with land use problems indirectly through joint efforts with other agencies and under statutes designed for other purposes.

INDIRECT LAND USE CONTROL BY COUNTY

In Texas, airport zoning is the county's only apparent independent zoning or land use authority, although this authority is shared with the federal government and the other members of the local airport zoning commission. Texas has a legislative Act authorizing municipal and county zoning regulation of airports.³⁰⁹ The Act specifically grants to a county the power to adopt zoning regulations designed to eliminate airport hazards located within its territorial limits.³¹⁰ This is a grant of zoning authority to the county but its application is limited and can hardly constitute planning other than for safety of flight or to combat severe noise problems. The interesting and useful provision of the Airport Zoning Act is the creation of a joint airport zoning board where several political subdivisions are responsible for hazards affecting a single airport.³¹¹ This part of the Act recognizes the need for coordination and a common plan among neighboring political entities to protect their joint interest. In effect, the Act recognizes the need for regional zoning where aircraft flights over a large area endanger several governmental units, therefore, an overall plan rather than several local

306. *E.g.*, *id.* art. 1269k (1963) (housing authority provisions for the county); art. 1581e (1962) (flood control and county authority of eminent domain); and art. 4477-8 (Supp. 1975) (county solid waste disposal and control).

307. *Id.* art. 970a (1963).

308. *See* *Sierra Club v. Lynn*, 502 F.2d 43, 56-57 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) (San Antonio annexed land which was within Bexar County).

309. TEX. REV. CIV. STAT. ANN. art. 46e-1 to -15 (1969).

310. *Id.* art. 46e-3.

311. *Id.* art. 46e-3.

provisions is essential to provide safety for the entire area. The need for such area-wide planning is equally great in other land use areas.

Another method of indirect land use control is the utilization of state agencies to protect local interests. The Bexar County Commissioners Court has managed to establish some land use controls within its territorial limits which are outside incorporated municipalities by the use of the Texas Water Code provisions authorizing the county to enter orders, resolutions, or regulations to prevent pollution of an area by private sewage facilities.³¹² While this authority may be effective to control the danger of pollution or health hazards resulting from faulty septic tanks, it may be exercised no further to restrict land use within the county.

The Edwards Aquifer Recharge Zone presents another limitation of the county's power to protect its inhabitants through local measures. This area is a special district comprised of Bexar and several other counties and is under the protection of the Texas Water Quality Board. The authority of the Texas Water Quality Board includes the power to establish regional areas for the protection of the quality of water within the state.³¹³ A county or contiguous counties may be designated a protected area after hearings and a determination by the board that the quality of water is threatened.³¹⁴ The board may refuse to grant waste permits or approve plans for sewer systems, treatment facilities, or disposal systems within such a designated area unless the permits or plans comply with any orders the board may have entered to protect the area.³¹⁵ The limitations regarding disposal systems may indirectly result in land use control such as establishing minimum lot size requirements³¹⁶ or determining the location of business or commercial activities.³¹⁷

The Edwards Underground Reservoir has been defined as one of these regional areas for which the Texas Water Quality Board has issued an order establishing waste disposal regulations.³¹⁸ While not intended to regulate land use,³¹⁹ the effect of the order is to impose incidental land use regulation within the boundaries of the counties and cities situated in the region. Many of the controls established by the order appear to be the

312. TEX. WATER CODE ANN. § 21.084 (1972). Bexar County initiated regulations indirectly affecting land use which were given authority of law when approved by the Water Quality Board. Bexar County Dep't of Pub. Works, Regulations for Private Sewage Facilities (Oct. 23, 1974), *approved*, Texas Water Quality Bd. Resolution No. 74-R-11 (Dec. 17, 1974).

313. TEX. WATER CODE ANN. § 21.201 (1972).

314. *Id.* § 21.201-.202.

315. *Id.* § 21.204(a)(2).

316. Tex. Water Quality Bd. Order No. 75-0128-20 § V(A)(3), at 13 (Jan. 28, 1975).

317. *Id.* § V(E), at 16.

318. *See id.* § V(E), at 16.

