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FLOOD PLAIN AND COASTAL AREA LAND USE CONTROLS

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ALABAMA DEVELOPMENT OFFICE

George C. Wallace, Governor

R. C. "Red" Bamberg, Director

W. M. "Bill" Rushton, Assistant Director

Bill J. Starnes, Director, State Planning Division

Preparation of this Document

Approved by:	Bill J. Starnes Director State Planning Division
Written by:	Harry Cohen Professor of Law The University of Alabama School of Law
Technical Advisors:	William H. Wallace, Jr. State Planning Division
	Walter B. Stevenson, Jr. State Planning Division
	William T. Watson Attorney Geological Survey of Alabama
Research Assistant:	Steven F. Harrison Geological Survey of Alabama

FLOOD PLAIN AND COASTAL AREA

LAND USE CONTROLS

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Abstract: This report treats two closely related subjects, flood plain controls and coastal zone management, separately. First historical and the federal legislative backgrounds are given for each subject followed by Alabama's experience and legislation on the subjects. By putting the programs in clear perspective various legal ramifications are explored and judicial examples are cited in detail in an effort to point out the "sign posts" for government officials, legislators and the interested public.

FLOOD PLAIN AND COASTAL AREA

LAND USE CONTROLS

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FLOOD PLAIN AND COASTAL AREA LAND USE CONTROLS

INTRODUCTION

Although all land use problems are increasingly more complex and important, none seem more immediate than the controlling of use in flood plains and wetlands or estuarine lands. It has been strongly argued that the two situations are not only similar but are intrinsically part of the same legal and factual fabric[1] because "concern over the interrelatedness of land uses has led to a recognition of the need to deal with entire ecological systems rather than small segments of them."[2] Yet the end results of the two land and water controls are different, at least in degree. Flood plain controls are created to prohibit construction which may damage property and endanger lives downstream. Wetland or Coastal Management legislation is aimed at trying to preserve delicate ecological systems which affect the future of wildlife and the entire chain of natural phenomenon in the area. Wetland controls may affect persons and their property far removed from the source of the land use, and perhaps all of us. Flood plain controls affect persons and property mainly within the watershed affected, although it must be admitted that dredging and filling in a natural river may affect the natural ecological chain.

Although all of these land use measures are negative in terms of land

development, flood plain regulations usually control the construction of structures rather than prohibit them completely. It is difficult to imagine allowing structures within estuarine areas in the same fashion as in the flood plains.

Because of these reasons, this report will discuss Flood Plain Land Use Controls apart from Coastal Management programs. Each part will discuss the background of state legislation generally, the nature of the Alabama Statutes involved, and the analogous cases which have arisen in other states under similar statutes. Another section will discuss the entire question called "The Taking Issue," which will assess the future of and the possibilities for effective and successful land use controls.

I. FLOOD PLAIN ZONING

A. The Practical Beginning of Flood Plain Zoning in the United States

As was stated in an earlier report,[3] Congress passed the National Flood Insurance Act in 1968 which, in effect, is utilized as a tool to entice States and local governments to create flood plain land use controls. The Statute authorizes the Secretary of Housing and Urban Development to carry out a program to facilitate the purchase of flood insurance against property damage, but before flood insurance will be issued, "an appropriate public body shall have adopted permanent land use and control measures (with effective enforcement provisions) which the Secretary finds are consistent

with the comprehensive criteria for land management and use under section 4102 of this title."[4]

The "comprehensive criteria" developed by the Secretary is based on studies and investigations, and the criteria will serve as the standard for evaluating the adequacy of the state or local land-use controls and other management techniques. The criteria developed must have the purpose of (1) restricting the development of land which is exposed to flood damage where appropriate, (2) guiding the development of proposed construction away from flood-prone areas, (3) assisting in reducing damage caused by floods and (4) otherwise improving the long-range land management and use of flood-prone areas. Subsidized insurance will cover only existing structures, but actuarial rates are created for new structures or improvements to older ones.[5]

The flood insurance program is only a partial device to aid the states and local subdivisions in an effort to create reasonable land-use controls to reduce losses to all kinds of property, public and private. Realistically, insurance can only compensate private losses. It cannot prevent damage and disruption generally. Insurance by itself does not make property owners more cautious, and it can cause laxness. Thus the insurance program is only an aid in helping the states begin to regulate land use in flood-prone areas.[6] In other words, land-use control near waterways of all kinds is a

necessity for the protection of entire communities.

What has happened since 1970 under this statute is very significant to an understanding of the present and future handling of flood plain zoning. Many small rural communities have never created any sort of land use control program. Consequently the Department of Housing and Urban Development (HUD) has had to try to ease the path to flood plain zoning for these communities. Even with most populous counties and communities, flood plain land use controls are new programs. The State legislatures generally have rushed to enable local communities to develop land use control systems under the Federal guidelines. Once the communities are given the power through legislative enabling statutes, the Secretary of HUD through the Federal Insurance Administration, will allow communities to create an ordinance which, although not of the variety necessary for permanent flood plain insurance, will demonstrate a good faith in issuing building permits. [7] Once the community has started its program and insurance is issued, local authorities must thereafter pass other ordinances which become the basic land use controls, i.e., flood plain zoning. [8] In defining the flood plains and flood hazards under the ordinances, the HUD, Federal Insurance Administration will help the local authorities with scientific aid but the local authorities are expected to do their part. It is in this area especially, that the State Agencies must aid the local officials. [9]

B. The Alabama Flood Plain Zoning Statute

When reading the Alabama statute entitled "Comprehensive Land Management and Use Program in Flood-Prone Areas"[10] it is readily realized that the Act was passed to enable counties to become eligible under the Federal Program. In fact, as part of the land use and control enabling section, it is said that the counties may create such "additional standards as may be necessary to comply with federal requirements for making flood insurance coverage under the National Flood Insurance Act of 1968 available in this state."[11] Counties are given broad powers to enact zoning, subdivision, building codes, and health regulations in order to protect the community against loss because of exposure to flood damage in flood-prone areas.[12] Floods are defined as "the general and temporary condition of partial or complete inundation of normally dry land areas."[13] "Flood prone area" is defined (in accord with the Federal regulations) as "any area with a frequency of inundation of once in 100 years as defined by qualified hydrologists or engineers using methods that are generally accepted by persons engaged in the field of hydrology and engineering."[14] The counties are authorized to create a county planning commission "for the purpose of enforcing this chapter,"[15] as well as a "county board of adjustment"[16] with powers similar to those granted under the general zoning enabling acts. The statute, however, clearly provides that the jurisdiction of the counties are only "outside the corporate limits of any municipality in the county."[17]

The last point emphasizes the fragmentation of jurisdiction which can arise in flood plain land use planning.[18] Although the counties have extensive enabling legislation relating to flood plain zoning, municipalities do not specifically have such power. The broadly worded zoning enabling act Title 37, section 777 states that municipal zoning regulations are designed "to lessen congestion in the streets, to secure safety from fire, panic, and other dangers; to promote health and the general welfare... to facilitate the adequate provisions of transportation, water, sewerage,... and other public requirements...."[19] But one must interpret these words to cover flood plain zoning. There are also broadly worded subdivision controls, and statutes relating to the regulation of new and old construction, which, again, if liberally construed, could serve the purpose. But the plain fact is that there is still no legislation at a statewide level dealing per se with municipal land use control of flood prone areas for those purposes.

Thus, the cities of the state cannot zone beyond their boundaries, and the counties do not have power to zone the flood plains within municipalities. It is quite possible, however, that the Federal Insurance Administration of HUD will suggest that the counties and cities work together in their zoning and management of the flood plains, and there is enough statutory material on the books to enable them to do so. The New York Court has indicated a strong resentment against "community autonomy in

land use controls"[21] and it is not inconceivable that courts will utilize the flood plain zoning situation to demand that different political units work together to achieve "comprehensive" land use planning and zoning.[22]

There is an important omission in the act relating to existing structures in the flood prone areas. Alabama case law protects the non-conforming use under zoning provisions generally against retroactive zoning,[23] but in other states there is an increasing use of provisions which amortize non-conforming uses over a period of time, and this is thought to be especially important in flood prone areas.[23a] Some statutes are using amortization provisions, i.e., requiring elimination of nonconforming uses after a fixed period of time determined by the value of the building involved. These statutes have had a rather mixed reaction from the courts, but many decisions have upheld them as constitutional.[24] In any event, this point should be emphasized for future legislative consideration.

