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STATE AND LOCAL RESTRICTIONS ON SITING COASTAL AQUACULTURE IN NEW YORK

Milton Kaplan
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for State and Local Government Law
Faculty of Law and Jurisprudence
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STATE AND LOCAL RESTRICTIONS ON SITING COASTAL AQUACULTURE FACILITIES IN NEW YORK

I. Introduction

In its findings leading to enactment of the National Aquaculture Act of 1980, Congress stated that "[m]any areas of the United States are suitable for aquaculture, but are subject to land-use or water-use management policies that do not adequately consider the potential for aquaculture and may inhibit the development of aquaculture."[1] In the final report on a national study of barriers to aquaculture development, commissioned by the United States Fish and Wildlife Service (hereafter referred to as the Regulatory Constraints Report), the authors concluded:

> There are few aspects of aquaculture uses of lands and waters . . . that are not regulated to some degree or other at all three levels of government -- federal, state, and local. These regulations may range in scope from environmental impact statements to pond construction permits. Some regulations govern specific activities such as grading, construction, and effluent disposal regardless of location. Others regulate activities within specific geographic areas such as conservation districts and the coastal zone. In short, within each broad category of regulation, the aquaculture entrepreneur likely will be confronted by several levels of government.
>
> A second level of complexity remains to be confronted, however. Within each level of government -- federal, state, and local -- are a variety of agencies with responsibilities touching on aquaculture. The propensity of many agencies within each level traditionally has been to stake out their piece of the regulatory turf and to guard it against all comers. That scenario, however, is changing among federal agencies and in many state agencies involved with aquaculture.[2]

The Regulatory Constraints Report and the background documents on which it was based compiled state laws and regulations impacting

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1. 16 USC § 2801(a)(8) (1982).

2. United States Fish and Wildlife Service, Final Report, Aquaculture in the United States: Regulatory Constraints I-2-3 (submitted by the Aspen Research and Information Center, March 16, 1981).

aquaculture development under the following categories: species management; water management; land management; health and safety; pollution control; and commerce and labor.[3] The subjects embraced by these categories are found in the the Regulatory Constraints Report's list of subcategories, set out in the Appendix attached to this report. Brief descriptions of just the New York laws and regulations in these categories fill 38 pages.[4] Analyses of these and federal laws and regulations, probing problems they pose for aquaculture development in New York, would fill volumes.[5] A summary of statutory permitting requirements in New York of potential concern to aquaculturists, compiled by the New York State Office of Business Permits, covers about 120 pages.[6]

The focus of this report is narrowed to direct siting requirements imposed by New York state and its local governments, with emphasis on the relationships between state and municipal regulatory regimes. Except for brief preliminary mention, and references to points of intersection with state or local regulatory activities, applicable federal laws will not be covered.[7] The reference to restrictions "directly" affecting aquaculture is not self-explanatory. By "direct siting requirement" we mean to include (1) the regulation of water based activities aimed primarily at protecting navigation and other traditional public uses of waters, such as restrictions on the placement of obstructions in open navigable waters, on dredging and filling, or on the operation of vessels;[8] (2) comprehensive land use control laws covering the entire jurisdiction of a municipality and prohibiting or

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3. Regulatory Constraints Report IV-3-8.

4. Id vol 2 at 354-92.

5. See two of the four reports on the United States Fish and Wildlife Service study leading to its final report: A Directory of Federal Regulations Affecting the Development and Operation of Commercial Aquaculture (350 pages); and A Directory of State Regulations Affecting the Development and Operation of Commercial Aquaculture (vol 1, 311 pages; vol 2, 657 pages).

6. The list is on file in the office of the New York Sea Grant Institute, Albany, New York.

7. See, e.g., Novack, Federal and State Controls over Land/Water Development in Navigable and Nonnavigable Waters, 1 Sea Grant L J 335 (1976).

8. Boating regulations will be noted both because they provide a background for analysis of central issues of state-local relationships in New York, and because some types of floating aquaculture facilities might conceivably fall under laws restricting the operation of vessels in navigable waters.

restricting aquaculture in uplands or waters within certain districts; (3) similarly restrictive laws and regulations applying to specified types of land or areas, including coastal erosion hazard areas, wetlands, flood plains, and waterfront revitalization areas.

Some of the more or less closely related subjects that will not be covered in this report are: the protection of, or restrictions on, littoral or riparian rights of aquaculturists or others;[9] the sale or leasing, or granting of licenses or permits to use, state or municipal underwater lands or shorelands for aquaculture;[10] fishing and fish hatchery licenses; water pollution from effluents of aquaculture operations or from external sources;[11] regulations of various other operations, such as restrictions on fishing for, or harvesting, finfish or shellfish; and the simplification and coordination of multiple permitting requirements for aquaculture activities. An overview of problems of pollution of shellfish growing waters is under preparation by the Sea Grant Law Program of the Faculty of Law and Jurisprudence, State University of New York at Buffalo; and other studies have been reported in various publications of the New York Sea Grant Institute.

State laws generally, and New York laws in particular, distinguish freshwater bodies and marine waters in framing regulatory laws.[12] "Generally, freshwater requirements tend to be less rigorous than marine, primarily because fewer public resources are involved."[13] Largely for that reason, although finfish culture in inland ponds, particularly by private operators, will normally be subject to siting restrictions, this report relates mainly to the siting of aquaculture facilities in or along marine waters. Some of the subjects would be pertinent as well to the development of finfish aquaculture along the shores of the Great Lakes or other large lakes.