319. *Id.* at 2.

direct result of the litigation and associated studies concerning protection of the Edwards Underground Reservoir.³²⁰ This is an effective method to protect such a special district but it contains no provisions for local considerations or peculiarities and thus fails to include suggestions which might be necessary to promote a broad plan in one locality.³²¹

The solution by which the county may gain some control over its land is participation in a Regional Planning Commission or Council of Governments as provided by statute.³²² Regional planning is intended to furnish guidelines and controls for a large area comprised of several separate governmental units in order to promote development of resources and economic and physical planning for the area as a single entity.³²³ The need for regional planning procedures has developed due to the rapid growth and urbanization of the country, and the failure to adapt antiquated land use controls to changing circumstances.³²⁴ Zoning and land use measures were first adopted when cities and towns were widely separated and the rural areas provided wide buffer zones between municipal boundaries.³²⁵ As a result of this historical basis the separate governmental units tend to remain fragmented and hesitate to develop a regional plan for fear that they may in some manner be surrendering some part of their sovereign powers.³²⁶

Texas and other states with similar statutes have attempted to avoid conflicts among possible members of these regional areas by making membership voluntary and limiting the powers of such regional agencies to planning and recommending only.³²⁷ The problem with neutral statutes such as the Texas statute is that by restricting the authority of the regional commissions to an advisory capacity they destroy the effectiveness of the planning program;³²⁸ it is of little value to have a regional plan for development when it cannot be enforced.³²⁹ Thus, in Texas, the county

320. *Compare* *Sierra Club v. Lynn*, 364 F. Supp. 834, 843 (W.D. Tex. 1973), *modified*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) with *Tex. Water Quality Bd. Order No. 75-0128-20 § VIII*, at 19-21 (Jan. 28, 1975). For a comprehensive discussion of the *Sierra Club* litigation see the foregoing section of this symposium.

321. While hearings are held prior to the establishment of a regional area, once the order is entered it must be appealed within 30 days of the effective date. *TEX. WATER CODE ANN. § 21.451* (Supp. 1976).

322. *TEX. REV. CIV. STAT. ANN. art. 1011m* (Supp. 1976).

323. 3 R. ANDERSON, *AMERICAN LAW OF ZONING § 18.02*, at 340-41 (1968).

324. Cunningham, *Land-Use Control—The State and Local Programs*, 50 *IOWA L. REV.* 367, 405-406 (1965).

325. *See* 3 R. ANDERSON, *AMERICAN LAW OF ZONING § 18.01*, at 336-37 (1968).

326. *See id.* § 18.04, at 345 (1968); 5 N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 160.01*, at 388-89 (1975); Cunningham, *Land-Use Control—The State and Local Programs*, 50 *IOWA L. REV.* 367, 405-406 (1965).

327. *See* *TEX. REV. CIV. STAT. ANN. art. 1011m §§ 4, 9* (Supp. 1976); 3 R. ANDERSON, *AMERICAN LAW OF ZONING § 18.04*, at 345 (1968); Evans, *Regional Land Use Control: The Stepping Stone Concept*, 22 *BAYLOR L. REV.* 1, 21-22 (1970).

328. 3 R. ANDERSON, *AMERICAN LAW OF ZONING § 18.04*, at 345 (1968).

329. The governmental units within the region are not required to conform to the

may attempt to gain some land use authority by joining a Regional Planning Commission but it has gained little except the opportunity to develop a theoretical plan for coordinated land use within the region which may or may not be implemented. Such attempts to promulgate regional planning are hardly any more effective than the present system of the county governments themselves.³³⁰

The Texas provisions for Regional Planning Commissions are inadequate and should be either amended, granting the Regional Planning Commission the authority to compel affected government bodies to become members and the power to enforce their regional plan, or should be repealed as ineffective for any purpose other than theoretical planning. Other alternatives, should regional planning fail to be made effective, necessitate a discussion of provisions enacted by other jurisdictions and the federal government's proposed legislation designed to promote land use controls.

LAND USE CONTROLS FOR ECOLOGICALLY FRAGILE AREAS

Land use control for ecologically fragile areas in Texas is present in the Water Quality Board's power to protect certain defined areas from the threat of water pollution.³³¹ Texas also has a statutory provision providing for the management of its coastal public lands.³³² The Act provides that the School Land Board shall be in charge of administering a comprehensive management program to preserve the natural resources of the coastal public lands.³³³ Several other states have similar statutory provisions, including California which has a statute designed to protect its coastline from pollution and destruction of the ecosystem.³³⁴ The California Act regulates development in the "coastal zone"³³⁵ and provides for six regional commissions which may adopt regulations to protect the area.³³⁶ California has also

plan and should the plan meet with their disapproval they may withdraw from the planning commission. TEX. REV. CIV. STAT. ANN. art. 1011m, § 9 (Supp. 1976).

