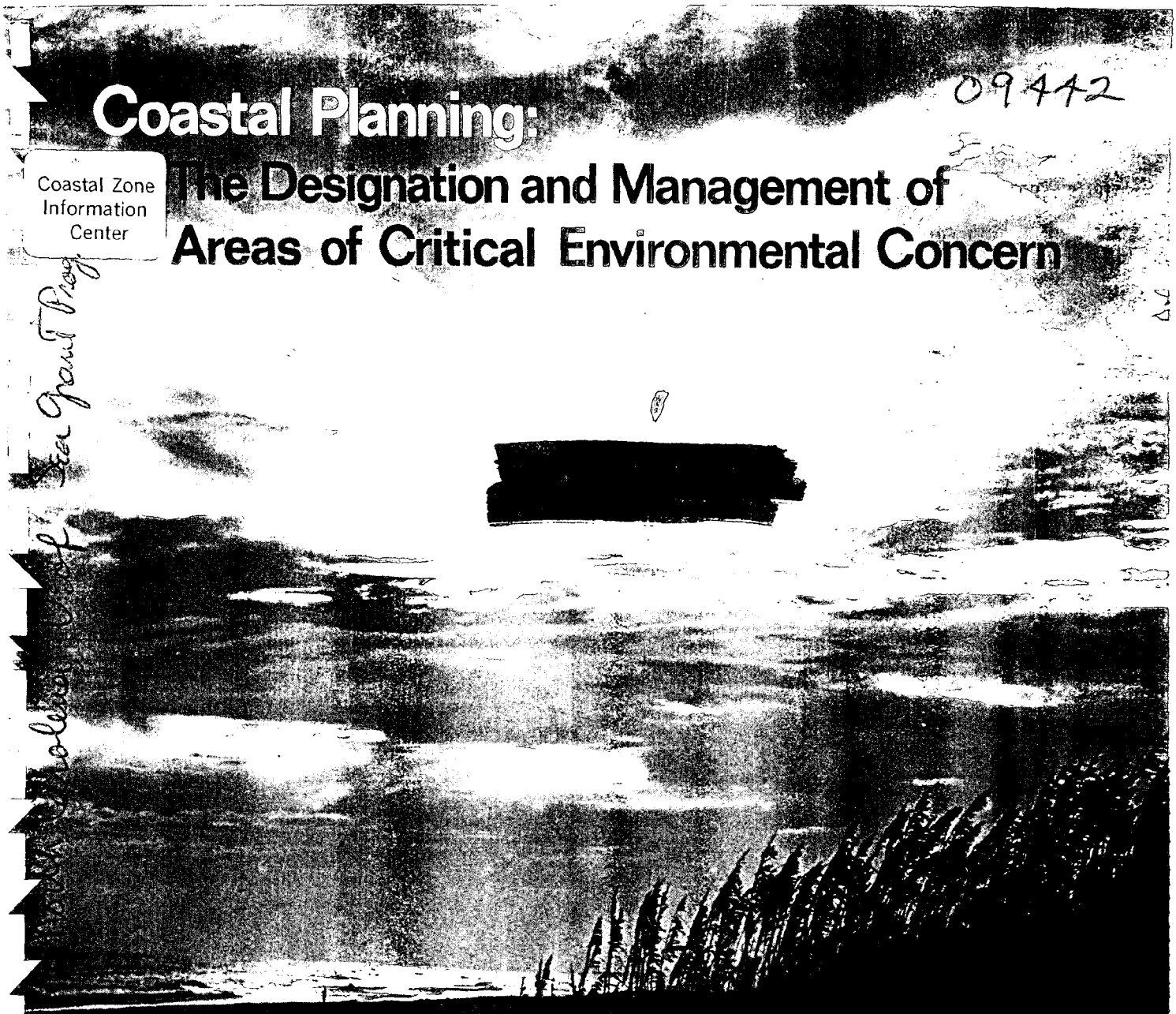

Coastal Planning:

The Designation and Management of Areas of Critical Environmental Concern

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Thomas J. Schoenbaum
Kenneth G. Silliman

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BY

THOMAS J. SCHOENBAUM

WITH

KENNETH G. SILLIMAN
Research Assistant

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Summary

The designation and management of areas of particular environmental concern is likely to become increasingly important as a tool of coastal planning. Uncertainty exists, however, as to whether the administrative and constitutional problems involved in the use of this mechanism can be overcome. This study suggests that such problems are soluble if the agency is aware of the legal limitations and takes steps to design a designation and management process that takes careful account of such limits.

COASTAL PLANNING: THE DESIGNATION AND MANAGEMENT OF AREAS OF CRITICAL ENVIRONMENTAL CONCERN

Thomas J. Schoenbaum*

Kenneth G. Silliman**

I. INTRODUCTION

One of the most interesting and controversial methods of land use control that has emerged in recent years is the regulation of development in "areas of particular concern".[1] This concept, which is a feature of several land use planning laws at the federal and state levels, is predicated on two fundamental ideas: (1) that there are certain geographical areas possessing characteristics so that special management attention is appropriate and (2) that responsibility for these areas should be primarily vested at the state level.

The advantages of this development control technique over more traditional methods are that it compels the identification of the fragile or important areas that are of special value and focuses regulation directly on safeguarding the natural characteristics, resources or public investments of the sites. The regulatory authority can also base its decision on the impact of the proposed action on the dynamics of the whole natural and human environment involved instead of on one or a few parameters, such as water or air quality.

Despite these attributes, the actual use of this technique has not been widely established. The attention of land use planners has been largely directed toward other issues, such as growth control. Moreover, area of particular concern designation and management has been retarded by unresolved legal and technical problems. Foremost among these are the level of information necessary and what values are of particular con-

cern, what are the criteria for development in such area, and whether regulation can be carried out without infringing established constitutional norms.

Nevertheless, area of particular concern designation will be of increasing importance as a regulatory tool. A requirement of the Coastal Zone Management Act of 1972 (CZMA) is that each state, in order to qualify for federal funds, must include in its coastal management program "an inventory and designation of areas of particular concern within the coastal zone".[2] The function of this designation is to assure the assertion of a measure of state-level control over areas of significant natural, historic or resource value, natural hazard areas and areas of unique significance to industrial or commercial development.[3] Specific attention must be given by coastal states to developing policies and a decisionmaking process to manage these areas, including guidelines on priority of uses.

Virtually all the eligible coastal states have applied for or received planning money under the CZMA to develop a coastal management program.[4] Coastal planning has become the cutting edge of land use planning in the United States. Area of particular concern designation and management will be one of the key elements in the elaboration of their management programs. The purpose of such designation is not necessarily to exclude all development in such areas,[5] but only to assure that they are subjected to special management so that their essential values and functions are not destroyed. The underlying concept is that in certain areas of the coastal zone private ownership rights are intimately bound up with public goods, such as waters, wetlands, wildlife and sites of important public investment such as ports, airports and parklands. In this instance the unregulated market, which is ordinarily relied upon to allo-

cate scarce economic goods, does not properly reflect the cost diminution or degradation of common property resources since the jointness in supply characteristic of such goods renders competition and a competitive market price impossible.[6] In order to protect public resources, then, a system of administrative allocation must supplement the market function in such areas.[7]

II. AN OVERVIEW OF AREAS OF CRITICAL CONCERN LEGISLATION

The inclusion of the concept of areas of particular concern in the CZMA reflects the influence of the Model Land Development Code of the American Law Institute (ALI), a suggested uniform law for state land use legislation, which includes provision for direct state-level intervention in the designation and management of "areas of critical state concern".[8] Such treatment is reserved for areas of major public investment of more than local significance, important historical, natural or environmental resource lands, proposed new community sites and lands within the jurisdiction of local governments which have not adopted development ordinances.[9] After the designation of these areas, local governments are required to control development in compliance with standards established by the state. Local development decisions may be appealed by the state to a state-level adjudicatory board.[10]

Despite the widely acclaimed "quiet revolution"[11] in state land use planning legislation, very few states have so far accepted this approach. Comprehensive "critical areas" laws have been defeated in several jurisdictions.[12] Many states, however, have adopted embryonic critical areas controls in the form of subjecting particular regions or resource areas to

state or regional-level development controls. For example, most coastal states have adopted regulations for wetlands, which are usually defined in terms of tidal data or plant species.[13] An increasing number of states set the criteria for the designation of flood plains and require local governmental regulation of development within them.[14] State coastal zone management laws have afforded protection to shorelands,[15] shorelines of statewide significance[16] and arbitrary geographical areas in close proximity to the land-water margin.[17] Moreover, large geographical areas in New York,[18] New Jersey[19] and California[20] have been singled out for special management. A few states have attempted state-wide zoning.[21]

Full-blown critical areas designation and management authority of the type envisioned by the ALI Model Land Development Code has only been enacted in a handful of states, however, and nowhere is it fully operational. Six states, four of which are "coastal states"[22] eligible to participate in coastal management under the CZMA have taken the lead in the use of this planning tool: Florida, Oregon, Minnesota, North Carolina, Nevada and Colorado.

The Florida Land and Water Management Act of 1972, is one of the earliest critical areas laws. The governor and his cabinet are empowered to declare a geographical unit an area of critical state concern if it contains environmental, historical, natural, or archeological resources of regional or statewide significance, is an area significantly affected by a proposed major public investment, or is of major development potential.[23] An area must be recommended by the state land planning agency, which must specify its boundaries, the basis and reasons for its inclusion and principles for guiding its development.[24] Local governments and regional planning agencies affected must be given notice of any proposed recommendation and, in the event of a designation, must adopt and enforce land development regulations that have been approved by the state land plan-

ning agency.[25] If enforcement at the local level is inadequate, the state land planning agency can institute suit to compel enforcement.[26]

Critical area designation in Florida has proceeded very slowly, due largely to political pressures and the difficulty of compiling an administrative basis for the designation showing that the area is in fact of state or regional significance. Three areas, the Big Cypress Swamp, the Green Swamp and the Florida Keys have been designated,[27] and more than sixty additional areas are under study.[28] This experience shows that Florida's program has not yet been able to overcome the legal and technical obstacles to designating a multiplicity of smaller areas as critical. Only large resource areas whose statewide importance is easy to defend have been included.