C. A Perspective Over and Recent Examples of Flood Plain Control Case Law

Although this survey of cases is designed to update our earlier discussion of decisions on flood plain zoning in 1970,[25] it is important that we not lose sight of earlier signposts in the law. It is also important that we realize our approach to be rather arbitrary. Dividing the flood plain zoning cases from the coastal management or zoning cases tends to blur the

similarities. In both types of cases there is to a great extent a series of restrictions and prohibitions on building along waterways of all kinds. Our attitude, however, is that flood plain management can tolerate more land use than coastal management because of the difference in the ends to be attained.

There are relatively few decisions dealing with flood plain and coastal area land use controls. This is to be expected, however, because the statutes are of recent vintage. Connecticut, as late as 1964, had the first clear-cut flood plain zoning case in the much discussed Dooley v. Town Plan. & Zon. Com'n of Town of Fairfield.[26] In 1961, the Town amended its zoning regulations by creating a new zoning classification called "flood plain district." About 404 acres were changed from "residential" to "flood plain district." Most of the area zoned was considered as tidal marshland subject to flooding by a stream called Pine Creek, and to hurricane flooding in the years 1938, 1944, and 1954. The land was restricted to use for parks, playgrounds, clubhouses, landings and dry docks, wildlife sanctuaries, farming, and parking accessory to other uses. Excavation, filling or removal of earth or gravel was forbidden except by special exception and then for only a limited time. The Supreme Court of Connecticut nullified these restrictions because the Town "froze the area into a practically unusable state,"[27] and, since most of the value of the property was sacrificed, the occasion was appropriate for the exercise of eminent domain.

The court said that the use for parks or wildlife sanctuaries actually restricted the property to governmental uses, and since the property was about a half-mile from Long Island Sound, marinas, boat houses, and docks were impractical. Farming on the land was practically ruled out by experts, and it was noted that the value of the land had depreciated at least 75 percent because some of the property was under contract for sale for residential use in the price range of $15,000 to $17,000 per lot.

Connecticut also had an earlier case[28] in 1959 wherein the water resources commission established a line along the bank of the Naugatuck River beyond which no structure or encroachment could be placed unless the commission specifically authorized it. The line established by the commission left the subject property only sixty square feet for the building of any structure thereon. Five stores and six residential apartments had been on the land for 60 years but a flood in 1955 had destroyed these buildings. Plaintiff requested the right to build a cinder-block building on a concrete foundation to be used as a market along the river. The court did not grant redress to the plaintiff but did qualify the state's control over the river bank. The court said:

> "The commission has, at most, refused its permission for the erection of a particular structure. Whether the plaintiff could build another type of structure - for example, one on piers or cantilevers - which would not

impair the capacity of the channel in time of flood is a matter which the commission was not asked to, and did not pass upon . . . .

". . . The trial court found that the encroachment lines as established by the commission extend for several miles along the Naugatuck river, accord with sound engineering principles and statutory requirements, and were designed to reduce hazard to life and property in the event of recurring floods. The commission did not abuse its powers in proceeding by way of regulation rather than by way of eminent domain. As to its refusal to allow the plaintiff to construct a cinder-block building on a concrete foundation within the encroachment line; this action was, under the circumstances of this case, justifiable . . . . It did not necessarily mean that no structure which would serve the plaintiff's purposes and permit the economic utilization of the property in his control would be allowed. Until it appears that the plaintiff has been finally deprived by the commission of the reasonable and proper use of the property, it cannot be said that there has been an unconstitutional

taking of property without just compensation."[29]

Two 1971 decisions on flood plain zoning, as such, tend to follow the pattern of the Connecticut cases, i.e. that flood plain zoning is generally constitutional but may be arbitrarily applied to individual tracts. Both cases are lower State Appellate Court opinions. In American Nat. Bank & T. Co. v. Village of Winfield, testimony showed that 70% of the site involved was within the flood plain of a 1954 flood. The owner of the 32 acre tract wished to build an apartment complex on the land. The only use allowed him under the zoning ordinance was the construction of single family residential dwellings, and he found that a great deal of soil would have to be utilized as fill in order to accomplish this purpose. The apartment complex could be designed in such a fashion that no soil would have to be hauled in. The value of the property as zoned for single family dwellings was $6,000 per acre compared to $33,000 an acre if rezoned for the desired multiple family buildings. Testimony showed that although the tract was a prime natural recharge area for the central and western part of the County, the flood plain area could be preserved and the recharge area preserved by the proposed creation of a lake and the proper direction of water drainage from roofs and parking areas. But it was agreed by all who testified on both sides that single family homes would result in substantially the same amount of impermeable coverage of the flood plains as the proposed apartment complex. The Illinois Court of Appeal held that the flood plain restrictions unduly

burdened the plaintiff's land use rights and said:

> "The ultimate question presented by this case is not whether ideally any impairment of the natural state of the subject property should be allowed but rather, whether the present ordinance is unreasonable in restricting the land to single family uses and precluding multiple family use. Thus, we think the trial court properly observed that maintaining the property for open recreation or park purposes , . . . would be beneficial to the public; but that this was not the issue. As the trial court noted, the public may acquire the flood plain and water recharge areas by eminent domain, but cannot require plaintiffs to bear a greater burden than other property owners in supplying public facilities. The result of the trial court's holding was to permit the highest and best use of the property but with due regard for engineering solutions which would be in the public interest of preserving as much of the flood plain and water recharge area as possible. The decree was therefore made subject to approval of plaintiff's engineering plans by the Village engineer. The finding that this condition has been met is

included in the supplemental decree."[31]

In Sturdy Homes, Inc. v. Township of Redford,[32] the zoning ordinance created a flood control area in which one-family dwellings could be constructed, but it was later amended to restrict any structure which would be inhabited under any circumstances. The plaintiff's land was placed in the flood plain, but although the general area had suffered two serious floods, plaintiff's land had never been flooded. The lower court found the entire flood plain ordinance to be unconstitutional on its face as confiscatory and a taking of property without just compensation.

The Michigan Court of Appeal held that the ordinance clearly deprived plaintiff of any use of his property because under the amendment he could only create publicly-owned and operated parks, libraries, parkways, and recreational facilities. "This is indeed a classic case," the court said, "in which the application of the zoning ordinance to the particular property amounts to expropriation.[33] On the other hand, they held, the lower court was wrong in finding the entire ordinance unconstitutional as the testimony in the case only related to plaintiff's property.

It is important to realize that in all of these decisions the courts were dealing with ordinances which came close to granting a landowner almost no land use of flood plains. The situation is difficult to defend when an "all or nothing approach," is taken.[34] Yet there is little doubt that

freedom to use land for a reasonable profit is not absolute.

> ". . . under the cases there is a difference between 'low rent' and 'no rent' [but] . . . the law should not protect the landowner's laziness in waiting for the economic users to come to him once feasible economic uses have been established."[35]

The latest case on flood plain zoning and the decision proponents of stringent controls are now most excited about is the 1972 case of Turnpike Realty Company v. Town of Dedham.[36] There the Massachusetts Supreme Judicial Court upheld strict regulation of flood plain land use in the face of heavy devaluation of the land brought about by the regulations. Plaintiff's land consisted of 61.9 acres composed of generally low lands along the Charles River and Mother Brook. The land includes two knolls, one of 3.2 acres and the other of .2 acres, which rise above the elevation of the lowland. The land was subject to periodic flooding which at times reached four to five feet. The Town created a flood plain district and under its zoning by-laws prohibited land fill or dumping, damming or relocation of water courses, as well as buildings or structures for "sustained human occupancy." It also provided that no structure or building shall be erected, altered, or used except for "one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not

requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals . . ."[37] and uses may be permitted by the Board where lands are not subject to flooding. Plaintiff claimed that its land was "artifically" flooded by manipulation of the flood control works on the Charles River, and argued that the by-law relating to the denial of residential use was arbitrary and unreasonable.