330. A commentary to the Texas Constitution mentions the county government's weakness:

The county government has long been the most inefficient and irresponsible unit in the Texas system of government. It lacks sufficient autonomy to be responsible to the voters of the county, and lacks the proper state supervision to make it a responsible agent of the state.

TEX. CONST. art. IX, § 3, commentary to repealed constitutional provision at 592. See generally 5 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 160.02, at 390-91 (1975); Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 406 (1965).

331. One specific example is the Edwards Recharge Zone.

332. TEX. REV. CIV. STAT. ANN. art. 5415e-1 (Supp. 1976).

333. TEX. REV. CIV. STAT. ANN. art. 5415e-2(a), -5, -6(a) (Supp. 1976).

334. CAL. PUB. RESOURCES CODE ANN. §§ 27000-27650 (Supp. 1975).

335. *Id.* § 27001. The coastal zone is basically the length of the coast line of California including the islands and running inland to the nearest mountain range. *Id.* § 27100.

336. *Id.* §§ 27201, 27240. This measure was enacted by initiative in 1972 and is

enacted a statute to protect San Francisco Bay and provide for its regulation as a unit.³³⁷ These special acts limited to particular areas within a state are primarily designed to protect ecological systems, and are not intended to promote any type of statewide planning or development other than that necessary to protect the environment. Thus, while environmentally sound, such limited provisions do not promote or coordinate development but limit development to environmentally safe activities. A lack of coordination still exists with agencies or areas outside of these special districts which should be filled with a statewide coordinating agency of some type.

STATEWIDE PLANNING

Hawaii was the first state to establish a statewide planning agency.³³⁸ In that state the land use commission may designate land within the counties as falling within one of four districts, and in making such a designation the commission is to consider the master plan of the county.³³⁹ The purpose of state control over the county districts of Hawaii is not to limit county authority but to insure that development, population distribution, and growth are coordinated among the individual units so that each may maintain its separate identity without disturbing the overall appeal of the state or adversely affecting a neighboring entity in pursuit of its own plan.³⁴⁰ The power vested in the Hawaiian state government is used to strengthen the county government and avoid any adverse influence by local bodies which might otherwise be able to politically influence the county government.³⁴¹ In this manner, the county has authority to plan its own development, thus assuring that local problems will be provided for and that the state will coordinate and enforce the provisions. This method overcomes the main problem of regional planning in which the commission has no power to enforce the area plans or even to require that all affected governmental bodies participate in the planning process. The State uses its power to enforce the local provisions while protecting the interests of the state as a whole. It seems to be the best solution available in that it appeases and protects each of the individual governments involved.

to be automatically repealed on Jan. 1, 1977. *Id.* § 27650. For a discussion of this Act and the related Federal Coastal Zone Management Act of 1972 see Note, *Saving the Seashore: Management Planning for the Coastal Zone*, 25 HASTINGS L.J. 191 (1973).

337. CAL. GOV'T CODE ANN. §§ 66600-66661 (1974); see Note, *Saving San Francisco Bay: A Case Study in Environmental Legislation*, 23 STAN. L. REV. 349 (1971). See generally Comment, *Land Use Control to Protect the Environment*, 10 IDAHO L. REV. 87 (1973).

338. ECKBO, DEAN, AUSTIN & WILLIAMS, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW 2 (1969); Note, *State Land Use Control: Why Pending Federal Legislation Will Help*, 25 HASTINGS L.J. 1165, 1178 (1974).

339. HAWAII REV. STAT. tit. 13, § 205-2 (Supp. 1974). The four types of districts are urban, rural, agricultural, and conservation. *Id.*

340. See ECKBO, DEAN, AUSTIN & WILLIAMS, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW 112 (1969).

341. *Id.* at 112.

The advantages obtained by such land use control in Hawaii are 1) state development as a whole is protected and each county is aware of its part in the overall plan; 2) the natural resources are protected by the counties, the parties best able to do so; 3) the counties are protected from undue political pressure; and 4) the State may directly control its conservation areas and provide for parks and historical areas.³⁴² With such diverse areas within Texas as the east Texas forests, gulf coast seashore, and west Texas hills, a planning system which provides for some type of coordinated use among these areas with the overall consideration of preserving Texas' natural resources would be worth consideration. The coordination would be the difficult problem, however, since one of the primary reasons the system works in Hawaii is the similarity of the islands.