Oregon has also devoted considerable effort to critical area designation. Under the Oregon Land Use Law of 1973, a Land Conservation and Development Commission (LCDC) was established with the authority to review and recommend to the Legislative Assembly the designation of areas of critical state concern.[29] Priority consideration may be given to the planning and siting of three kinds of activities, public transportation facilities, public utilities, such as sewage and water supply systems, and public schools, as well as ten categories of geographical areas: (1) lands adjacent to freeway interchanges, (2) estuarine areas, (3) tide, marsh and wetland areas, (4) lakes and lakeshore areas, (5) wilderness, recreational and outstanding scenic areas, (6) beaches, dunes and coastal headlands, (7) wild and scenic rivers, (8) flood plains and hazard areas, (9) unique wildlife habitats, and (10)agricultural land.[30] The designation of particular areas is, then, a cumbersome administrative and legislative process which is carried out on a case-by-case basis. For each area of critical concern recommended, the LCDC must

specify the criteria developed and the reasons for the proposed designation, the damages that would result from uncontrolled development and suggested state regulations that would apply within the proposed area.[31] Not surprisingly, the implementation of this program in Oregon has been slow[32]; to date only one area, the Willamette River Greenway, has been designated.

In Minnesota the critical areas designation process begins with the Environmental Quality Council which is authorized to prepare criteria for the selection of two types of critical areas, sites surrounding major governmental development facilities and historical, natural, scientific, or cultural resources of regional or statewide importance.[33] Specific critical areas can only be designated by the Governor upon the recommendation of the Environmental Quality Council, which must specify its boundaries, the basis of the designation and principles for guiding development in the area.[34] The Governor's designation is effective for not longer than three years, and permanent approval must be obtained by the legislature or the appropriate regional development commission.[35] The lower St. Croix River is the only area which has so far been designated by the Governor under this process.[36]

North Carolina's "area of environmental concern" (AEC) program is a critical areas process that applies only in twenty counties covered under the Coastal Area Management Act of 1974.[37] This law requires local governmental units to adopt land use plans pursuant to state-level guidelines and subject to the approval of a state agency, the Coastal Resources Commission.[38] The AEC program is intended to supplement the local planning process by creating a separate state-local system of direct control of development in the designated areas. The AEC designation and implementation is thus independent of the planning and plan implementation process,[39] but the latter must be carried out to be consistent with and to protect the AEC program.[40]

Unlike Florida, Oregon and Minnesota, in North Carolina a state agency, the Coastal Resources Commission (CRC) has the authority to designate areas of environmental concern.[41] Categories of areas that may be the subject of designation include (1) coastal wetlands, (2) estuarine waters, (3) renewable resource areas (watersheds, acquifers and prime forestry land), (4) natural or historic areas (national or state parks, natural and scenic rivers, wildlife refuges, complex natural areas, remnant species areas, unique geological formations and historic sites), (5) public trust areas, (6) natural-hazard areas (sand dunes, beaches, floodways, erosion-prone areas and potential air inversion areas), and (7) sites around major public facilities.[42] The designation process is a formal rulemaking procedure involving notice, public hearing and a comment period.[43]

The implementation of this process has only begun despite the fact that the CRC has possessed this authority since 1974. The first step was the designation of Interim Areas of Environmental Concern[44] effective August 1, 1976. These include (1) coastal wetlands characterized by the presence of some of ten specified species of marsh plants, (2) estuarine waters including the coastal bays, sounds and the Atlantic Ocean to the limit of the state's jurisdiction, (3) several public water supply areas, (4) national and state parks, (5) ten properties owned by the State of North Carolina which have been designated by the Secretary of the Interior as National Historic Landmarks, (6) public trust submerged lands to the mean high water mark, (7) frontal dunes along the Outer Banks, (8) ocean and estuarine erodible areas and (9) complex natural areas that are nominated by members of the public.[45] The CRC has been inhibited by political and legal uncertainties from more extensive use of its authority to designate AEC's.

Two non-coastal states, Colorado and Nevada, have also established critical areas programs on the ALI model. In Nevada the Division of State Lands of the Department of Conservation and Natural Resources is authorized

to carry on a statewide land use planning process that includes the identification of "areas of critical environmental concern."[46] This term is defined very generally, however, as meaning any area where "uncontrolled development could result in irreversible degradation of more than local significance"[47], and this program is not typical because 86.4 percent of the lands of the state are federally owned.[48] The Colorado "areas of state interest" program is unique in that it is administered by local governments which are given the authority to designate areas of state interest and to grant or deny permits for development within such areas.[49] The state-level land use commission reviews local government designations and can nominate specific areas for inclusion.[50]

From this review of leading jurisdictions which have established critical areas programs, it is evident that no coherent process for the designation and management of such areas has emerged. Political considerations have prevented the full utilization of this management tool and the important administrative and constitutional questions inherent in such a program have yet to be faced. If critical areas programs and the mandate of the CZMA to establish coastal areas of particular concern are to be carried out, a process must be designed which surmounts and deals with the important legal questions involved. This, in turn, can lead to a greater political acceptance of these programs.

III. THE ADMINISTRATIVE AND CONSTITUTIONAL LAW FRAMEWORK FOR DESIGNATING CRITICAL AREAS: CASE STUDY - THE NORTH CAROLINA COASTAL AREA MANAGEMENT ACT

The North Carolina model for designating areas of environmental concern under the Coastal Area Management Act is a useful prototype for the analysis of the appropriate administrative framework for critical areas designation, particularly in the coastal zone. It is unique in setting

out relatively detailed statutory categories of coastal AEC's, in delegating the power to designate critical areas to a state-level agency with heavy local representation,[51] and in employing a relatively simple designation process.

The North Carolina designation process involves four major categories of administrative action. First, policies, standards and criteria must be developed by the CRC for the various types of AEC's. These must, of course, be consistent with the statutory categories,[52] but the CRC is specifically authorized[53] to adopt more detailed policies and standards. These include not only precise scientific criteria that will serve to define AEC's but also guidelines for priority uses within each particular category.[54] They should also include a statement of the policy basis for the inclusion of each type as an AEC. This is the first step in providing an adequate basis for the administrative action of designation. The second step of the process is the application of the standards and criteria to particular coastal resources. It is essential to carry out an inventory of resources and, with respect to each area proposed as an AEC, to establish by means of scientific data that the particular characteristics of the area fit the general criteria for the category of AEC in which it is proposed to be included. At that point a proposed designation may be developed which must be adequately defined either in terms of specific geographical boundaries or a precise written definition.[55] The third step required by statute is public notice of proposed rulemaking to designate a particular AEC and the holding of a public hearing at which any person may make an oral statement or submit a written comment. The final step is the consideration of the submitted comments and the final designation of the AEC.[56]

The analysis that follows will consider the legal problems and challenges that may arise with respect to this four-part designation process and what

must be done by an administrative body in order to minimize the possibility of a successful legal attack on the process. Because the North Carolina pattern closely follows that required for area of particular concern designation under the CZMA, this inquiry should be relevant for other coastal states as well.

A. Administrative Law and the Designation Process

An agency attempting to implement critical areas legislation must not exceed its statutory authority or operate in violation of statutory requirements.[57] Substantively, this means that the CRC's general criteria and standards formulated in the course of step one[58] of the administrative process must be consistent with the statutory language and objectives of the Coastal Area Management Act (CAMA) and that the designation of particular geographical areas must be defensible in terms of both the statutory language and the general criteria and standards relied upon by the agency.

Where an agency rule or designation violates the plain meaning of the statutory language, it will be invalidated. In Sibson v. State,[59] the New Hampshire Port Authority attempted to apply the requirements of a state law which covered "any bank, flat, marsh, or swamp in and adjacent to tidal waters" to a four acre parcel of land on the landward side of a salt meadow. The court, holding that the Port Authority lacked jurisdiction, interpreted the words "adjacent to" as applying only to land contiguous with tidal waters.[60]

On the other hand, an agency such as the CRC can adopt criteria to define ambiguous statutory language or categories of critical areas,[61] and in such a case, its application of the criteria to designate particular sites will be upheld if consistent with general statutory

objectives. The courts will usually defer to an agency's interpretation, but the agency will be called upon to produce testimony as to the scientific basis of its action and the relation to legislative purposes. In Juanita Bay Valley Community Association v. City of Kirkland,[62] a property owners' association challenged the state of Washington Department of Ecology's designation of "associated wetlands" as applied to Lake Washington. The relevant law, the Washington Shoreline Management Act, contained no specific statutory definition of this term, but the Department of Ecology drew a series of maps designating "associated wetlands" throughout the entire state. A witness from the department testified that the criterion used in designating the wetland was whether a marshy area was essentially at the same level and connected to the major body of water. The court upheld the designation as consistent with the statutory purposes, stating that where reasonable men could differ as to their interpretation, the agency's determination will be upheld.[63] Similarly, in Gulf Holding Corporation v. Brazoria County,[64] the state of Texas' determination that a beach along San Luis Pass was covered by the Texas Open Beach Act, which protects public access to beaches on the Gulf of Mexico, was upheld on the basis of evidence in the form of aerial photos and testimony of a biologist that San Luis Beach had the characteristics of a Gulf of Mexico beach as opposed to a bay beach.[65]

Procedurally, the critical areas designation process must be carried out by the agency in strict conformity with statutory requirements. The chief problem here is that many states have adopted general administrative procedure acts to govern agency decisionmaking.[66] Such an act will normally apply to the critical areas designation process except to the extent that a particular critical areas statute may provide to the contrary.[67] Thus, to the maximum

extent possible, the procedural requirements of both laws must be observed. The North Carolina CAMA provides a specific rulemaking procedure for the designation of AEC's[68] as well as a provision for judicial review from permit denial,[69] but the publication of rules of the CRC is governed by the North Carolina Administrative Procedure Act.[70]

One of the most important procedural issues that may arise is whether the critical areas designation process is rulemaking or adjudication. Two important consequences flow from this determination; if the agency's action is adjudication, a hearing must be provided at which the introduction of evidence and the right of cross-examination of witnesses is afforded, and there is normally a right to judicial review.[71] If the statute is not clear as to which is intended, the determination will fall to the courts.