In answering the charge that the restrictions were unreasonable and unduly burdensome the court said that plaintiff could obtain a permit to build on land not subject to flooding or not unsuitable because of drainage conditions. They said that an example of the type of situation where a landowner might resort to a permit for any use would be the two "knolls" on the land which rise above the general level of flood and swamp. As far as land subject to flooding, the plaintiff has not been deprived of all beneficial uses because they are permitted to use the land for certain named uses which, although substantially restrictive, still "must be balanced against the potential harm to the community from overdevelopment of a flood plain area."[38]

II. ALABAMA'S COASTAL ZONE MANAGEMENT ACT: A DILEMMA WITHIN A DILEMMA

A. The Background of the Statute

In 1972 Congress passed the Coastal Zone Management Act in response to concern about the continuous erosion and destruction of ecologically

important shorelines and wetlands.[39] It has been said that it is ironic that the very reason for people coming to the shorelines, i.e., the scenery and the estuaries where fish life propogates, are the basis for the destruction.[40] People fill in marshes, shorelines and wetlands, in order to live and work near the sea, they cause pollution thereof,[41] and then bring in their mass transportation and their "paraphenalia" to have access to the shorelines, all of which contribute to the problem.[42] The problem becomes one of dealing with what has been called the "edge", i.e., the zone of contact between land and water, the significant ecological, recreational and commercial area where the land and water environments meet.[43]

What Congress was trying to do was to create a start toward coastline protection, a "stopgap" measure, which after study would bring on effective national legislation.[44] The 1972 Act was a cautious avoidance of intruding on State prerogatives, and in effect, contained no effective sanctions.[45] Besides holding out money for research activities if the State passed a Coastline Management Act[46] acceptable to the Secretary of Commerce, it was provided that the various Federal Agencies involved in coastline problems, such as the Corps of Engineers, would work within the State legislative framework and aid those States.[47] In other words, States which passed acceptable acts would receive special attention from Federal officials working in coastline matters. The Secretary was also authorized to create a Coastal Zone Management Advisory Committee to advise him on policy

matters concerning the coastal zone.[48] That Committee was formed and has had a number of problems trying to work with various localities. The age-old State versus Federal control controversy has already started to affect coastline management.[49]

In the light of all of this, the Alabama legislature passed its Coastal Area Act in 1973.[50] The first three sections[51] of the Act generally follow those of the Federal Act, the gist of which is to protect not only marine resources and wildlife which are "ecologically fragile,"[52] but also to conserve "natural and scenic characteristics."[53] The first section recognizes the competing demands for development and preservation but emphasizes that there is an "urgent need to balance" and this should be brought about by a cooperative effort with counties, municipalities, the State "and other vitally affected interests."[54] The second section describes State policy in terms of encouraging and assisting "counties and municipalities to exercise effectively their responsibilities . . . through the development and implementation of administrative programs to achieve wise use of the land and water resources of the coastal areas giving full consideration to ecological, cultural, historic, and aesthetic values as well as to needs for economic development."[55] In addition, adequate consideration should be given to harbor facilities for oil and gas as well as utility facilities.[56] The definition section closely tracks the Federal Act and the coastal area is said to mean not only coastal waters but also adjacent shorelands which "includes transitional and intertidal areas,

salt marshes, wetlands, and beaches . . . but extends inland from the shorelines only to extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."[57]

The rest of the statute deals with exemptions, compositions and functions of the Alabama Coastal Area Board, the development of a program by the Board, procedures for permit applications (in rather great detail), appeals, and penalties. Although all sections are significant, three of them invite immediate attention and comment.

B. The Exemption Section and Equal Protection

Section 315 exempts from the permit system numerous activities, among which are construction and maintenance of piers, boathouses, "and similar structures,"[58] the "use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling;"[59] all "areas developed in the future by federal, state or county governments for the establishment of a superport or a pipeline buoy terminal for deep-draft, ocean-going vessels where regulated by federal or state agencies in a manner consistent with the purposes of this act;"[60] activities "associated with or is necessary for the exploration, production or transportation of oil or gas when such activity is conducted, in a manner consistent with the purposes of this act," under a valid permit granted by a "duly constituted agency of the State of Alabama;"[61] normal maintenance and repair activities

of any utility . . . or renewing on private or public rights of way any sewers, mains, conduits, pipes, cables, utility tunnels, power lines, towers, poles, tracks or the like, or making service connections thereto, or inspecting, maintaining, repairing, or renewing any substation, pumping or lifting facility."[62]

This exemption section could create a legal problem which may attack the basic constitutionality of the entire Act. Any person denied a permit may claim that his position has been unfairly or illegally classified. All who are similarly situated must be treated in a similar fashion, and all such persons are entitled to the equal protection of the laws. Where, for example, the purpose of the regulation is to prevent injury to wetlands, and a developer is denied the right to fill his land for the building of a resort condominium, the Statute which exempts an oil company or a superport authority from the same regulations as the developer, can be argued to be denying the developer equal protection of the law. The argument has been described in this fashion in terms of flood plain regulations:

> "The basic evil of a classification which excludes private activity but which permits obstructions by government and by public utilities is that landowners within the flood water area are forced to bear the external cost of the permitted activity while other

persons, without cost, share in its advantages. This would seem to violate all principles of equity or ability to pay in providing for public benefits."[63]

C. The Constitutionality of the Board's Power to Regulate

Section 318 creates a permit system under which a permit may be denied by the Board for any activity not excepted by the Act.[64] Although this "denial, suspension or revocation" of a permit can be appealed to the circuit court of any county having jurisdiction over the property,[65] it can be argued that this is an unconstitutional general delegation of the police powers of the State without the specific power to zone. The statute in section 317 grants the Board the right to set "Broad guidelines on priority of uses in particular areas."[66] The general rule in the United States provides that a general grant of police power does not include the power to create and enforce zoning ordinances. "Nothing less than a specific grant of zoning power will suffice."[67] It would seem that if a municipal legislature cannot zone without a specific grant of the power to do so, then an administrative body may not do so.[67a] On the other hand, it can be argued that the statute is clearly a special grant of power to combat a specific evil, well outlined in the statute. It would be most unfortunate if a successful attack was mounted against the Alabama statute on this point.

There is little doubt about the legislative intention in this statute.

Fragmentation of control over the coastline areas is not the way to conduct a wetland management program,[68] and the legislature seemed to avoid the difficulty. Leaving all wetland control to individual counties or cities involved is as dangerous as it is in land use law generally. Most wetlands legislation in the country is centrally administered,[69] although Virginia for example, authorizes local governing authorities to regulate wetlands by zoning the areas subject to some supervision by the State Marine Resources Commission.[70] The San Francisco Bay Commission is a good example of a successful regional bay and shoreline program,[71] and the courts seem to be receptive to controls over the "uncoordinated, haphazard" dredging and filling of that valuable natural resource.[72]

D. Definitions of Coastal Areas in the Statute, and State versus Private Ownership of Shorelines and Wetlands

One of the toughest problems which can and will arise under all of the coastal zoning statutes, including Alabama's, is the extent of land the Act describes and regulates. The definition in section 314 of the Alabama statute is almost a paraphrase and restatement of the original Congressional definition. The coastal area is said to include "the adjacent shorelands (including the waters therein and thereunder) strongly influenced by each and in proximity to the shorelines of Alabama, and includes transitional and intertidal areas, salt marshes, wetlands and beaches," and 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."[73]

If the state "owns" the regulated areas, whatever they may be, then few legal problems affecting private landowners arise. The courts have generally held that the states own the beds of navigable waterbodies to the high water marks.[74] In Alabama, it has been held that the State is held to own only to the low water mark on navigable rivers, but on rivers subject to the ebb and flow of the tide, the ownership is to the high-water mark.[75] It has been held, however, that insofar as the tidewaters are concerned, there is no distinction upon the ground of navigability between the shallows and depths of navigable waters; and waters flowing over lands in Mobile Bay, even though not navigable in fact, are owned by the State to the high-water mark.[76] If the high water mark is the upper limit to the wetlands, then ecologically important marshes and wetlands are covered to some extent.[77] But tidal waters flow through and around much land with vegetation, and establishing the mean high-tide line can become very difficult.[78] Even establishing a high tide line in any instance of controversy evolves into a burden of proof problem. Whether the burden of proof should be placed on the State because of its great financial and physical resources is a continuing question.[79]