MODEL LAND DEVELOPMENT CODE

In 1963 the American Law Institute received funding to write a Model Land Development Code and as of April 15, 1975, the Code had reached proposed official draft status.³⁴³ This Code will be the first major development in standardized enabling legislation since the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act.³⁴⁴ The Code places primary responsibility for regulation of land development in local governments with provisions for state intervention in areas judged by the state to be sufficiently pressing to require such broad regulation.³⁴⁵

Article 1 of the Model Land Development Code embodies the intent of the legislation to provide the local governments with the power to plan and regulate development of the land.³⁴⁶ The local government establishes its

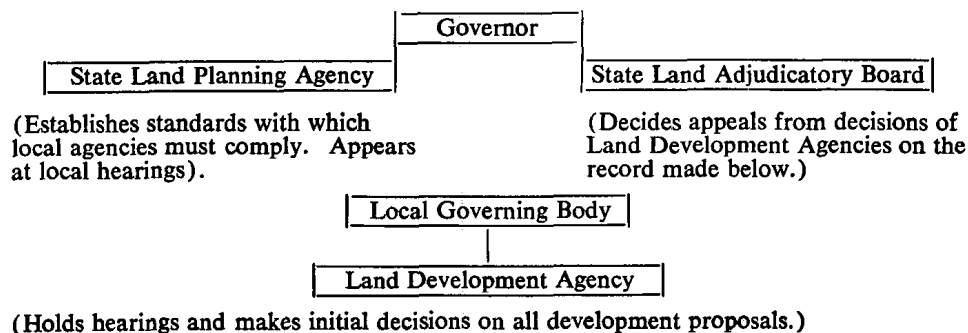
342. *Id.* at 112.

343. ALI MODEL LAND DEV. CODE (Proposed Official Draft No. 1, 1974) [hereinafter cited as MODEL CODE]. For a general discussion of articles 1-5, 7 and 8 see Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928 (1974).

344. FOX, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 929 (1974).

345. *Id.* at 948-49.

346. MODEL CODE § 1-102; Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 930 (1974). The chart below illustrates the organizational structure of the Model Code. Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANNUAL 59, 62.



regulations by adopting a single "development ordinance," intended to encompass all land use activities which have under present concepts been separately enacted and controlled, such as subdivision and zoning regulations.³⁴⁷ The Code provides that this Land Development Ordinance be administered by a highly flexible organization known as the Land Development Agency, composed of whatever entities the local government may choose to designate.³⁴⁸ In addition, the Land Development Agency may adopt supplementary rules not inconsistent with other provisions of the Code.³⁴⁹ The local government is also empowered to appoint any agency, commission, or department to formulate a Local Land Development Plan stating objectives, policies, and standards to guide development within the planning jurisdiction, which plan the local government may then adopt.³⁵⁰ The State Land Planning Agency³⁵¹ may establish Areas of Critical State Concern³⁵² or areas of regional impact in which a large development due to its size will create environmental issues of statewide or regional significance.³⁵³ Once such areas are established, however, the local governments are permitted to adopt land development regulations to handle the problem in a manner consistent with both local and state developmental provisions.³⁵⁴ If a problem arises concerning the Land Development Agency's enforcement of such regulations, then administrative appeal is available to the State Land Adjudicatory Board.³⁵⁵

347. MODEL CODE § 2-101, Commentary at 33; Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 932 (1974).

348. MODEL CODE §§ 2-102, -301; Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 932-33 (1974).

349. MODEL CODE § 2-302(3).

350. *Id.* § 3-101; Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 936 (1974).

351. MODEL CODE § 8-101. The State Land Planning Agency is the state-wide counterpart of the Land Planning Agency. Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 939 (1974).

352. MODEL CODE § 7-201(3). These may be areas which are significantly affected by major public facilities such as airports, areas containing important historical locations or environmental resources, proposed sites for new communities, or land which has not been designated in a local development ordinance for more than three years. *Id.*

353. *Id.* § 7-301. The effect of having the State Land Planning Agency designate areas of critical state concern and areas of regional impact is to permit state interference in only about 10% of the local land development decisions. Approximately 90% of all local land development decisions have no regional impact. Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANNUAL 59, 63-64.