A classic example of this problem is the 1974 Hawaii case, Town v. Land Use Commission.[72] Acting under that state's land use act, the Land Use Commission had approved a petition to amend the district designation of certain property from agricultural to rural. The landowners adjoining this property then brought an action challenging this decision. Plaintiffs alleged that the procedure of approval had violated the Hawaii Administrative Procedure Act, in that the Commission had taken testimony from the applicant for the district change and had "viewed" the actual site without giving prior notice to Town and other adjoining landowners. The issue of whether plaintiffs were in fact entitled to prior notice and the right to rebut the applicant's testimony hinged on the determination of whether the action of the Commission constituted rulemaking or a contested case. The Hawaii Supreme Court found the action to be a contested case, and accordingly the denial of the notice and cross examination rights was held to be reversible error.[73]

The North Carolina CAMA specifically allays this difficulty by providing that the AEC designation process is carried out by a rulemaking procedure involving public notice and a hearing for the purpose of receiving oral and written statements.[74] There appears to be no right of judicial review from the AEC designation process,[75] although under the Declaratory Judgment Act,[76] a person directly affected could obtain an adjudication of the general legal and constitutional validity of the rule on its face.[77]

B. Adequate Standards for Critical Area Designation: The Non-Delegation Doctrine

The maxim that legislative and judicial powers may not be delegated to state agencies has its roots in the separation of powers doctrine found in many state constitutions.[78] Although the non-delegation doctrine in its pure form enjoyed early success in the state courts, the necessities that dictated the creation of state administrative agencies have transformed this rule into the requirement that legislative and adjudicative power cannot be delegated without adequate "guiding standards." The "standards" test has been criticized as being "ritualistic", however, in failing to furnish criteria that can be consistently and equitably applied.[80] It has been suggested that the significant factor in the application of the non-delegation doctrine is not the "standards" test, but rather the degree of protection against arbitrariness.[81] Since that time a significant number of courts have begun to emphasize procedural safeguards as well as standards.[82]

Recent decisions in several different state courts indicate that critical areas legislation will not be vulnerable to attack based on the non-delegation doctrine.[83] In CEEED v. California Zone Conservation Commission, the California Supreme Court held that the Coastal Conservation Act of 1972 (Proposition 20)

contained adequate standards to guide the agency in issuing permits for development in the coastal zone. The general legislative policies that "the development will not have any substantial adverse environmental or ecological effect" and that the development be consistent with the objectives of the act (preservation, restoration and enhancement of the coastal area and balanced use of coastal resources) were sufficient. The court stated that it was permissible for the agency to be empowered to use discretion and judgment of a high order in weighing complex factors in the decisionmaking.[84] Toms River Affiliates v. Department of Environmental Protection[85], a New Jersey case upholding the constitutionality of the Coastal Facility Act, sustained the validity of general rather than detailed standards in regulatory legislation, especially where adequate procedural safeguards protected against unreasonable administrative action.[86] In Mills, Inc. v. Murphy[87], the Supreme Court of Rhode Island upheld the Fresh Water Wetlands Act although the agency was given discretion to decide on wetland alteration governed only by the standard "best public interest" and the general legislative purposes of the act.[88]

Under the North Carolina CAMA, the CRC is delegated the tasks of adopting guidelines for the use of coastal lands and waters, particularly the AEC's, and of designating the AEC's.[89] The guidelines are to be formulated consistent with the general legislative goals of the CAMA,[90] and the different categories of AEC's are defined with varying degrees of specificity. On the one hand, there are several categories that are very precisely defined in the act itself; these include coastal wetlands, estuarine waters, water supply sources, capacity water use areas, prime forestry land, natural and scenic rivers, scientific or research stream segments, wildlife refuges and historic places.[91] As to these types of AEC's, the CRC exercises little if any discretionary power and

there is no delegation problem.

On the other hand, many categories of AEC's are defined only in general terms in the act. These are complex natural areas, remnant species areas, unique geological formations, public trust areas, sand dunes along the outer banks, ocean and estuarine beaches and shorelines, floodways and floodplains, areas of excessive erosion or seismic activity, air inversion and key facility areas.[92] In order to designate these types, the CRC must exercise discretion both in adopting more detailed criteria and in designating particular geographical areas. This may be difficult because of a lack of scientific data, differing views among scientists on the validity of various criteria, and legal uncertainties where, as in the definition of public trust areas, legal judgment is necessary.[93] The CRC, however, is empowered to choose between competing alternatives as long as their designations are (1) supported by reasonable scientific evidence, (2) within the general goals of the act and (3) adopted in compliance with procedural formalities. The North Carolina courts should follow the CEEED, Mills and Toms River decisions in upholding the exercise of such a delegation of authority since in other contexts it has been held that general policy standards accompanied by procedural safeguards is constitutionally permissible.[94]

C. Substantive Due Process and the Scope of the Police Power

The objectives of state critical areas laws go beyond the traditional purposes of older types of land use measures such as zoning and subdivision controls. Lands and waters are treated as resources and as units of the natural world. The goal is not merely to provide for the orderly development of the community, to protect against nuisances and to prevent the danger of fire and collapse of buildings,[95] but to safeguard the environment, natural resources and the functioning of natural ecosystems. It is appropriate to inquire whether these are valid substantive legislative goals and permissible state objectives under the police power.

Substantive due process was formerly a powerful tool by which the federal courts measured the constitutionality of legislative acts. Since Nebbia v. New York,[96] however, the U.S. Supreme Court has permitted an increasingly wide range of permissible objectives in the field of economic, and social legislation.[97] Recent decisions involving the validity of land use legislation clearly indicate that the police power encompasses more than the traditional purposes of zoning and includes environmental quality.[98]

A state court reviewing the substantive validity of the objectives of a statute and the proper scope of the police power is not controlled by U.S. Supreme Court decisions, however. In general, the state courts have been much more active in invalidating legislation because it exceeds the scope of the police power under state constitutional law.[99] It can therefore be expected that state courts will closely scrutinize both the objectives of critical areas laws and the relationship of any particular designation or development control to those objectives.

Although the law in this area is still emerging, a series of recent state court decisions indicate that protection of natural resources and the functioning of natural systems are, at least on their face, permissible state objectives under the police power. Most of these decisions involve critical areas controls over wetlands, shorelands or coastal areas. In New Jersey, wetlands legislation was upheld and regulation relating to environmental and ecological considerations and the continued existence of species of wildlife was stated to be a valid police power objective.[100] A Maryland court sustained that state's dredge and fill statute, stating that it was "within the purview of the police power for the state to preserve its natural resources."[101] In Mills, Inc. v. Murphy,[102] the Supreme Court of Rhode Island upheld the regulation of wetlands as buffer zones and absorption areas for flood waters, wildlife habitat and recreation areas. The well-

known case of Just v. Marinette County[103] upheld the protection of the natural state of shorelands as within the police power. Other courts have upheld protection of air, soil and water,[104] and marine resources[105] as permissible state objectives.

Although the North Carolina courts have traditionally taken a more narrow approach to the valid scope of the police power than some states,[106] it can be expected that the environmental objectives of the CAMA, the conservation of natural resources and the management of the natural ecosystems of the coastal area,[107] would be upheld as valid state objectives. In Stanley v. Department of Conservation and Development,[108] the Supreme Court of North Carolina stated that the abatement and control of air, water and environmental pollution were valid functions under the police power. In addition, a 1973 amendment to the North Carolina Constitution specifies that "it shall be a proper function of the State of North Carolina . . . to . . . preserve park, recreational, and scenic areas, to control . . . the pollution of our air and water . . . and in every other appropriate way to preserve as a part of the heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty."[109]

Assuming the purposes of a critical areas statute are constitutionally valid on their face, agency action to implement the legislation must bear real and substantial relation to permissible statutory objectives.[110] For example, in MacGibbon.v. Board of Appeals of Duxbury[111] a landowner was denied a special permit to excavate and fill a marsh by the town board of appeals based on a zoning ordinance which imposed controls on marshes and wetlands. On judicial review the Supreme Court of Massachusetts annulled the board's decision. It was found that preservation of the ocean food chain was not a legally tenable ground for denying the permit where the land in question was above mean high tide, although the court recognized that pro-

tection of marine fisheries and coastal wetlands were proper police power objectives. Similarly, the danger of flooding and erosion, although valid police power objectives, was not an adequate ground for permit denial when this problem could have been resolved by permit conditions and safeguards.[112]

Under the North Carolina CAMA, the discretionary actions of the CRC must satisfy this standard. Thus the adoption of general criteria for the various categories of AEC's should be based upon specific resource objectives that are clearly within the general legislative purposes[113] and the particular statutory definitions[114] involved. The application of these criteria to particular geographical areas must be based upon empirically derived data documenting the fact that the designation meets the criteria of a particular category. Permit denials, in the case of privately owned AEC's, must be based upon the grounds enumerated by statute[115] accompanied by the factual basis for such findings. In addition, the exercise of authority under the police power must not in its application unreasonably restrict a private landowner's right to use his land; this problem is considered below.[116]

D. Procedural Due Process Requirements for the Definition and Deliniation of the Boundaries of Critical Areas.

Procedural due process under the Fourteenth Amendment[117] requires that an individual be given adequate notice and an opportunity for a hearing before he is deprived on any significant property interest.[118] Whether there is a constitutional right to a hearing in the critical areas designation process is somewhat unclear. Notice and a hearing may be required before the promulgation of a zoning ordinance or the rezoning of specific property,[119] but critical areas designation, unlike zoning, does not, in itself, prohibit or affect any specific use of property. In CEEED v. California Coastal Zone Conservation Commission,[120] the California Supreme Court held that the state need not afford affected property owners a hearing prior

to implementing an interim permit system applying only to land within 1000 yards of the coast. This may not apply in the case of permanent critical area designation, however, and most states, including North Carolina under the CAMA,[121] provide for notice and a hearing, prior to administrative designation.