Many other questions arise as to ownership of tidal waters and lands adjacent thereto. Could private citizens have adversely possessed or

prescribed against such lands? Although adverse possession and prescription do not run against the State of Alabama today, there was a period in the State's history (1852-1908) when private ownership of State owned property could be acquired by adverse possession and prescription.[80] Yet, even today, the State can be "estopped" to demand that a use of a navigable waterway bed for a long period be discontinued.[81] However, public streets, highways, parks and other lands dedicated to the public use have been declared not to be susceptible to adverse possession or prescription.[82] Navigable waterways in Alabama have been said to be "public thoroughfares" both under statute and court decisions.[83] For this reason, it would seem that it would be very difficult to convince the courts that one could adversely possess or prescribe against the lands under navigable waters, including those lands under the "shallows and depths of navigable waters," as the court put it in United States v. Turner.[84]

Another important correlative question in this area concerns the alienation of state lands considered tidal waters. Under the Alabama Constitution, the State cannot convey lands "to corporations or associations for a less price than that for which they are subject to sale to individuals . . ."[85] The legislature has authorized the sale of any lands, not presently used for governmental purposes,[86] but the governor is authorized to issue patents to purchasers of "swamp and overflowed lands" made prior to October 10, 1903, upon sufficient proof being made that payment was given therefore.[87]

Classically, the States, like the English Crown, were supposed to hold the titles to the beds of navigable waterways "in trust" for the public good, for the public rights of navigation or fishery and they could not confer upon a grantee a greater right than originally held.[88] Although there have been conveyances of the beds of navigable streams in Alabama, the courts have said that the grant must not be inconsistent "with public interests to which the navigable waterways are permanently originally dedicated."[89]

Although the State of Alabama has claimed absolute ownership of shellfish and "seafood existing or living in the waters of Alabama not held in private ownership legally acquired"[90] under navigable waters, the State has always recognized some type of private rights in them.[91] The State has also authorized riparian owners to build wharves and docks on navigable waterways, but they are subject to a navigational servitude, and it is presumed, the traditional servitude allowing fishery rights.[92]

If it is so that the State may alienate various property rights in lands including those of the tidal variety, there are also questions of the right to shoreline property created through the processes of accretion, reliction, avulsion and erosion. The common law rules seem to be in existence in Alabama to the effect that land built up at the edge of riparian property by gradual and imperceptible deposits belong to the riparian owner, while accretions from sudden avulsion belong to the State.[93] But a famous

Alabama case held that some 55.91 acres of land resulting from dredging by the Corps of Engineers in Mobile Bay, which had accumulated and become high, solid and firm ground covered with grass, shrubs and trees above the mean high tide of the Bay, belonged to the riparian owner.[94] The court called this "streamlined accretion or perhaps a reclamation."[95]

What this discussion finally leads to is the entire problem of the "taking issue." If the State finds a paramount necessity to regulate privately owned shorelines and wetlands, the question which inevitably arises is whether the regulations can become so onerous as to amount to a taking of private property without just compensation to the privately held rights. The so called "public trust" doctrine, i.e., the State holds the wetlands and shorelines in trust for all of the people and can regulate them to preserve their important ecology, may be a good part of important arguments which can be utilized against constitutional attacks.[96] As has been recently stated in an important recent study of the subject:

> "In general, it is argued that actual title to tidal wetlands remains in the states because the state holds that title "for the public trust." Important qualifications exist, since the state may grant rights of usage ordinarily associated with ownership such as wharfage and excavation. While the parameters

governing the public trust in tidal wetlands are fuzzy, Maryland's highest court has approved legislation re-asserting state title in "lands under the navigable waters of the state below the mean high tide, which are affected by the regular rise and fall of the tide." Looking to the rights held by riparian owners, they found there was no inherent right to dredge sand and gravel from the tidal lands which could not be absolutely prohibited by the state to preserve the state's natural resources.[97]

In the same fashion, the Attorney General of the State of Georgia has said:

> " . . . the development of the legal ramifications surrounding the State's ownership has indicated the existence of a public trust administered by the State and covering the marshlands of the State which imposes upon the ownership of such lands various burdens in favor of the general public. As a result, the marshlands of Georgia are not susceptible to private exploitation or conservation without regard to the common-law trust purposes to which these lands have been long dedicated."[98]

III. EXAMPLES OF JUDICIAL REACTION IN THE UNITED STATES TO COASTAL MANAGEMENT AND ZONING FACT SITUATIONS

It is, of course, extremely difficult to distinguish between many of the legal issues of the flood plain zoning cases and the Coastal Management and Zoning situations. The "taking issue" is always present and is the crux of the conceptual arguments. There is, however, the distinction in fact situations which can be emphasized, and again, as we have often said, there are differences in the means and ends of each set of regulations. In both situations one often finds the landowner endeavoring to fill and/or dredge fill his land. In the flood plain zoning situation, filling land and building above the flood stages has been a preferred type of use, while in the coastal situation, filling is a very detrimental act.

A decision which bridges the two situations is the much cited Morris County Land Improvement Co. v. Parsippany-Troy Hills Township.[99] Plaintiff's property consisted of 66 acres in a corner of a large 1500 acre swamp called Troy Meadows. The Meadows was once part of a large lake but is what is now called "typical swampland, with a high water table and marsh grass and cattail vegetation. The surface soil is black or dark brown muck and peat, two to six feet deep, wet and very unstable. The second stratum, from two to four feet in thickness, consists of clay and silt materials which drain poorly and are highly compressible in nature. The bottom layer is composed of sand and gravel, found, on the average, seven

or eight feet beneath the surface. The testimony in the case is uncontradicted that the two top layers will not bear structures, are unsuitable for fill and would have to be removed and the land filled with proper material before it could be used for any active purpose, except possibly the raising of fish or the growing of aquatic plants."[100]

About 75% of the land is owned by a private conservation and preservation group, called "Wildlife Preserves, Inc." and they do not want any part of Troy Meadows to be filled because the effect would be biologically adverse to the conservation of wildlife. When plaintiff acquired his Troy Meadows land he also owned land across the road wherein he conducted a sand and gravel business, and it was zoned for industrial use. At the time plaintiff purchased the meadow land, it was zoned in the most restrictive residential classification, but it was demonstrated that no one would build an expensive home in a marsh. An amendment to the zoning ordinance "forbade any new use, or change in existing use except for agricultural purposes or the growing of fish, water fowl and water plants, and also forbade any dumping or other disposal of material or any change in the natural or existing grade of the land."[101] unless a permit was secured. The plaintiff attacked the classification and was unsuccessful in his application for a rezoning of his property. Thereafter new regulations permitted essentially the same uses except that a one family dwelling could be constructed as an adjunct to any uses allowed, such as "commercial greenhouses, raising of aquatic

plants, fish . . ." and additionally "radio or television transmitting stations and antenna towers" could be erected.[102] In deciding for the plaintiff the court said:

> "From the evidence . . ., it is apparent that these almost "freezing" regulations were enacted as a stopgap or interim measure with the expectation or hope that higher governmental authority might well acquire the area as part of a large and much discussed flood control project to benefit the entire Passaic Valley - a project which has not yet come to pass.[103]
>
> . . .
>
> There cannot be the slightest doubt from the evidence that the prime object of the zone regulations is to retain the land substantially in its natural state.[104]
>
> . . .
>
> It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit. This benefit is twofold, with somewhat interrelated aspects: first, use of the area as a water

detention basin in aid of flood control in the lower reaches of the Passaic Valley far beyond this municipality; and second, preservation of the land as open space for the benefits which would accrue to the local public from an undeveloped use such as that of a nature refuge by Wildlife (which paid taxes on it).[105]

. . .

The universal truth of the pithy observation of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 . . . (1922) must not be disregarded:

'The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut, than the constitutional way of paying for the change.'

While the issue of regulation as against taking is always a matter of degree, there can be no question that the line has been crossed where the purpose and practical effect of the regulation is to appropriate

private property for a flood water detention basin or open space. These are laudable public purposes and we do not doubt the high-mindedness of their motivation. But such factors cannot cure basic unconstitutionality. Nor is the situation saved because the owner of most of the land in the zone, justifiably desirous of preserving an appropriate area in its natural state as a wetland wildlife sanctuary, supports the regulations. Both public uses are necessarily so all encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required."[106]

The court in a footnote to the opinion then made a very significant point. It said that there was no evidence that this legislation dealt with the matter of intra-municipal flood control. It did not appear that the rise in water level affected any other area in the township. The emphasis was on use as a detention basin for the benefit of lower valley sections rather than on any effort to prevent or channel it.