354. MODEL CODE § 7-203.

355. *Id.* §§ 7-501 to -502. The initial hearing on the development proposal is held by the Land Development Agency, and when that decision is appealed to the State Land Adjudicatory Board it merely reviews the evidence presented in the hearing below. The State Land Adjudicatory Board has appellate jurisdiction only and must remand to the Land Development Agency if any new evidence is to be presented. *Id.* § 7-503, Note, at 331; Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANNUAL 59, 62-63.

The overall effect of this proposed regulatory and organizational process is that the control of development remains in the hands of the local governments, but their planning and enforcement functions are vastly improved over existing capabilities. The legislature and the State Planning Agency formulate broad policies and the Land Development Agencies determine local area policies which they administer in view of the broad state requirements,³⁵⁶ thus lessening the "Big Brother" effect. The State Land Adjudicatory Board merely acts as a non-partisan appellate review.³⁵⁷

The Model Code should not be as antithetical to local government as is the present system of regional planning since the Code is designed to make local governmental planning more efficient and to vest it with more authority to enforce local provisions.³⁵⁸ The local governments will not have to fear losing any of their powers in entering the structure provided for in the Model Code and any fear of state control over their activities should be dispelled since the state provisions are to be implemented only through the local governments. Another protection from state control is the appellate procedure in which the Adjudicatory Board in its deliberations may consider only the hearings of the local Land Development Agencies. The local governments have little to lose by adopting the Model Code and stand to gain sound planning and development practices accompanied by increased power with which they may enforce their policies.

NATIONAL LAND USE LEGISLATION

It has recently been said that: "The most serious unresolved environmental problem in this country is land use."³⁵⁹ Local land use control and ineffectual regional planning commissions are not adequate means to protect the environment.³⁶⁰ With the failure of local government to act in a positive manner the federal government has increasingly intervened in environmental problems.³⁶¹ The problem with this intervention is that it has, in general, been uncoordinated and often conflicting or repetitious.³⁶² Several individual federal legislative measures have been aimed at isolated environmental problems such as clean air, safe drinking water, and other related problems.³⁶³ These problems could and should have been corrected

356. MODEL CODE, Commentary on Article 7, at 290.

357. MODEL CODE § 7-503, Note, at 331.

358. See Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANNUAL 59, 62-63.

359. Udall, *Land Use: Why We Need Federal Legislation*, 1975 BRIGHAM YOUNG L. REV. 1.

360. See *id.* at 9.

361. See *id.* at 3-7.

362. See *id.* at 2.

363. E.g., Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. 1972); Clean Air Act, 42 U.S.C. § 1857 (1970); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f to 300j-9 (Supp. 1976). The National Environmental Policy Act, 42 U.S.C.

at the local level had the local governments been responsive and capable of efficient land use control.³⁶⁴ A possible solution to the local lack of efficiency and the federal fragmentation of effort would be a national land use policy designed to promote effective and coordinated land development measures by enticing local governments to implement regional and statewide measures to promote sound land use policies. Such a bill was passed in the Senate during both the 92nd and 93rd Congresses, but has yet to gain approval in the House of Representatives.³⁶⁵

In February of 1975 Congressman Udall introduced a bill in the House of Representatives, one of a continuing series of attempts to enact some type of federal-state land use program,³⁶⁶ designed to make federal grants available to states which implement state land use programs.³⁶⁷ The state programs are to include both a state land use planning agency with primary authority to develop and implement the program and an advisory council to aid in developing the program³⁶⁸ The bill provides generally that primary authority to regulate land use rests with the states, and they may implement their planning measures in one of three methods. The state may either utilize direct state land use planning and regulation, or local government programs coordinated by a state agency or a combination of both.³⁶⁹

The state land use program is to include defining the state role in problems which are of more than local concern, and, in defining this role, the state is to consider food and fiber requirements, energy needs, housing supply, transportation needs, and recreational and open space needs.³⁷⁰ The strongest environmental provisions appear to be those authorizing the state to develop policies for land use in areas of critical state concern, large scale

§§ 4321-47 (1970), is not a solution to the problem of these isolated and uncoordinated measures. The NEPA is not a "standard-setting" act for environmental control but merely sets a "procedural policy" to which federal agencies must conform when their activities affect the environment. See Muskie & Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 164 (1973). This article explains the difference between the "standard-setting" statutes promulgated by the federal government and the procedural or "policy" statutes such as the NEPA.