The most important due process problem faced by an agency in designating critical areas, however, is how to describe or delimit the boundaries of such areas in order to give affected landowners adequate notice of the regulation of their property. Specific boundary line determination will often be impractical or expensive, yet the area regulated must not be defined in unduly vague terms. It appears that three different methods may be used to solve this problem.

First, some categories of critical areas may be best described through word definitions; these are sufficient to give adequate notice. In United States v. St. Thomas Beach Resorts,[122] the court upheld a word definition of "shoreline of the Virgin Islands" against a vagueness attack. The definition, "from the seaward line of low tide, running inland a distance of fifty (50) feet, or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier, whichever is the shortest distance", was held to give adequate notice.[123] Word definitions are also common in wetlands statutes, and these have been upheld against a vagueness attack.[124]

Second, where mapping is desirable, the agency may informally plot boundary lines using aerial photos and tax maps. Massachusetts has, in the implementation of its coastal wetlands act, recently adopted this form of notification. The procedure has been described as follows:

> . . . The Department [of Natural Resources] prepares a tentative map of the area to be protected, and consults local assessor's maps to determine the ownership of the land affected. At this stage, an effort is made to in-

> clude any land, and any landowner, whose wetland status is uncertain . . . When the proposed order has been prepared by the Department, those persons registered as owners of the subject property upon local assessors' maps are notified by certified mail, at least three weeks in advance, that a hearing on the order will be held in their local community. No other private persons are so notified . . . . At the conclusion of the hearing, the Department makes available to affected property owners a form on which they can request a personal appointment with a state officer . . . . Once negotiations with landowners are complete, the Department draftsmen plot the boundaries of the order on copies of the local assessor's maps and record these maps, with copies of the written order, as conservation restrictions against the land involved. The orders thereby are made known to anyone examining the title to the property.[125]

The Massachusetts courts have not ruled on the procedural adequacy of this form of notification, but authorities have not encountered any problem with it.[126] It appears to meet "the two major statutory functions which may be affected by definitions. One of these functions is to guide the adjudication of rights and duties; the other is to guide the individual in planning his own future conduct."[127]

Third, where necessary and appropriate, boundary lines of critical areas may be described with reference to readily identifiable landmarks such as highways, county lines, ownership lines or geographical features. Where adequate reason exists for the designation and where necessary for administrative purposes, courts have allowed considerable discretion in the drawing of regulatory boundary lines and do not require mathematical precision or a line or which all would agree. There must only be a reasonable basis for the particular line selected.[128]

E. Equal Protection Considerations

All persons are guaranteed equal protection of the laws by the United States Constitution,[129] and this requirement is also a feature of most state constitutions.[130] In the context of the regulation of land use, this right affords protection against classifications that are arbitrary or not

reasonably related to legitimate objectives.[131] A classification that is found to be unreasonable will be struck down.

A state critical areas law and designation process creates a classification in distinguishing between those who own land within critical areas and those who do not. In general, the courts have evolved two different legal tests to determine the reasonableness of a classification depending on the subject matter and the nature of the right affected. The more lenient "rational basis" or "minimum scrutiny" test is used in examining classifications in economic and social legislation; this holds that if there is any reasonable basis for the difference in treatment it will be sustained, and the attacking party must establish the invalidity beyond a reasonable doubt.[132] The "strict scrutiny" test, on the other hand, is generally reserved for examining classifications involving fundamental rights and certain suspect classifications,such as race.[133] Land use classifications have been judged by the "rational basis" test, and the courts have been reluctant to overturn legislative determinations in the area.[134] There is no bright line distinction between the two tests,[135] however, and in designating critical areas, the agency should be prepared to go beyond the minimum requirements of the "rational basis" test.

In a variety of contexts, courts have recently upheld state critical areas legislation in the face of an equal protection challenge. Classifications based upon both the natural characteristics and resources of areas and upon the size of a particular development within a resource area have been validated. In Mills, Inc. v. Murphy,[136] landowners alleged that Rhode Island's wetlands act had denied them equal protection by treating their freshwater wetlands differently and less favorably than saltwater wetlands. The Rhode Island Supreme Court, in upholding the classification, emphasized that the difference in overall approach whereby the state promulgated a

statewide plan for coastal wetlands but required an owner to apply for a permit to develop fresh water wetlands was susceptible to a variety of reasonable explanations:

> "the greater development pressure on coastal wetlands suggests the need for immediate state action while the situation regarding fresh water wetlands might not be so pressing; the high incidence of state-ownership in coastal wetlands might facilitate centralized action while the almost exclusively private ownership of fresh water wetlands would tend to hinder such an approach; the probable interdependence and interactions of coastal wetlands could necessitate unitary state action while the more random pattern of fresh water wetlands might thwart such an attempt."[137]

Potomac Sand and Gravel Co. v. Governor of Maryland[138] considered the validity of prohibiting dredging of sand and gravel from wetlands but not interfering with the taking of sand and gravel from inland pit excavations. This classification was held valid since the protection of natural resources was a valid purpose under the police power and prohibiting dredging in a natural area such as a wetland was rational in the light of the harm to those areas caused by dredging.[139] In Re Spring Valley Development,[140] a 1973 decision of the Maine Supreme Court, upheld that state's Site Location of Development Act, which applied only to subdividers of over 20 acres. This was held to be reasonably related to the statutory purpose of protection of the environment because of the likely heavy impact of the large developer.[141]

Not every court will unquestioningly accept the reason for a classification, however, especially in the case of the application of a classification by an administrative agency. Kmiec v. Town of Spider Lake[142] involved landowners who began a development after having been assured by a local official that their development would not infringe a town zoning ordinance, but whose property was subsequently placed in an agricultural classification by a new ordinance passed upon the proposal of a regional development commission. The court held that the landowners had met the

burden of proving there was no rational basis for the agriculture classification. The agency official testified that he had determined that the property was agricultural based solely upon aerial photos and maps that were several years old and had not inspected the property. The court was unwilling to hypothesize conceivable justifications for this classification and, even though control of orderly community development was accepted as a proper public purpose, it carefully scrutinized the testimony of the official responsible for the classification and the expert appraiser of the property. Moreover, other courts in considering land use classification have applied the traditional "rational basis" test, but have referred either to specific trial testimony or to legislative findings to buttress their conclusions that the classifications involved were reasonable.[143]

In order to overcome equal protection problems both in adopting general criteria and in selecting particular critical areas, an agency should (1) keep a careful record of the basis of its designations and (2) be prepared to document the relationship of the designation to statutory goals which, in turn, can be shown to be permissable state objectives under the police power. Where this is done, the courts will accept some seemingly arbitrary legislative or administrative line-drawing, such as mapping the geographic boundaries of particular areas or subjecting developers of projects over a certain size tract of special rules,[144] where this is done for administrative convenience.[145]

Equal protection considerations also require that all persons within a particular classification be treated alike. This would prohibit an ad hoc or piecemeal designation of critical areas within a regulated area. As a practical matter, however, this merely requires the designation process to be preceeded by an inventory of the resources of the area and a good faith attempt not to discriminate between like areas. Complete knowledge and perfect data

are not required under the rational basis test, and designations may be added, deleted or modified as new data becomes available and as conditions change.[146]

An additional problem of equal protection is presented when, as is the case with the North Carolina CAMA, critical areas legislation is limited to one particular portion of a state, such as the coastal area. This, in effect, establishes a class consisting of the particular section of the state subject to regulation as opposed to the rest of the state which is not. This also presents the question as to whether such legislation is invalid as a "local, private or special act" which is prohibited under the constitutions of many states, including North Carolina.[147]

These questions have been extensively litigated in New Jersey in the context of that state's Hackensack Meadowlands Reclamation and Development Act (HMRDA) and the Coastal Facility Review Act (CFRA). In Meadowlands Regional Development Agency v. State,[148] the court upheld the constitutionality of the HMRDA, which created a special regional commission to regulate development within an 18,000 acre area in two New Jersey counties. The crucial question under the local legislation provision of the New Jersey constitution was whether the classification was reasonable viewed against the purpose the act exists to serve. In judging this issue, the court applied the "rational basis" test, and indicated the identical question is presented in the context of equal protection. It was found that the Hackensack Meadowlands constituted a "vast reservoir of vacant lands," possessing factual characteristics that warranted special treatment.[149] In Toms River Affiliates v. Department of Environmental Protection,[150] the CFRA withstood attack on equal protection and local legislation grounds. The court found that the "unique and irreplaceable nature of the coastal area . . . and its importance to the public health and welfare amply support the reasonableness of special legislative treatment and regulation,"[151] and that the legislative

findings provision of the act itself expressed the reasons for the legislation and its rational correlation with the coastal area.[152]

Both courts gave short shrift to challenges based upon the arbitrariness of geographical boundaries drawn on maps. It was explicitly recognized that a line on a map is a product of a series of decisions based on planning criteria and on choices made between competing alternatives. There is no need for such a line to be ultimately correct or beyond argument; it need only be reasonable in the circumstances in which it was made.[153]

A similar view would be taken by the North Carolina courts. In a 1974 article,[154] Professor Glenn extensively analyzed the North Carolina CAMA as to whether its application only to a twenty-county coastal zone infringed the local legislation provision of the North Carolina Constitution or the equal protection clause of the United States Constitution. He concluded that this classification was reasonably related to the purposes of the CAMA and would be upheld.[155]

IV THE MANAGEMENT OF CRITICAL AREAS AND THE "TAKINGS" PROBLEM

Once critical areas have been designated together with general principles to guide their development, a permit-letting process is the usual mechanism for their management. The CZMA requires and the ALI Model Act recommends state-level control of the management process, although the actual grant or denial of a permit may be the responsibility of local government.[156] Experience has shown that local participation in management is essential to the success of a critical areas program.[157] Some states with critical areas laws, such as Oregon and Florida,vest permit letting in local governmental authorities under guidelines issued by the state.[158] The North

Carolina CAMA,on the other hand, grants this authority to the state-level CRC, although local governments are given permit-letting power over minor developments.[159]

Whether local government or a state agency has primary authority, effective management implies the power to attach conditions or to deny permits for development. Denial of a permit under the North Carolina CAMA requires an adjudicatory hearing and specific findings of certain statutorily required grounds.[160] Lurking in the background of every proceeding, however, will be the question whether in the particular case regulation constitutes a "taking" of private property[161] despite the fact that the statutory grounds for permit denial may be present. The permit-letting agency, not wanting to commit an unconstitutional act, will search for guidance as to how far it may go in attaching conditions or in denying a permit without infringing this constitutional norm.