"This case, therefore, does not involve the matter of police power regulation of the use of land in a flood

plain on the lower reaches of a river by zoning, building restrictions, channel encroachment lines or otherwise and nothing said in this opinion is intended to pass upon the validity of any such regulations."[107]

It is normal, when discussing cases on this subject to include three cases. We have already discussed the Dooley and the Morris County Land Improvement cases. The third case is the Massachusetts decision in Commissioner of Natural Resources v. S. Volpe & Co.[108] There the Commissioner sued to enjoin the defendant from placing any futher fill on Broad Marsh in the town of Wareham in violation of regulations designed to protect marine fisheries and an estuarine complex. The defendant owned 49.4 acres within Broad Marsh, which was part of a larger tract of 78 acres. Broad Marsh is an area within the coastal waters which was often overflowed by the tides. Defendant intended to dredge a channel and basin into Broad Marsh in connection with a marina to be constructed, but all of this was incidental to the defendant's main project of filling the marsh for the construction of houses with water rights for boating. The authorities did not object to the dredging of the channel and basin, but objected to any filling of Broad Marsh. The trial judge held that the defendant could dredge a channel to his higher ground, which would not cause damage to marine fisheries, and therefore an absolute restraint was not placed on the defendant's ability to develop his land. The Supreme Judicial Court reversed the lower court citing the Morris

County and Dooley decisions, as well as Justice Holmes in Pennsylvania Coal Co. v. Mahon. The court said:

> "The plaintiffs argue as though all that need be done is to demonstrate a public purpose and then no regulation in the interests of conservation can be too extreme . . . .
>
> In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights.
>
> . . .
>
> . . . whether the defendant is the uncompensated victim of a taking invalid without compensation depends upon further findings as to what uses the marshland may still be put and possibly upon other issues which have not been argued and which are:
>
> . . .
>
> 2. The uses which can be made of the locus in its natural state (a) independently of other land of

the owner in the area; (b) in conjunction with other land of the owner.

3. The assessed value of the locus for each of the five years, 1960 to 1964, inclusive.

4. The cost of the locus to the defendant.

5. The present fair market value of the locus (a) subject to the limitations imposed by the Commissioner: (b) free of such limitations.

6. The estimated cost of the improvements proposed by the defendant."[109]

. . .

In addition to the above decisions, the supreme courts of Maine and Connecticut have also reacted strongly against too burdensome regulations imposed on wetlands. In State v. Johnson,[110] the Maine Supreme Judicial Court upheld the State Wetlands Control Board statute as constitutional but held that the landowners had been unduly burdened by the regulations placed on them. There the owner was denied permission to fill a portion of his marshlands so that the land could be offered for sale as residential sites. The lower court found that the land was unquestionably coastal wetlands within the statute, playing an important role in conservation of aquatic and

marine resources and that the land unfilled has no commercial value. Again, a court cited Holmes' opinion, the Dooley and Morris County Land Improvement Co. and Volpe cases, and said:

> "As distinguished from conventional zoning for town protection, the area of Wetlands representing a 'valuable natural resource of the State,' of which appellants' holdings are but a minute part, is of statewide concern. The benefits from its preservation extend beyond town limits and are statewide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this statewide conservation program, granting fully its commendable purpose .
>
> . . . their compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate in their deprivation of reasonable use the exercise of the State's police power is unreasonable . . . . [it] is both an unreasonable exercise of police power and equivalent to taking

within constitutional considerations."[111]

The court went on and held that the statute generally was not unconstitutionally vague and was explicit in its intention and standards. Although the prohibition against the filling of the appellant's land was an unreasonable exercise of the police power they said, "It does not follow that the restriction as to draining sanitary sewage into coastal wetland is subject to the same infirmity."[112]

Connecticut did about the same thing as Maine in Bartlett v. Zoning Commission of Town of Old Lyme.[113] There the zoning regulations prohibited any construction except wooden walkways, wharves, duck blinds, public boat landings and the like. A landowner could apply for a special exception but only for the construction of a boat channel, boat house, or pier. The court found that the commercial value of the property, if used for other types of buildings was $32,000 while under present restriction the worth was $1000. This, the court held, amounted to an unconstitutional taking of the landowner's property.

Although there are less potent examples on both sides of this battle between the "ecological and the constitutional" as Chief Justice Wilkins put it in Volpe, so-called conservationists and ecologists are quick to point out the cases of Zabel v. Tabb[114] from the United States Fifth Circuit Court of Appeals, and Just v. Marinette County[115] from Wisconsin.

In Zabel v. Tabb, the suit was brought to compel the Secretary of the Army through the Chief of Engineers to grant a permit to dredge and fill in the navigable waters of Boca Ciega Bay in Pinellas County near St. Petersburg, Florida. The landowners own land above and below the water, and they wished to dredge and fill their property in the Bay for a trailer park, with a bridge or culvert to their adjoining upland. When the permit was filed there was much opposition from private sources, as well as from the U. S. Fish and Wildlife Service. The Court said that the evidence showed the dredging and filling would have a distinctly harmful effect on the fish and wildlife resources of Boca Ciega Bay, but no material adverse effect on navigation. The case was decided against the government by the lower court, but the Fifth Circuit reversed. The court held that the Congress has the power to protect wildlife in navigable waters.

> "We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own

> infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.[116]
>
> . . . In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce."[117]

The Supreme Court of Wisconsin in the Just case had an even weaker fact situation than in Sabel, but the Court chose to establish new ground in the subject. The Justs owned 36.4 acres on Lake Noquebay, a navigable lake in Marinette county. They subdivided the land and sold land extending back from the lake some 600 feet.

> "This property has a frontage of 366.7 feet and the south one half contains a stand of cedar, pine, various hard woods, birch and red maple. The north one half, closer to the lake, is barren of trees except immediately along the shore. The south three fourths of this north one half is populated with various plant grasses and vegetation including some plants which N. C. Fassett in his manual of aquatic plants has classified as "aquatic." There are

> also non-aquatic plants which grow upon the land. Along the shoreline there is a belt of trees. The shoreline is from one foot to 3.2 feet higher than the lake level and there is a narrow belt of higher land along the shore known as a "pressure ridge" or "ice heave," varying in width from one to three feet. South of this point, the natural level of the land ranges one to two feet above lake level. The land slopes generally toward the lake but has a slope less than twelve per cent. No water flows onto the land from the lake, but there is some surface water which collects on land and stands in pools."[118]

The land is designed as swamps or marshes on the United States Geological Survey Map, and is included as wetlands under the state statute. In order to place more than 500 square feet of fill on the land the Justs were required to obtain a permit from the zoning administrator of the county. They brought in more than 500 square feet on the wetlands part of the property. The Justs sought a declaratory judgment and the court found in favor of the county. The court formed the issues in terms of a reexamination of the problem. They said that land and water in its natural state are unpolluted. The state, under the trust doctrine, has the duty to eradicate

the present pollution and to prevent further pollution in its navigable waters. This is a maintenance of the natural status quo of the environment. In order to see the court's rather unique approach, it is worthwhile to quote the court's language extensively:

> "What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps andwetlands were once considered wasteland, undesirable, and not picturesque. But as people became more sophisticated, an appreciation was acquired that swamps andwetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.
>
> Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?
>
> . . .

This is not a case where an owner is prevented from using his land for natural and indigenous uses. The uses consistent with the nature of the land are allowed and other uses recognized and still others permitted by special permit . . . . .

Changes and filling to some extent are permitted because the extent of such changes and fillings does not cause harm. We realize no case in Wisconsin has yet dealt with shoreland regulations and there are several cases in other states which seem to hold such regulations unconstitutional; but nothing this court has said or held in prior cases indicate that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.

. . .

The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and

preserve those waters for fishing, recreation, and scenic beauty.

. . . To further this duty, the legislature may delegate authority to local units of the government, which the state did by requiring counties to pass shoreland zoning ordinances.

This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state. They have been held subject to special taxation, and are subject to the state public trust powers, and since the Laws of 1935, ch. 303, counties have been authorized to create special zoning districts along waterways and zone them for restrictive conservancy purposes. The restrictions in the Marinette county ordinance upon wetlands within 1,000 feet of Lake Noquebay which prevent the placing of excess fill upon such land without a permit is not confiscatory or unreasonable.[119]

. . .