364. See Udall, *Land Use: Why We Need Federal Legislation*, 1975 BRIGHAM YOUNG L. REV. 1, 6-7.

365. S. 268, 93d Cong., 1st Sess. (1973); see Comment, *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 U. MIAMI L. REV. 135, 204 (1973).

366. For a discussion of the handling of the previous bills see Healy, *National Land Use Proposal: Land Use Legislation of Landmark Environmental Significance*, 3 ENVIRONMENTAL AFFAIRS 355 (1974); Udall, *Land Use: Why We Need Federal Legislation*, 1975 BRIGHAM YOUNG L. REV. 1, 9-10; Comment, *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 U. MIAMI L. REV. 135, 204-205 (1973).

367. H.R. 3510, 94th Cong., 1st Sess. § 201 (1975).

368. *Id.* § 201(a)(1), (2).

369. *Id.* § 204(a)(1), (2), (3).

370. *Id.* § 301(a), (b).

subdivisions, and developments of regional impact.³⁷¹ The designation of areas of critical state concern is derived from the Model Land Development Code³⁷² and includes areas of historic, environmental, recreational, or esthetic importance.³⁷³ These critical areas are to be developed cautiously, and special care is to be taken in authorizing development over aquifers and watershed lands.³⁷⁴ The bill also provides that special considerations be made when large scale subdivisions are to be planned.³⁷⁵ The provision for developments of regional impact also provides for environmental considerations, but it is not nearly as strong as its counterpart in the Model Land Development Code.³⁷⁶

The federal government, in the regulation of the use of public lands within the state, must insure that any policies that might affect nearby state land are consistent with the established state policies.³⁷⁷ The state land use program, however, may be subverted in cases of overriding national interest as determined by the President.³⁷⁸ Limitations on the federal power to control the state program include a specific denial of the power to withhold grant money in an attempt to influence state land use policies,³⁷⁹ and a prohibition against federal agencies interfering with the administration of the state land use program.³⁸⁰ There is also a provision against a state interceding in land use decisions of purely local concern.³⁸¹

The bill is not as protective of local government rights as the Model Code but it is better than the systems of land use control presently in existence. The provisions for environmental considerations in regulating land use and the coordinating of land use programs are long overdue. The states are expected to control land use within their boundaries and coordinate with federal plans, and the federal government is restricted from interfering with the state land use programs except in matters of national concern. Overall, the Land Use and Resource Conservation Act of 1975 is protective of state rights and would eliminate much of the fragmentation existing in present land use programs.

371. *Id.* §§ 302, 304, 306.

372. MODEL CODE § 7-201.

373. H.R. 3510, 94th Cong., 1st Sess. § 302 (1975).

374. *Id.* § 302.

375. *Id.* § 304.

376. Compare H.R. 3510, 94th Cong., 1st Sess. § 306 (1975) with MODEL CODE § 7-301. The subdivision controls of the *Model Code* are contained in article 2, but a large scale subdivision would also fall within the *Model Code* provisions for a development of regional impact.

377. H.R. 3510, 94th Cong., 1st Sess. §§ 402, 404(b)(8) (1975).

378. *Id.* § 402(a).

379. *Id.* § 509(b).

380. *Id.* § 509(a).

381. *Id.* § 509(e).

CONCLUSION

The present local, fragmented land use controls are outdated and cannot cope with the complexities of the modern world. The present situation will continue as long as local governments are reluctant to relinquish any of their land use control and the states continue to be hesitant about reassuming the powers they have relinquished to the localities. The federal government is equally reluctant to correct the problem by failing to enact a coordinated land use measure, leaving federal controls which are isolated, uncoordinated statutory provisions.

The local government is still the most knowledgeable agency with regard to 90 per cent of all land use controls. The other 10 per cent of land use measures affect more than one locality necessitating at least regional cooperation; regional controls are presently inadequate due to a lack of enforcement power.

The most efficient model available is the Model Land Development Code. The Code vests the primary planning authority in the locality—where it belongs—but provides for statewide land use planning and coordination. In the alternative, direct statewide planning is a good solution, provided the control of land use can be obtained from the municipalities. Another possibility is federal legislation, which, while not as responsive to local government control, does offer a comprehensive statewide program which will protect the environment. Any of these options is preferable to the present inefficient and wasteful system. The problem of protection of resources is not remedied by uncoordinated land use measures; some type of organized planning and land use control must be adopted.