There is no shortage of impressive legal scholarship on the takings issue. Its jurisprudential basis has been explored,[162] and its origin and history have been analyzed.[163] Writers have attempted to find guiding principles for its application,[164] and there have been calls for reforming its impact by statute or by a decision of the United States Supreme Court.[165] Yet, there is still tremendous confusion about this doctrine among decision-makers who are called upon to face it on a day-to-day basis.

The only certain proposition that may be advanced regarding the manner the takings clause is applied today by the courts is that there is no abstract legal theory that will provide a basis for predicting the outcome of any particular case. This is evident from the recent cases that have applied the takings doctrine in a wetlands or coastal context. In Just v. Marinette County[166], the Wisconsin Supreme Court upheld a shoreland zoning ordinance that placed a landowner's property in a conservation district. The

land was in close proximity to a navigable lake,and denying the owner the right to change the natural character of the site was necessary to protect navigable waters for fishing, recreation and scenic beauty under the public trust.[167] Loss of property value was irrelevant where the depreciation was based on what the land would be worth in its filled condition.[168]

In Turnpike Realty Company v. Town of Dedham,[169] a zoning by-law establishing a flood plain district was upheld by the Massachusetts Supreme Court even though the landowner introduced testimony of an expert witness that the highest and best use of his property, located within the district, was for apartment buildings,and the value of his land was reduced by eighty-eight percent. The court found that the purposes of the ordinance, (1) the protection of persons and property against floods, (2) the protection of other landowners against possible damage from the removal of the natural buffer effect of the flood plain,and (3) the protection of the community from disaster relief and public works to prevent flooding, were proper and that the record showed the land in question was in fact subject to flooding. Reasonable uses of the landowner's property under these circumstances were, the court found, woodland, grassland, agricultural and recreational uses that did not require filling.[170]

Potomac Sand and Gravel Co. v. Governor of Maryland[171] is also instructive to show the practical application of the takings doctrine. The Maryland Court of Appeals sustained a prohibition on dredging or filling wetlands as reasonable because the use of the lands for this purpose would cause too great a loss to public benefits that are derived from marshes. The court specifically cited (1) the deprivation of spawning areas for fish, (2) the destruction of rare species of vegetation, (3) increased turbidity of coastal waters, and (4) loss of an accessible food supply for diving ducks. Also relevant was the fact that seventy percent of the pro-

posed dredge sites were tidal waters and state owned property.[172]

On the other hand, in MacGibbon v. Board of Appeals of Duxbury,[173] the Massachusetts Supreme Court, although it did not directly decide the taking issue, annulled a denial of a permit application to fill coastal wetlands on the basis that the town board in question had a general policy that no permits would be granted to fill coastal wetlands. The court held that the town had exceeded its authority in not making adequate findings of fact and in not considering the extent to which the landowner was deprived of all practical value of his property.[174] The court suggested that the town should acquire the property in some way if its purpose was the preservation of the marshland in its natural state.[175]

In State v. Johnson,[176] the Maine Supreme Court invalidated a restriction on the filling of a particular plot of coastal wetlands as an unconstitutional taking. It was found that the natural resource benefits of regulation, "the conservation and development of aquatic and marine life, game birds and waterfowl," were public benefits whose cost should have been publicly borne. Moreover, the land, absent the addition of fill, had no commercial value whatever.[177]

These cases offer no touchstone to guard against foundering on the rock of the takings problem. Diminution of the value of the land involved is not the key, since courts will overlook this to the extent they are willing to uphold the police power purpose.[178] Public harm versus securing a public benefit[179] is not a workable test, since one court's prevention of public harm is another court's securing of a public benefit.[180] The North Carolina CAMA adopts a statutory test, whether the restriction deprives the owner "of the practical uses of [his property], being not otherwise authorized by law."[181] But this rule, as Professor Glenn has convincingly demonstrated,[182] merely codifies the confusing case law in North Carolina, and presents the problems of determining a "practical use" and when

a restriction is "authorized by law."[183]

As a practical matter, then, a permit-letting agency must learn to live with uncertainty as to how the takings clause will be applied. It should be realized, however, that takings cases turn on their facts, and that it is within the agency's power to deal with and to minimize this problem. Careful agency rulemaking and factual development are the solution to the takings question. In the context of an agency attempting to manage critical areas, three particular suggestions may be made.

First, in drafting guidelines for priority uses for different categories,[184] the agency should list what uses of land are practical for each type of critical area; this listing should not be a mere pro forma exercise, but should represent a good faith attempt by the agency to nominate practical uses that would be consistent with the resource value objective of the particular category.[185] It should be made clear that no general prohibition against changing its natural character is intended if this can be done without infringing specific resource values.

Second, the purposes of the use restrictions for each category of critical area should be carefully and precisely expressed in the general guidelines. Such purposes, in order to be valid, must be permissible state objectives under the police power. The range of purposes to which use restrictions are tied will range from the more traditional police power objectives to the newer and more controversial. Protection of property and persons from natural hazards, safeguarding major public investments, assuring the orderly development of the community, and protecting the public from having to bear the financial burden of disaster assistance and the construction of structures to protect persons and property against natural hazards are traditionally permissible police power objectives. There should also be little doubt that protection of important resources

such as air, soil, water and marine fisheries is permissible under the police power.[186] The basis for this objective should be existing water and air quality standards as well as study of the "carrying capacity" of such resources to accommodate development.[187]

The protection of public rights and the public trust have also been recognized as proper public purposes under the police power.[188] Although the precise extent of the public trust doctrine is uncertain in many states,[189] the emerging majority view is that it is a source of public ownership of tidelands and lands under navigable waters.[190] This would include many coastal areas, such as beaches, estuarine lands, shorelands and marshlands. In some states the public trust doctrine has been more expansively defined as including habitat for wildlife and marine life.[191] In addition, legal doctrines other than the public trust doctrine have been recognized as the source of public rights to use the dry sand area of beaches[192] and non-navigable waters.[193]

The most controversial police power purpose in the land use context will be the preservation of wildlife, natural areas and rare species of plants and animals. These are increasingly recognized as legitimate state objectives, however, by constitutional amendment[194] or by court decisions upholding a broadened view of the police power.[195]

Third, a management agency under a critical areas law should develop the facts of each particular case sufficiently to show the relationship of any permit restriction or denial to a particular public purpose as well as the necessity of the restriction in order to achieve it. If it cannot be shown that a restriction on development is reasonably related to even an unquestioned public purpose, a takings problem may result.[196] Care must be taken by the agency in making its findings of facts.

It must be recognized, however, that the police power alone cannot be

relied upon to achieve natural area preservation in the coastal zone. Where it is desirable to go beyond the protection of specific police power objectives, public acquisition will be necessary. Effective land use management to achieve the preservation of natural diversity requires the creation of a separate but related program to survey potential natural areas and to secure their acquisition by means of purchase or gift of legal title, easements or development rights.[197]

V

CONCLUSION

The creation of a critical areas program for a large number of specific areas and resources will be a new challenge for coastal states in the process of implementing coastal zone management programs. Critical areas controls have not met with great success so far because, even in those states that have authorized them, the designation process is cumbersome and fraught with political and legal difficulties. There is opposition to state-imposed land use controls expecially where large areas are involved.

A more workable critical areas program, especially in the coastal zone, is the designation of specialized geographical areas tied to particular state police power objectives. The experience of North Carolina's "areas of environmental concern" program tends to show that, while this approach is not without difficulty, it is more politically acceptable and easier to implement than a program involving larger geographical units because, outside of the specialized critical areas, the planning process can be left largely in local hands. The novel constitutional problems of such an approach can be solved by careful agency attention to the designation and management process.

FOOTNOTES

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** Research Assistant and third year student, University of North Carolina School of Law.

1. This is the synonym for areas of critical environmental concern used in the Coastal Zone Management Act of 1972. See 16 U.S.C. §1454(b)(3) (Supp III, 1973). In this article these terms will be used interchangeably.

2. 16 U.S.C. §1454(b)(3) (Supp III, 1973); 15 C.F.R. §923.13 (1975).

3. 15 C.F.R. §923.14 (1975)

4. The CZMA provides funds for management program development. 16 U.S.C. §1454 (Supp. III, 1973).

5. In fact, some areas of particular concern will be shorelands where port complexes, oil refineries and other heavy industry that is directly or indirectly dependent on access to coastal waters will be accommodated. 16 U.S.C. §923.13 (1975).

6. J. HITE AND E. LAURENT, ENVIRONMENTAL PLANNING - AN ECONOMIC ANALYSIS, APPLICATIONS FOR THE COASTAL ZONE 18-19 (1972). This does not exclude the possibility of conflicts over the use of such goods; it is merely a reflection of the fact that the right to use certain

resources exists in common and is not, at least in theory, affected by another's use.

7. Some economists argue that administrative allocation should not be allowed to replace the market because decisions will be in the hands of a "planning elite". Johnson, Some Observations on the Economics of the Coastal Plan, 49 SO. CAL. L. REV. 749, 756 (1976). This overlooks the fact that individuals still have the power to initiate development and that mechanisms for public participation can be built into any administrative allocation system.