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public. It is observed that a use of special permits is a means of control and accomplishing the purpose of the zoning ordinance as distinguished from the old concept of providing for variances. The special permit technique is not common practice and has met with judicial approval, and we think it is of some significance in considering whether or not a particular zoning ordinance is reasonable.

. . .

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be

considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

We are not unmindful of the warning in Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322:

". . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans."[120]

IV "THE TAKING ISSUE"

In 1973, the President's Council on Environmental Quality published a Study and Report called "The Taking Issue."[121] which is available through the U. S. Government Printing Office. The purpose of the Report was in Chairman Russell E. Train's words to "clarify and inform public debate, in order that American's future can be better served by a more rational system of land use policies and controls."[122] He admitted that the subject (rights of private property and the constitutional limits to public control of those rights) is "fraught with emotion"[123] and is not well understood but nevertheless one of serious national concern.

The Report is extremely well done, but is, it can be argued, almost a brief in favor of overwhelming controls on private land use in the flood plains and in the coastal zones. After an historical analysis of the background and the existence of the "taking clause" of the fifth amendment,[124] the report argues that Justice Holmes rewrote[125] the constitution in Pennsylvania Coal Co. v. Mahon.[126] The case dealt with a statute of the Pennsylvania legislature which banned the taking of coal under land wherein structures, rights of ways, cemeteries, residences, etc., may be caused to cave-in, subside or collapse. The plaintiffs in that case purchased property in which the minerals had years before been conveyed. When the coal company was about to mine they wrote the plaintiffs a warning letter. The plaintiffs thereafter requested an injunction against the mining which

was finally refused. Holmes' analysis in the case, the Report said, went against prior law, especially when he said that the taking issue was of degree and not of kind. The question, he said, was where to draw the line, and that depended on the facts of each case. Holmes, in effect, held that the fourteenth amendment incorporated the "taking clause" of the fifth amendment.

Thereafter, the classic zoning cases in the 1920's, Euclid, Gorieb and Nectow utilized the Holmes reasoning and the decision became "black-letter law."[127]

The Report then exhaustively goes into the current law not only on flood plain and wetlands zoning but into general zoning law as well. Open space doctrines are discussed,[128] as well as preservation of historic building[129] and aesthetic zoning attitudes.[130] The approach then becomes one of building the reader to a point where a strong argument is made that the "taking issue" is really built on a myth. It is argued that most "taking" cases in the 60's and 70's have been won by governmental authorities.

> "Measuring changes in the law by counting ayes and nays is risky business, but this list gives some rough sense of the way the cases have been going. Local governments have won most of them but then they always have. The 'myth' of the taking clause has always lured

landowners to expect more from it than prior precedents really justify."[131]

The Report then argues that some public objectives are more important than others, and that there are "heavy-weight" public purposes to be attained over almost all obstacles.[132]

> "The myth of the taking clause says that government can never tell a man that he can't "use" his land (i.e., make money out of it) unless it pays him compensation. In reality, however, courts have often upheld regulations that effectively prohibit any profitable use of land if the regulation serves a "heavyweight" public purpose."[133]

Dangerous water-filled quarries, destruction of cedar trees which spread fungus to orchards and fruit trees, and the Just v. Marinette County type of factual situations are given to demonstrate "heavyweight" public purposes necessitating strong public regulation of private properties.[134]

It is this type of emotive reasoning which weakens the ecologist's approach. To argue that enjoining quarrying after the landowner has taken vast quantities of sand and caused substantial danger to human life generally, and to uphold regulation of fungus spreading trees to a certain distance from

orchards and fruit trees should lead to wholesale ecological controls under most any circumstances is the type of brief writing and generalization which should be taken for what it is.

Even to the casual observer of the judicial scene, it is apparent that courts have always been filled with "judicial restraint" when confronted with the task of invalidating statutes and ordinances of any legislative body. But this does not mean that astute judges, such as Oliver Wendell Holmes, Jr., must never intervene in aid of private property owners. After the Supreme Court zoning cases of the 1920's, state and lower federal courts were left with the complex problem of balancing between rights of private landowners and state control over land use.[135] It is quite difficult to find consistent patterns of cases and to tie it all up in a neat package. But this is what Justice Holmes saw as the result of the dilemma of private property ownership within a system of partial state regulation.

The ecological optimists who seem to be confounded forget the Holmes' dicta that the life of the law has not been logic but experience. If our collective state and national experiences demonstrate that it is time to put clamps on private development along our coasts and our flood plains, it shall be so. Framing all of this in tight conceptual packages is foolishness from another day.[136]

V. THE "TAKING ISSUE" IN ALABAMA LAND USE LAW DECISIONS

If we try to gain an overview of the Alabama decisions on land use law, it becomes quite apparent that the courts have been quite hesitant to overturn local zoning authorities. Examples of the courts' leniency are abundant. The decisions relating to spot zoning and comprehensive zoning are outstanding instances of this judicial restraint. Anytime a court approves the notion that "the term spot zoning is nothing more than a catchy phrase,"[137] we should be forewarned that the decision makers are going to approve a great deal of what the zoning authorities are going to do.

The case of Burma Hills Development Co. v. Marr[138] is also instructive in the same fashion. The court held there that a restrictive covenant or the right to enforce a restrictive covenant does not constitute a property right or interest which requires the payment of compensation to those entitled to enforce the covenants. The cost to the state, the court said, could be highly prohibitive, and compensation to surrounding owners would greatly restrict the rights of the state to condemn property. The court "admitted" that they were taking a minority view in the country, but they felt a compulsion to protect the public purse rather than the rights of sometimes thousands of property holders.

These policy attitudes are important guides to what could happen when the flood plains and coastal areas of Alabama are regulated. Although

the court has held that local authorities cannot completely prohibit the carrying on of a lawful business such as a rock crushing plant outside of a comprehensive zoning ordinance,[139] it has also held that it can be "regulated."[140] The Alabama cases seem to say that the zoning authorities may control land uses which are of danger to the general vicinity, even though a landowner may find it extremely difficult to conform to reasonable standards. In Southern Rock Products Company v. Self,[141] the company was denied a permit to carry on a quarrying operation, although the property was zoned for general industry, because the operation would cause noise, vibration, fumes, and dust affecting a considerable portion of the city. The court held that the municipality had authority to pass a zoning ordinance which regulated the use of private property prohibiting the removal or crushing of rock from lands lying in certain areas or under certain conditions. In addition, the company had the burden of proof to demonstrate that it was not and would not in the future affect the public with offending noises, vibrations and dust in violation of a valid city ordinance.

It is true that the court has held that a prohibition against any "practical" use of the landowner's property would not be approved.[142] But the cases do not involve "nuisance-like" uses. It seems that the use of the nuisance argument in the flood plain cases, in particular, have a chance of success.[143] Hazards wrought by quarrying and the presence of high structures near airports, it can be argued, are no more dangerous

than obstructions in floodways. And if the state has wielded too heavy a stick against all practical uses, individual landowners can appeal to boards of adjustments for redress or to the courts where factual circumstances demonstrate injustice. In other words "all practical use of land" does not mean authorization of a "noxious" use which may injure others.

The coastal zoning issue is a harder issue for the courts. The scarcity of uses which can be authorized along a coastal wetland squarely raises the question of forcing landowners to shoulder the greater financial and physical burden of protecting the shorelines. It may be, as the Wisconsin court said, in Just v. Marinette County,[144] that landowners should only be allowed to use these lands in their natural states and not change the "lay of the land." But this is a new doctrine and if applied to all land use control measures would, in effect, cut land development to an absolute minimum. A number of eastern states,[146] Connecticut and New Jersey[147] in particular, are acquiring tidal marshlands under eminent domain powers, and in the final analysis, this may be the only answer. Acquisition of key areas by federal and state governments would be an important step in coastal land use controls generally.

The problem lends itself to philosophical discussion. It seems that those bent on enforcing stringent regulations are saying that landowners who own tidal coastline areas have been given a windfall. These innuendoes go

straight to the heart of our land ownership system. The same can be said about any kind of landowner in any part of the United States. As Holmes implied, if we accept our system of land ownership, regulation of land use is a matter of degree, and government should not cross certain lines whatever the necessities of the case unless the danger to lives and property are immense.