8. A MODEL LAND DEVELOPMENT CODE §§7-201 to 7-208 (1975).

9. Id. §7-201(3).

10. Id. §7-502 and 7-503.

11. F. BOSSELMAN AND D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

12. R. LINOWES AND D. ALLENSWORTH, THE STATES AND LAND USE CONTROL 108 122 (1975).

13. For a review of these laws see Ausness, Land Use Controls in Coastal Areas, 9 CAL. WEST L. REV, 391, 408-410 (1973).

14. For a summary of this legislation see R. LINOWES AND D. ALLENSWORTH, THE STATES AND LAND USE CONTROL 103-104 (1975).

15. WIS. STAT. ANN. §59,971 (Supp. 1975).

16. WASH. REV. CODE §90.58.030(e) (Supp. 1974).

17. California, for example, has established a permit area one thousand yards inward from the mean high tide line. Cal. Pub. Res. Code, §27104 (West Supp. 1975).

18. New York has subjected the Adirondack Park to special regulation by a regional agency. N.Y. EXECUTIVE LAW §§800-819 (McKinney Supp. 1975).

19. New Jersey has singled out the Hackensack Meadowlands for special regulation. N.J. STAT. ANN. §§13:17-1 to -86 (Supp. 1975);

20. The San Francisco Bay Conservation and Development Commission regulates wetlands around San Francisco Bay. CAL. GOVT. CODE, §66632(a)(Supp. 1975). In August, 1976, the California legislature adopted a coastal plan placing development controls on the state's 1,072 mile coastline. The plan will be administered by the Coastal Zone Conservation Commission. 7 ENVIR. RPTR. 660 (Aug. 27, 1976).

21. Hawaii, for example, has enacted a statewide land use management law establishing a state land use commission. All the lands of the state are classified according to four categories, urban, rural, agricultural and conservation HAWAII REV. STAT. §§205-1-16.2 (Supp. 1975).

22. 16 U.S.C. §1453(c) (Supp. III 1973).

23. FLA. STAT. ANN. §380.05(1)(b) and (2)(a)(b)(c)(1975).

24. FLA. STAT. ANN. §380.05(1)(a)(1975).

25. FLA. STAT. ANN. §380.05(4)(5) and (6)(1975).

26. FLA. STAT. ANN. §380.05(9)(1975).

27. The Big Cypress Swamp has been designated by statute. FLA. STAT. ANN. §380.055. The other two areas have been administratively designated. See R. HEALY, LAND USE AND THE STATES 113-116, (1976).

28. R. HEALY, LAND USE AND THE STATES 113 (1976).

29. ORE. REV. STAT. §197.040(i) (1975).

30. ORE. REV. STAT. §197.230(2)(1975).

31. ORE. REV. STAT. §197.405 (1975).

32. Akins, Designation of Areas of Critical State Concern in Oregon, in COASTAL DEVELOPMENT AND AREAS OF ENVIRONMENTAL CONCERN, PROCEEDINGS OF A SYMPOSIUM 10 (UNC Sea Grant Program 1975).

33. MINN. STAT. ANN. §116G.05 (Supp. 1976).

34. MINN. STAT. ANN. §116G.06

35. MINN. STAT. ANN. §116G.06 Subd. 2 (c) (Supp. 1976).

36. Telephone Interview with Ms. Yo Jouseau, staff member, Minnesota Environmental Quality Council, July 24, 1976.

37. N.C. GEN. STAT. §113A-100 et. seq. (1975). Under the North Carolina Land Policy Act of 1974, the Land Policy Council is authorized to identify policies for the determination of areas of environmental concern on a statewide basis, but this law is not self-executing. N.C. GEN. STAT. §113A-155 (1975).

38. N.C. GEN. STAT. §113A-110 (1975).

39. For a description of the plan implementation process see Schoenbaum and Rosenberg. The Legal Implementation of Coastal Zone Management: The North Carolina Model, 1976 DUKE L. J. 1 (1976).

40. N.C. GEN. STAT. §113A-111 (1975).

41. N.C. GEN. STAT. §113A-113(1975). Local governments participate in the designation process through nominating particular areas within their jurisdiction.

42. N.C. GEN. STAT. §113A-113 (1975).

43. N.C. GEN. STAT. §113A-115(1975).

44. The authority for interim designation is N.C. GEN. STAT. §113A-114 (1975). Development within an interim AEC does not require a permit, but notice must be given to the CRC. N.C. GEN. STAT. §113A-114(e).

45. Coastal Resources Commission Rules, Subchap. 7F §§.0100 to .1400 (1976).

46. NEV. REV. STAT. §321.720 (1975).

47. NEV. REV. STAT. §321.660 (1975).

48. NEV. REV. STAT. §321.640 5(1975).

49. COLO. REV. STAT. §§24-65.1 - 401 and - 501 (Supp. 1975).

50. COLO. REV. STAT. §24-65.1-407 (Supp. 1975).

51. The majority of the members of the CRC are nominated by local governments. N.C. GEN. STAT. §113A-105(1975).

52. See text accompanying note 42 supra.

53. N.C. GEN. STAT. §113A-107 (1975).

54. Id. This step is also required by the CZMA Guidelines. 15 C.F.R. §923.13 (1975).

55. N.C. GEN. STAT. §113A-115 (1975).

56. Id.

57. See generally F. COOPER, STATE ADMINISTRATIVE LAW, 677-89 (1965).

58. See text accompanying notes 52-54, supra.

59. 110 N. H. 8, 259 A.2d 397 (1969).

60. Id. at 11, 259 A.2d at 400.

61. Under the North Carolina CAMA, several critical area categories are precisely defined by reference to objective criterion. Others, however, are defined only in general terms in the act. See text accompanying notes 91-92, infra.

62. 9 Wn.App. 59, 510 P. 2d 1140 (1973).

63. 510 P.2d at 1153.

64. 497 S. W. 2d 614 (Tex. App. 1973).

65. Id. at 618.

66. Administrative Procedure Acts have been enacted in at least the following states: Alaska, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, North Dakota Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington, Wisconsin, Wyoming and Virginia. For a partial listing of the statutes, see GELLHORN AND BYSE, CASES AND MATERIALS ON ADMINISTRATIVE LAW 1160-64 (1974).

67. E.g., N.C. GEN. STAT. §150A-1 (1975); HAWAII REV. STAT. §91-14 (Supp. 1975).

68. See N.C. GEN. STAT. §§113A-114 to 115 (1975).

69. N.C. GEN. STAT. §113A-123 (1975).

70. It is questionable at this point whether the statutory rulemaking procedures provided in CAMA will be affected by the enactment of the Administrative Procedure Act. See text accompanying note 67, supra.

71. The rationale for this difference in treatment is the distinction between adjudicative and legislative facts, which was first advanced by Professor K.C. Davis in 1942. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364, 402-16 (1942). When adjudicative facts are in dispute, the party affected is entitled to support his allegations by argument and proof. Londoner v. Denver, 210 U.S. 373 (1908). In addition, the rights of confrontation and cross examination are constitutionally required in adjudicatory proceedings. Greene v. McElroy, 360 U.S. 474 (1959). On the other hand, "parties ordinarily have no constitutional right to present oral argument on issues of law, policy and discretion." K.C. DAVIS ADMINISTRATIVE LAW TEXT §6.01 (1972), citing Federal Communications Commission v. WJR, 337 U.S. 265 (1949). As for statutory rights, it is rare for a state administrative procedure act to provide full trial type procedures for rulemaking. Hawaii's Act does provide for 20 days notice, and allows all interested persons opportunity "to submit data, views or arguments, orally or in writing." HAWAII REV. STAT. tit. 8, §91-3 (1968). However, cross examination is not provided. Accordingly, it may be concluded that in most cases an affected person will have no cross examination rights when an agency is engaging in rulemaking unless that agency's organic legislation specifically provides for such a right. With respect to judicial

review of an agency determination, it should be noted that many states provide only for review of "an order in a contested case." F. COOPER, supra note 57 at 537 (emphasis added). One of these states, North Carolina, has defined "contested case" as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of specific parties are to be determined. Contested cases include, but are not limited to proceedings involving rate making, price fixing and licensing. Contested cases shall not be deemed to include rulemaking and declaratory rulings." N.C. GEN. STAT. §150A-2(2) (1975).

72. 55 Hawaii 538, 524 P.2d 84 (1974).

73. 524 P.2d at 91-92.

74. N.C. GEN. STAT. §113A-115 (1975).

75. Although the North Carolina CAMA does allow any person having an interest in land within an area of environmental concern to obtain judicial review to determine whether a final CRC decision affecting such land constitutes a taking, its provisions are limited to decisions or orders of the CRC under Part Four of the CAMA. N.C. GEN. STAT. §113A-123(a)- (b) (1975). Since Part Four deals only with permit applications and appeals, the section cannot be interpreted as granting judicial review of AEC designations. Schoenbaum, The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina, 53 N.C. L. REV. 275, 297 (1974). In addition, it is unlikely that AEC designations would be reviewable under the North Carolina Administrative Procedural Act. See note 71, supra.

76. N.C. GEN. STAT. §§1-253 to 267 (1975), as amended (Supp. 1975).

77. E.g. CEEED v. California Coastal Zone Conservation Commission, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974); Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241, cert. denied, 409 U.S. 1040 (1972); Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973); J.M. Mills, Inc. v. Murphy, 352 A.2d 661 (R.I. 1976); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); 22 Am. Jur. 2d, Declaratory Judgments, §29.

78. F. COOPER, supra note 57 at page 45. It should be noted that if the constitution of a particular state has no separation of powers requirement, the non-delegation doctrine does not apply. See cases cited Id. at note 17.

79. K.C. DAVIS, ADMINISTRATIVE LAW TEXT, §2.06 (1972).

80. Id. For a general discussion of the flaws of the "adequate standards" test, see F. COOPER, supra note 57 at pp. 61-70.

81. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, §151 (1958).

82. K.C. Davis contends this approach has been adopted in at least California, Iowa, Kentucky, New Jersey, and Wisconsin. K.C. DAVIS, supra note 79 at §2.06, n.16. The new test is well articulated in Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 355 A.2d 679, 685 (1976). In addition, the North Carolina Supreme Court seems to have adopted this position in Humble Oil and Refining Co. v. Board of Alderman, 284 N.C. 458, 202 S.E.2d 129 (1974). In response to Humble's contention that a zoning ordinance was void for lack of adequate standards

the court stated: "In our view the ordinance achieves reasonable specificity. Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair trial standards; (3) base its findings of fact only upon competent, material and substantial evidence; and (4) in allowing or denying the application, it state the basic facts on which if denied with sufficient specificity to inform the parties, as well as the court, what induced its decision." Id. at 471, 202 S.E.2d at 138.

83. 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (Court of Appeals 1974).

84. 118 Cal. Rptr. at 329-30 (1974).

85. 140 N.J. Super. 135, 355 A.2d 679 (1976).

86. 355 A.2d at 685.

87. 352 A.2d 661 (R.I. 1976).

88. 352 A.2d at 665-68.

89. See N.C. GEN. STAT. §§113A-107 to 115 (1975).

90. Id. §113A-107(a).

91. See Id. §113A-113.

92. Id.

93. For a discussion of the public trust doctrine as applied in North Carolina, see Schoenbaum, Public Rights and Coastal Zone Management, 51 N.C. L. REV. 1, 16-18 (1972).

94. Although the North Carolina courts continue to refer to the adequate standards test in their opinions, there are indications that other factors are involved. At least two North Carolina cases cannot be explained in terms of standards alone. Glenn, The Coastal Area Management Act in the Courts: A Preliminary Analysis, 53 N.C. L. REV. 303, 327 (1974). Furthermore, as the previous discussion of Humble Oil, supra note 82, indicates the North Carolina Supreme Court may allow an administrative agency to function on vague guidelines if the agency can show that review of its decisions will be accomplished in a format that meets specifically enumerated trial-type procedures. The CRC is required to meet all the fair trial elements listed in Humble. See N.C. GEN. STAT. §113A-122(b)(8, 9); Glenn, supra at note 111. In addition, the recent enactment of the North Carolina Administrative Procedure Act may add another layer of procedural protections. Accordingly, the CRC should have little difficulty in showing it can meet the requirements of Humble.

95. These purposes were upheld in Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).

96. 291 U.S. 502 (1934).

97. The following quotation is illustrative:

> We refuse to sit as a 'superlegislature to weigh the wisdom of legislation and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulation of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'

Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1962). For a general discussion of the decline of substantive due process in the federal courts, see Strong, The Economic Philosophy of Lochner; Emergency, Embrasure and Emasculation, 15 ARIZ. L. REV. 419-55 (1973).

98. In Village of Belle Terre v. Boreas, the court stated:

> "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." 416 U.S. 1, 9 (1974).

99. See Heatherington, State Economic Regulation and Substantive Due Process of Law, 53 Nw. U. L. REV. 229, 229-30 (1958).

100. Sands Point Hardor, Inc. v. Sullivan, 136 N.J. Super. 436, 439, 346 A.2d 612, 613 (1975).

101. Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 371, 293 A.2d 241, 248, cert. denied 409 U.S. 1040 (1972).

102. 352 A.2d 661, (R.I. 1976).

103. 56 Wisc. 2d 7, 201 N.W. 761 (1972).

104. In re Spring Valley Development, 300 A.2d 736 (Me. 1973).

105. The regulation of "marshland with saline water on it "through a permit system is a valid exercise of the police power in New Hampshire. Sibson v. State, 111 N.H. 305, 282 A.2d 664 (1971). Similarly, the regulation of filling in a bay area by a permit procedure is permissible in California. Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970). The "aesthetic" requirement that docks constructed on the shorelines of an Adirondack

Park lake be compatible with that lake's rustic shoreline was upheld in New York. McCormick v. Lawrence, 372 N.Y. Supp.2d 156, 83 Misc. 2d 64 (1975), and the regulation of an area subject to seasonal or periodic flooding was validated in Massachusetts. Turnpike Realty Company v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972).

106. In contrast to the broad New York view, ". . . it is still doubtful in North Carolina whether aesthetic considerations alone will support zoning restrictions." Brough, Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases, 53 N.C. L. REV. 925, 941 (1975), citing State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972); Little Pep Delmonico Restaurant, Inc. v. Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959). Of course, those AEC designations which can be supported by economic arguments as well are likely to be on firmer ground. See Note, Aesthetic Zoning: A Current Evaluation of the Law, 18 U. FLA. L. REV. 434, 437 (1965). The regulation of coastal wetlands and estuarine waters, for example, can be supported by reference to the relation between the viability of these areas and the sports and commercial fisheries catch. Potomac Sand and Gravel Co. v. Governor of Maryland 266 Md. 358, 373, 293 A.2d 241, 249, cert. denied, 409 U.S. 1040 (1972).

107. In addition, regulation of the environment in the interest of public health and safety has been validated in North Carolina. See text accompanying note 108, infra. Natural hazard AECs such as frontal dunes, ocean erodible areas, and estuarine and river erodible areas should clearly fall within this holding.

108. 284 N.C. 15, 199 S.E. 2d 641 (1973).

109. N.C. GEN. STAT. Const. Art. XIV, sec. 5 (Supp. 1975).

110. In re Spring Valley Development, 300 A.2d 736 (Me. 1973), State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

111. ___Mass.___, 340 N.E. 2d 487.

112. Id. at 491-92.

113. The goals of the coastal area management system are expressed in N.C. GEN. STAT. §113A-102(a)(b) (1975).

114. Statutory definitions are contained in Id. §113A-113.

115. Specific standards to be followed in the grant or denial of permits are outlined in Id. §113A-120.

116. See text accompanying notes 156-196, infra.

117. U.S. CONST., Amendment 14.

118. Boddie v. Connecticut, 401 U.S. 371 (1970).

119. See Hurst v. City of Burlingame, 207 Cal. 134, 277 P.308 (1929), Bell v. Stoddard 220 Ga. 756, 141 S.E. 2d 536 2d 536 (1965), Hart v. Bayless Investment and Trading Co., 86 Ariz. 379, 346 P.2d 1101 (1959). In Hurst and Hart, however, the decisions were based on zoning enabling statutes which required notice and hearing, and "discussion of constitutional requirements was pure dictum." San Diego Building Construction Association v. City Council of San Diego, 118 Cal. Rptr. 146, 529 P.2d 570 (1974). In the latter case, the adoption of a city zoning ordinance through the initiative process was upheld against plaintiffs' contention that such a procedure violated constitutional notice and

hearing requirements. More significantly, the U.S. Supreme Court has recently held that a zoning amendment adopted by referendum vote was not invalid for failure to provide notice and hearing. Eastlake v. Forest City Enterprises, Inc., 49 L.Ed.2d 132 (1976). But cf Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973), in which the Oregon Supreme Court ruled that zoning decisions focusing on specific lots or landowners would be subject to quasi judicial review procedures. Despite this apparent disparity, the cases may be reconciled by reference to K.C. Davis' distinction between legislative and adjudicative facts. See note 71, supra. Thus, in the zoning field, a decision concerning a specific piece of property is quasi-judicial, while one applying to an "open class" is legislative. See Comment, Zoning Amendments - The Product of Judicial or Quasi Judicial Action, 33 Ohio St. U.L.J. 130 (1972), quoted in Fasano, 264 Ore. at 581, 507 P. 2d at 27. Although the Fasano court provided little guidance as to how this distinction can be applied in future litigation, relevant factors may include the size of the parcel involved, who initiates the change, the number of owners affected, the label of local decision (e.g. variance, zone change), and the deciding body. Coon, The Initial Characterization of Land Use Decision, 6 EN. LAW. 121, 126-135 (1975).

120. 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974).

121. N.C. GEN. STAT. §113A-115 (1975).

122. 386 F. Supp. 769 (D.V.I. 1974), aff'd 529 F 2d 513 (3rd Cir. 1975).

123. Id. at 772-73. The court states

> "Defendant does not state whether it believes the Open Shorelines Act to be unconstitutional for this reason, on its face, or in its application. There is nothing before the court other than defendant's naked assertion to this affect. Nonetheless, whatever may be the unexpressed contention of the defendant in this regard, I do not believe the act to suffer from vagueness but rather consider it to pass constitutional muster with flying colors."

Id. at 773. (emphasis added).

124. Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 377-78, 293 A.2d 241, 252, cert. denied 409 U.S. 1040 (1972). In a Utah case, a district court held that reference to a surveyed meander line provided sufficient notice. The court then stated:

> The fact that in one small area on the westside of the lake the meander line has not as yet been surveyed and established does not affect this conclusion. It is something which is susceptible of ascertainment.

Great Salt Lake Authority v. Island Ranching Co., 18 Utah 2d 45, 48, 414 P.2d 963,965, rev'd on other grounds, 18 Utah 2d 776, 421 P.2d 304 (1966).

125. F. BOSSELMAN AND D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL, 208-09 (1971).

126. Telephone Interview with Paul W. Granges, Attorney, Massachusetts Water Resources Commission, on February 17, 1976.

127. 62 HARV. L. REV. 76, 77 (1948) cited in Swed v. Inhabitants of Town of Bar Harbour, 182 A.2d 667 (Me. 1962).

128. Meadowlands Regional Development Agency v. State, 112 N.J. Super. 89, 102, 270 A.2d 418, 425, aff'd 304 A.2d 545, appeal dismissed, 414 U.S. 99 (1973). See text accompanying notes 144-145, 152, infra. Of course, it may be advisable to survey boundary lines when feasible. For a discussion of

methods of demarcking shoreline boundaries, see Maloney and Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N.C. L. REV. 185, 249-60 (1974).

129. U.S. CONST. Amendment 14.

130. E.g. N.C. CONST. Art. I, §19 (1970)

131. See, e.g. Lindsley v. Natural Carbonic Gas. Co., 220 U.S. 61 (1910); Village of Belle Terre v. Boreas, 416 U.S. 1 (1974).