VI. CONCLUSIONS AND SUGGESTIONS FOR ALABAMA

The purpose of this report has been to describe and critically analyze land use statutory and judicial materials affecting Alabama. It is useless for us to appraise the law in the light of political realities unless there is a special expertise involved. To say, for example, that the Alabama Development Office should suggest to the legislature that the exemptions in the Coastal Management Act be modified would bring forth a knowing smile from an astute reader. These are the kinds of things which are quite obviously subject to constitutional attack in our coastal management legislation, and further discussion would be repetitious. Yet there are specific proposals concerning flood plain zoning which have a reasonable chance of being accepted.

The first suggestion should result in immediate legislation. There is no reason, except oversight, for municipalities to lack the specific power to zone their flood plains. Enabling legislation should be quickly forthcoming.

This legislation, however, should be coupled with some type of regional watershed controls which demand that both municipalities and counties involved in the same watersheds act together to zone the flood plains. There is a strong possibility that HUD will demand working relationships anyway and it would be to Alabama's credit if it began doing this kind of thing before being ordered to do so.

No specific suggestions will be made concerning the Coastal Management Act. Although there are provisions therein which are subject to attack on constitutional grounds, it seems that there is no real opportunity to amend the act. Unless the legislature is receptive to the changes in the act outlined in this report, there is no reason to tamper with the situation. At least the present act has the merit of enabling regional controls and it is the first Alabama land use statute to do so with appropriate sanctions.

FOOTNOTES

1. F. Bosselman, D. Callies, J. Banta, The Taking Issue 155 (1973) The authors seemingly object to the courts treating the two types of controls differently.

2. Ibid at 213.

3. H. Cohen, Land-Use Regulations in Flood-Prone Areas 3 (1970).

4. 41 U.S.C. § 4022 (1970).

5. H. Cohen, supra note 3 at 3.

6. Id. at 4.

7. This information was obtained through discussion with Mr. Nicholas Lally, Director, Flood Plain Management Division, Federal Insurance Administration, U. S. Department of Housing and Urban Development, Washington, D.C. A sample ordinance is attached and listed as Appendix I which is of the first variety of "good faith" ordinances.

8. S. Snow, Study of Guidelines for Land Management and Use of Flood Prone Areas in Alabama (1973).

9. There are other new types of protections being offered in Congress both for the protection of individuals and to help the States and local authorities to enter the flood insurance programs. At present there are proposed Congressional Amendments to the Housing and Urban Development Act of 1968 which provide that sellers or lessors of property within flood hazard areas must notify the purchaser or lessee of such land within a reasonable period in advance of the signing of the purchase agreement, lease or other documents. There is also a proposed amendment allowing the Secretary of HUD to insure protection from 100 year floods if the Secretary shall find that the community is making "adequate progress" where certain percentages of the costs of the flood protection system has been appropriated and expended. Congressional Record, House, 5448-5449, June 30, 1974. There is some urgency for Congress to pass legislation preventing victimization of the public by landowners and speculators where land is flood prone. In Comment, Ecological and Legal Aspects of Flood Plain Zoning, 20 Kansas L. Rev. 268, 273 (-274) (1972) it was said: "Flood frequency is determined by engineering studies; therefore a layman could not be expected to appraise the

flood danger accurately without assistance from specialists. And even when this information is available, there is evidence that it is either not fully understood or that it is ignored. Flood control projects may be one cause of misunderstanding. Bankers and realtors in Topeka, Kansas who have access to information concerning flood dangers indicated in interviews that they paid more attention to information concerning protection from floods, than to information concerning flood dangers. Because they based their decisions to lend or buy on a distorted consideration of the facts, they contributed to victimization of the public even though their decisions were made in good faith. On the other hand, if the land is zoned as flood plain, bankers are not willing to take buildings located thereon as loan collateral. Presumably the flood danger does not become apparent until official action is taken."

10. Ala. Code, tit. 12, §341-364 (1958) (Supp. 1973).

11. Id. §344.

12. Id. §342.

13. Id. §341.

14. Id. §341.

15. Id. §348.

16. Id. §359.

17. Id. §343.

18. See Teclaff, The Coastal Zone-Control over Encroachments, 1 J. Maritime L. and Comm. 241, 279 (1970).

19. Ala. Code, tit. 37, §777 (1958).

20. Ala. Code, tit. 37, §462, §785, §797 (1958) (Supp. 1973). See also Wheat v. Ramsey, 284 Ala. 295, 224, So. 2d 649 (1969).

21. See Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291, 300 (1972).

22. See also discussion thereof in F. Bosselman, D. Callies, J. Banta, supra note 1 at 233-235.

23. See Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67,

(1965) noted in 18 Ala. L. Rev. 182 (1965).

23a. See Hines, Howe and Montgomery, Suggestions for a Model Flood Plain Zoning Ordinance, 5 Land and Water L. Rev. 322, 343 (1970) "The strong policy grounds of flood plain regulation require a nonconforming use provision which is tailored to the statutory goals . . . If the nonconforming use provision generates political opposition, then that battle is nonetheless preferable to flood plain regulation which is an empty letter."

24. See R. M. Anderson 1 American Law of Zoning, §6.65, 446-451 (1968).

25. H. Cohen, Land-Use Regulations in Flood-Prone Areas (1970).

26. 151 Conn. 304, 197 A. 2d 770 (1964).

27. Id. at 197 A. 2d 773.

28. Vartellas v. Water Resources Commission, 146 Conn. 650, 153 A. 2d 822 (1959).

29. Id. at 153 A. 2d 825-826.

30. 1 Ill. App. 3d 376, 274 N.E. 2d 144 (1971).

31. Id. at 274 N.E. 2d 146. On these points see Comment, Flood Plain Zoning in California-Open Space by Another Name: Policy and Practicality, 10 San Diego L. Rev. 381 (1973).

32. 30 Mich. App. 53, 186 N.W. 2d 43 (1971).

33. Id. at 186 N.W. 2d 46. See Bartke, Dredging, Filling and Flood Plain Regulation in Michigan, 17 Wayne L. Rev. 861, 900-901(1971) for an adverse opinion.

34. Wilkes, Constitutional Dilemmas Posed by State Policies Against Marine Pollution - The Maine Example, 23 Main L. Rev. 143, 172 (1971).

35. Id. at 152. The cases demonstrate that careful drafting of the use provisions of flood plain zoning ordinances is a necessity to avoid constitutionally based attacks. See Pitney, Zoning - Areas of Critical Environment Concern, New Jersey St. B. J. 34, 39 (No. 65, Fall 1973). See Also Comment, County and Municipal Flood Plain Zoning Under Existing Wyoming Legislation, 7 Land & Water L. Rev. 103, 104 (1972).

36. _____ Mass. _____, 284 N.E. 2d 891 (1972). cert. den. 409 U.S. 1108; 46 A.L.R. 3d 1422 (1973).

37. Id. at 284 N.E. 2d 894.

38. Id. at 900.

39. 16 U.S.C.A. §1451-1464 (Supp. 1974).

40. Wilkes, supra note 34 at 149.

41. Heath, Estuarine Conservation Legislation in the States, 5 Land & Water L. Rev. 351, 352 (1970).

42. Teclaff and Teclaff, Saving the Land-Water Edge From Recreation, For Recreation, 14 Ariz. L. Rev. 51, 63-64 (1972).

43. Id. at 51-52.

44. See N.Y. Times, p. 50, Sat. Mar. 2, 1974.

45. The real penalties to a State which does not adopt a Coastal Area Management Act is denial of research funds and a kind of "black mark between the lines" with Federal officials. Of course, this may not mean much to tough states-rights advocates. See N.Y. Times, p. 50, Mar. 2, 1974. See also Knight, Proposed Systems of Coastal Zones Management: an Interim Analysis, 3 Nat. Resources Law. 599, 603 (1970). "What is involved is a struggle between uniformity and special interests . . . a strong federally administered program of coastal zone management would ensure uniformity and consistency in developing what is obviously a national resource; while the unique problems of each state and locality dictate that the decision-making apparatus be situated closer to the source of the problem."

46. 16 U.S.C.A. Supra, note 55 at §1455.

47. Id. §1456.

48. Id. §1460.

49. See "States' Rights Issue is Holding Up a Federal Program to Protect Coastlines," N.Y. Times, p. 50, Mar. 2, 1974.

50. Ala. Code, tit. 8, §312-322 (1958) (Supp. 1973).

51. Id. § 312, § 313, §314.

52. Id. § 312(c).

53. Id. § 312(e).

54. Id. § 312(g).

55. Id. § 313(b).

56. Id. § 313(c).

57. Id. § 314(a).

58. Id. § 315(e).

59. Id. § 315(h).

60. Id. § 315(i).

61. Id. § 315(j).

62. Id. § 315(k).

63. Dunham, Flood Control Via The Police Power, 107 U. of Penn. L. Rev. 1098, 1128-1129 (1959).

64. Ala. Code, tit. 8, § 318 (1958) (Supp. 1973).

65. Id. § 319.

66. Id. § 317(g).

67. R. M. Anderson, 1 American Law of Zoning § 3.10, 140 (1968).

67a. See Comment, Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning, 49 N. C. L. Rev. 866, 881-883 (1971).

68. Heath, supra note 41 at 357.

69. Id. See also Note, Coastal Wetlands in New England, 52 Boston U. L. Rev. 724, 739 (1972).

70. Note, State and Local Wetlands Regulation: The Problem of Taking

Without Just Compensation, 58 Va. L. Rev. 876, 880 (1972).

71. Heath, supra note 41 at 363.

72. F. Bosselman, D. Callies, J. Banta, The Taking Issue 261-262 (1973).

73. Ala. Code, tit. 8, §314(a) (1958) (Supp. 1973).

74. Cohen, Water Law in Alabama - A Comparative Survey, 24 Ala. L. Rev. 453, 465 (1972). See also Clineberg and Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 So. Car. L. Rev. 7, 10 et. seq. (1971).

75. Cohen, supra note 74 at 468.

76. Id. at 469.

77. See the discussion in Brion, Virginia Natural Resources Law and the New Virginia Wetlands Act, 30 W. & L. L. Rev. 19, 50 (1973).

78. Porro and Teleky, Marshland Title Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323, 325 (1972).

79. Id. at 326.

80. See the landmark decisions in State v. Boros, 257 Ala. 690, 60 So. 2d 843 (1952), and State v. Inman, 239 Ala. 348, 195 So. 448 (1940).

81. Cohen, supra note 74 at 470.

82. See Comment, Title to Subaqueous Lands in Alabama, 11 Ala. L. Rev. 273, 286 (1959).

83. Id. at 286.

84. 175 F. 2d 644, 647 (5th Cir. 1949).

85. Ala. Const. 1901, Art. 4, §99.

86. Ala. Code, tit. 55, §66 (1958).

87. Ala. Code, tit. 47, §60 (1958).

88. Although the subject is not one which can be easily unraveled, the

statement made here of the doctrine is the generally accepted one. For a complete discussion of the history and relevancy of the theory see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473, 476-468 (1970).

89. Comment, supra note 82 at 285.

90. Ala. Code, tit. 8, §112 (1958).

91. Comment, Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish, 23 Ala. L. Rev. 100, 102 (1970).

92. Cohen, supra note 74 at 470.

93. Hagan v. Campbell, 8 Port. 9, 26 (1838).

94. State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).

95. Id. at 259 Ala. 183. The latest U. S. Supreme Court case on the subject, Bonelli Cattle Company v. Arizona, U. S. 94 S. Ct. 517 (1973) held that the rechanneling of the Colorado River was a relocation of the waters by artificial means and accretion caused thereby should be treated as the property of the riparian owner. See also Rice, Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control, 46 N. C. L. Rev. 779, 806 (1968).

96. See Sax, supra note 88 at 553-556.

97. F. Bosselman, D. Callies, J. Banta, supra note 71 at 311.

98. Id. at 312-313. For an opposing argument see Abbott, Some Legal Problems Involved in Saving Georgia's Marshlands, 7 Geo. St. B. J. 27, 29 (1970).

99. 40 N.J. 539, 193 A. 2d 232 (1963).

100. Id. at 193 A. 2d 234.

101. Id. at 235.

102. Id.

103. Id.

104. Id. at 239.

105. Id. at 240.

106. Id. at 241-242.

107. Id. at 242.

108. 349 Mass. 104, 206 N. E. 2d 666 (1965).

109. Id. at 206 N. E. 2d 671-672. See also MacGibbon et al. v. Board of Appeals of Duxbury, 356 Mass. 696, 255 N. E. 2d. 347 (1970).

110. 265 A. 2d 711 (Sup. Jud. Ct. Me. 1970) noted in 46 A. L. R. 3d 1422 (1972).

111. Id. at 716.

112. Id. at 717. It is interesting to note that the Maine court is not merely going out of its way to halt environmental "progress." In In Re Spring Valley Development, 300 A. 2d 736 (1973) the court upheld a legislative enactment called the "Site Location Law" which required persons intending to construct or operate a development which may substantially affect local environment to notify, before commencing the construction, the Environmental Improvement Commission. The Commission can then determine after a hearing whether the development will adversely affect the environment. Although the Johnson case was cited, the court said that there was nothing here which constituted an unreasonable burden on property as would amount to an uncompensated taking as in the Johnson case.

113. 161 Conn. 24, 282 A. 2d 907 (1971). For a discussion of the Connecticut, Massachusetts, and Maine cases see Comment, The Wetlands Statutes: Regulation or Taking? 5 Conn. L. J. 64 (1972).

114. 430 F. 2d 199 (5th Cir. 1970).

115. 56 Wis. 2d 7, 201 N. W. 2d 761 (1972).

116. Zabel v. Tabb, supra note 114 at 201.

117. Id. at 203-204.

118. Just v. Marinette County, supra note 115 at 201 N. W. 2d 766.

119. Id. at 768-769.

120. Id. at 770-771.

121. F. Bosselman, D. Callies, J. Banta, The Taking Issue (1973).

122. Id. in "Foreword."

123. Id.

124. Id. at 104.

125. Id. at 124.

126. 260 U. S. 393 (1922).

127. The Report correctly states that the Supreme Court then almost retired from 'the field' of land use law. F. Bosselman, et al, supra note 121 at 138.

128. Id. at 168.

129. Id. at 182.

130. Id. at 188.

131. Id. at 232.

132. Id. at 195.

133. Id. at 257.

134. Id. at 257-265.

135. Id. at 195.

136. See Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149, 186 (1971) "In short, rather than fumbling with doctrinal labels and legal accusations, we can put our energy into trying to determine what resolution of conflicting uses is likely to maximize total net benefits for us, and how we can best achieve that goal." Michelman, Property, Utility, and Fairness: "Comments on the Ethical Foundations of Just Compensation" Law, 80 Harv. L. Rev. 1165, 1258 (1967). "That Holmes had some inkling . . . of the long view is indicated by his insistence that civilized governments impose disproportionate hardship on citizens only when they cannot help it. . ." See also Van Alstyne, Taking or Damaging By Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1 (1971).

137. Come v. Chancy; 289 Ala. 555, 269 So. 2d 88, 17 (1972).

138. 285 Ala. 141, 229 So. 2d 776 (1969).

139. Reynolds v. Vulcan Materials Company, 279 Ala. 363, 185 So. 2d 386 (1966).

140. Southern Rock Products Company v. Self, 279 Ala. 488, 187 So. 2d 244 (1966).

141. 282 Ala. 186, 210 So. 2d 419 (1968).

142. See for example, Zoning Board of Adjustment v. Wright, 283 Ala. 654, 220 So. 2d 261 (1969).

143. See however, Van Alstyne, supra note 136 at page 15 where it is said in relation to the nuisance arguments, "Yet, at the same time, novel and nontraditional policy goals, perceived as lacking in broad community acceptability, have sometimes failed to obtain judicial approval. Objectives with a strong historic pattern of social approval are thus more likely to survive constitutional attack than those which are regarded as avant garde."

144. Supra note 115.

145. Heath, Estuarine Conservation Legislation in the States, 5 Land and Water L. Rev. 351, 364 (1970).

146. Id. at 369. See also Comment, Coastal Zoning, 4 Vand. Int. L. J. 127, 135-136 (1970). Even where the state has the right to acquire coastal lands, "when local subdivisions are faced with a choice between retaining their broad tax base afforded by industry; and, on the other hand, authorizing condemnation expenditures necessary to implement the zoning plan" they do not respond favorably when forced to choose the wetlands. Id. at 135.

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