132. McGowan v. Maryland, 366 U.S. 420, (1957); McDonald v. Board of Election Commissioners, 394 U.S. 802 (1968); Village of Belle Terre v. Boreas, 416 U.S. 1 (1974).

133. For a concise discussion of cases involving fundamental interests or suspect classifications, see Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 17-20 (1972).

134. See Village of Belle Terre v. Boreas, 416 U.S. 1, 8 (1973); Young v. American Mini Theatres, Inc., 96 S.Ct. 2240, 2453 (1976). In Young, the Supreme Court rejected both equal protection and first amendment challenges to a Detroit ordinance prohibiting operation of certain "adult" establishments within certain distances of each other.

135. Professor Gerald Gunther has recently called attention to the development of what he labels the "sliding scale" approach to equal protection analysis. This new test would recognize a middle ground between middle or strict scrutiny. The elements of this "minimum scrutiny with bite" standard are as follows:

> It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to national reactions created by perfunctory judicial hypothesizing. (emphasis added).

Gunther, supra note 133 at page 21. For cases exemplifying this "newer" equal protection, see Reed v. Reed, 404 U.S. 71 (1971), Eisenstadt v. Baird, 405 U.S. 438 (1971), and Weinberger v. Weisenfield, 420 U.S. 1975. In addition, the Alaska Supreme Court has explicitly adopted this more rigorous test in a 1976 decision. In Isaakson v. Rickey, 550 P. 2d 359 (Alaska 1976), the court observed:

> This new standard will, in short, close the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry.

550 P. 2d at 363. The new test will be applied whenever the "compelling state interest test is found inappropriate. Id. at 363. For a federal land use decision which applied the sliding scale approach, but was later reversed, see Boreas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973), rev'd on appeal 416 U.S. 1 (1974).

136. 352 A.2d 661 (R.I. 1976).

137. Id. at 669.

138. 266 Md. 358, 293 A.2d 241, cert. denied 409 U.S. 1040 (1972).

139. Id. at 373, 293 A.2d at 249.

140. 300 A.2d 736 (Me. 1973).

141. Id. at 752.

142. 60 Wisc. 2d 640, 211 N.W. 2d 471 (1973).

143. In Sand Point Harbor, Inc. v. Sullivan, 136 N.J. Super. 436 A.2d 612 (1975), New Jersey's Wetlands Act was upheld against an equal protection challenge. The court drew on trial testimony relating to the differences between regulated and non-regulated areas to support its decision. 346 A.2d at 614. In Tom River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 355 A.2d 679 (1976), a Superior Court used the legislative findings of New Jersey's Coastal Area Facility Review Act to support its conclusion that the coastal area could constitutionally receive special treatment. 355 A.2d at 686.

144. Projects defined as "major developments" under North Carolina's CAMA must obtain permits directly from the CRC. N.C. GEN. STAT. §113A-118 (1975).

145. Village of Belle Terre v. Boraas, 416 U.S. 8, n. 5 (1974); In re Spring Valley Development, 300 A.2d 752-54 (Me. 1973).

146. North Carolina's CAMA allows the CRC to periodically amend its AEC designations. N.C. GEN. STAT. §113A-115(c)(1975).

147. N.C. GEN. STAT. Const. Article II, §24(1)(1975). For a discussion of the possible application of this doctrine to the N.C. CAMA, see Glenn, supra note 94, at pp. 306-14.

148. 112 N.J. Super. 89, 270 A.2d 418, aff'd 304 A.2d 545

149. 270 A.2d at 425.

150. 140 N.J. Super. 135, 355 A.2d 679 (1976).

151. 355 A.2d at 686.

152. Id.

153. 270 A.2d at 425, 355 A.2d at 686. See also Village of Belle Terre v.Boreas 416 U.S. 1 (1974).

154. See Glenn, supra note 94.

155. Id. at 306-14.

156. See text accompanying notes 2-3, 8-10, supra.

157. R. LINOWES AND D. ALLENSWORTH, THE STATES AND LAND USE CONTROL 232-233 (1975).

158. FLA. STAT. ANN. §380.05 (1975); ORE. REV. STAT. §197.250 (1975). In Oregon, however, a state agency has responsibility for issuing permits for activities of statewide significance. ORE. REV. STAT. §197.415 (1975).

159. N.C. GEN. STAT. §113A-118 (1975).

160. N.C. GEN. STAT. §113A-120 (1975). These findings would be reviewable in court under the "substantial evidence" standard. In Re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973); In Re Wildlife Wonderland, Inc., 346 A.2d 645 (Vt. 1975).

161. U.S. CONST. Arts V and XIV.

162. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law", 80 HARV. L. REV. 1169 (1967).

163. See F. BOSSELMAN, D. CALLIES AND J. BANTA, THE TAKING ISSUE 51-138 (1973).

164. Sax, Takings, Private Property and Public Rights, 81 YALE L. J. 149 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 SO. CAL. L. REV. 1 (1971).

165. F. BOSSELMAN, D. CALLIES AND J. BANTA, THE TAKING ISSUE 238-255; 266-283 (1973).

166. 201 NW2d 761, 56 Wis. 2d 7 (1972).

167. 201 NW2d at 768.

168. 201 NW2d at 771.

169. 284 NE2d 891 (Mass. 1972)

170. 284 NE2d at 899-900.

171. 293 A2d 241, 266 Md. 358 (Md. App. 1972).

172. 293 A2d at 250. In Norbeck Village Joint Venture v. Montgomery County Council, 254 A.2d 700, 254 Md. 59 (Md. App. 1969), a zoning ordinance was upheld despite a two-thirds diminution in value of a landowner's property. In New Jersey, wetlands legislation has been upheld. Sands Point Harbor, Inc. v. Sullivan, 346 A.2d 612, 136 N.J. Super. 436 (1975); Toms River Affiliates v. Department of Environmental Protection, 355 A.2d 679, 140 N.J. Super. 135 (1976). In Maine, the application of the Site Location Law was upheld in In Re Spring Valley Development, 300 A.2d 736 (Me. 1973). See also Sibson v. State, 336 A.2d 239 (N.H. 1975); Candlestick Prop., Inc. v. San Francisco Bay C. & D. Comm., 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

173. 255 N.E. 2d 347 (Mass. 1970).

174. 255 N.E. 2d at 350, 352. The town board subsequently again denied the permit and, on judicial review of the decision the Massachusetts Supreme Court ordered the granting of the permit. MacGibbon v. Board of Appeals of Duxbury, 340 N.E. 2d 487 (Mass. 1976).

175. 255 N.E. 2d at 352. See also Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E. 2d 666 (Mass. 1965).

176. 265 A.2d 711 (Me. 1970).

177. 265 A.2d at 716. Contrast the decision of the same court in In Re Spring Valley Development, 300 A.2d 736 (Me. 1973). The court distinguished Johnson only on the basis that in Spring Valley there was nothing in the record to indicate an unreasonable burden. 300 A.2d at 749. For earlier cases holding that an unconstitutional taking existed see Morris Co. Improvement Co. v. Township of Parsippany - Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Dooley v. Town Plan and Zoning Commission, 151 Comm. 304, 197 A.2d 770 (1964); Bartlett v. Zoning Commission of the Town of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971).

178. See Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, cert. denied, 371 U.S. 36 (1972) (property in question rendered worthless); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

179. The harm-benefit test is the rule that a taking occurs when the police power is used to secure a public benefit. For criticism of this rule see Bowden, Legal Battles on the California Coast: A Review of the Rules, 2 COASTAL ZONE MMT. J. 273, 281-282 (1976).

180. This is readily apparent from a consideration of the cases, notes 170-177 supra.

181. N.C. GEN. STAT. §113A-123(b) (1975).

182. Glenn, The Coastal Area Management Act: A Preliminary Analysis, 53 N.C. L. REV. 303, 330-338 (1974). The case from which this statutory definition was apparently taken is Helms v. City of Charlotte, 255 N.C. 647, 122 S.E. 2d 817 (1961).

183. See Glenn, supra note 182 for a discussion of these problems.

184. This is a required step for the designation of areas of particular concern in coastal zone management. See note 54, supra.

185. For examples of this see especially Just v. Marinette County, 56 Wis. 7, 201 N.W. 2d 761 (1972) and Turnpike Realty v. Town of Dedham, 284 N.E. 2d 891 (Mass. 1972).

186. See text accompanying notes 104, 105 and 108 supra.

187. See generally, D. GODSCHALK, F. PARKER AND T. KNOCHE, CARRYING CAPACITY: A BASIS FOR COASTAL PLANNING? (1974).

188. Just v. Marinette County, 56 Wis. 7, 1201 N.W. 2d 761 (1972); Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972). See also NORTH CAROLINA CONST. Art. XIV, Sec. 5. (Supp. 1975).

189. See generally, Schoenbaum, Public Rights and Coastal Zone Management, 51 N.C. L. REV. 1 (1972).

190. Ashmore v. State ___S.E. 2d___(Ga. 1976); Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E. 2d 513 (1970); Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 146 S.E. 434 (S.C. 1928); International Paper Company of Moss Point v. Mississippi State Highway Department, 271 So. 2d 395 (Miss. 1973) cert. denied 414 U.S. 827 (1973); Neptune City v. Avon-By-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972). See generally Comment, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 YALE L. J. 762 (1970).

191. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

192. State ex. rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) (custom); Gion v. City of Santa Cruz, Z Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (dedication); Seaway Company v. Attorney General, 375 S.W.2d 923 (Tex. 1964) (prescription); United States v. St. Thomas Beach Resorts, 386 F. Supp. 769 (D.V.I. 1974).

193. State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904). See generally D. DUSCIK, SHORELINE FOR THE PUBLIC 87-136 (1974).

194. N.C. Const. Art. XIV, Sec. 5 (Supp. 1975).

195. See text accompanying notes 100-104 supra.

196. MacGibbon v. Town of Duxbury, 340 N.E.2d 487 (Mass. 1976).

197. For recommendations and a survey of state natural area preservation programs see generally THE PRESERVATION OF NATURAL DIVERSITY: A SURVEY AND RECOMMENDATIONS (The Nature Conservancy 1975).

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