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9. Some aspects are discussed in a companion report prepared by the author for the New York Sea Grant Institute, Access to Waters and Underwater Lands for Aquaculture in New York (January 1984) (hereafter cited as the Aquaculture Access Report).

10. The focus of the Aquaculture Access Report.

11. Except to the extent water pollution is one of the environmental factors taken into account in passing on the appropriateness of proposed aquaculture sites under statutes examined by this report.

12. See article 13 of the New York Environmental Conservation Law, dealing separately with marine and coastal resources, including marine fisheries.

13. Regulatory Constraints Report IV-15.

The nature of the siting regulations to be discussed in this report is dictated by the nature of the aquaculture facilities and operations governments deem it necessary or desirable to regulate. The factual context is presented in some detail in the companion report on access to New York waters and underwater lands for aquaculture.[14] A brief, general description should suffice for the purposes of this report.

The term "aquaculture," in its broadest sense, is defined as "the growing of aquatic organisms under controlled conditions."[15] A subclass is sometimes marked out for aquatic activities taking place in brackish or seawater -- called "mariculture."[16] The field may also be divided in accordance with the the types or species of organisms cultivated, the major categories being animals and plants. The animal varieties are divided into fish (finfish, or vertebrates); mollusks (shellfish or bivalve culture, e.g., oysters, clams, mussels); and crustacea (e.g.,

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14. Aquaculture Access Report.

15. Bardach, J.E., J.H. Ryther and W.O. McLarney, Aquaculture: The Farming and Husbandry of Freshwater and Marine Organisms 2 (New York: Wiley-Interscience, 1972) (cited hereafter as Bardach). The National Aquaculture Act of 1980 defines "aquaculture" as the "propagation and rearing of aquatic species in controlled or selected environments, including but not limited to, ocean ranching (except private ocean ranching of Pacific salmon for profit in those States where such ranching is prohibited by law)." 16 USC § 2802(1) (1982). "Aquaculture," one of the activities subject to the land use regulations promulgated under the New York Tidal Wetlands Act (Environmental Conservation Law, art 25 [McKinney Supp 1982]) is defined in the regulations as "the cultivation and harvesting of products that naturally are produced in the marine environment, including fish, shellfish, crustaceans and seaweed, and the installation of cribs, racks and in-water structures for cultivating such products, but shall not mean the construction of any building, any filling or dredging or the construction of any water regulating structures." 6 NYCRR § 661.4 (1977).

16. Clay, G.S., et al, Ocean Leasing for Hawaii II-1 (prepared for the Aquaculture Development Program, Department of Planning and Economic Development, State of Hawaii) (1981) (cited hereafter as Clay). Gerald Bowden issues a caveat in noting the general, "clearly sensible," distinction based on the difference between fresh water and sea water habitats: "[C]urrent usage tends to blur the distinction. The reader is cautioned, therefore, not to draw any saline inferences from seemingly interchangeable use of the words aquaculture and mariculture." Coastal Aquaculture Law and Policy 2 (Westview Press, Boulder, Colo, 1981).

shrimps, crabs, lobsters).[17] Examples of subcategories of marine plants are seaweed and plankton.[18]

The cultivation of shellfish or crustacea may entail any of four types of operations: bottom culture, as in the planting of seed oysters or clams on the water bed; off-bottom culture, using a structure placed on the water bottom to support the growing crop in the waters above, or suspending trays or bags of oysters from floating racks or rafts affixed to the water bottom by cable; pond culture, using seawater or brackish water ponds, sometimes connected with the sea or bays by lagoons or channels; and onshore hatcheries, generally using tanks, either to produce seed oysters or clams, or to enhance the growth of seed oysters or clams initially developed in water bottoms or on off-bottom facilities.[19]

The rearing of finfish is generally done in pens or cages suspended in water and attached to bottom land. More so than for shellfish or crustacea cultivation, space requirements for finfish aquaculture normally require access to upland sites adjacent to the water based facilities for locating hatcheries, tanks, freezers, or other processing buildings or equipment.

The cultivation of seaweed can take a variety of forms and dimensions, but generally it requires the use of floating rafts or raft-like structures anchored to the water bottom. Pending experimentation in New York with the cultivation of seaweed for biomass conversion to produce methane gas, though on a small scale of perhaps a quarter of an acre or less, suggests that to achieve acceptable yields the seaweed farms for energy conversion would require the exclusive use of many acres, if not square miles, of water surface. Whether or not the farms

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17. Clay II-1 - II-2; O. W. Terry, Aquaculture 11-12 (New York Sea Grant Institute, MESA New York Bight Atlas Monograph 17, 1977) (cited hereafter as Terry). The "aquatic species" covered by the definition of "aquaculture" in the National Aquaculture Act of 1980 include "any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant." 16 USC § 2802(3) (1982). As used in New York's Fish and Wildlife Law (article 11 of the Environmental Conservation Law), "'fish' means all varieties of the super-class Pisces"; "'Food fish' means all species of edible fish"; and "'Shellfish' means oysters, scallops, and all kinds of clams and mussels." Environmental Conservation Law § 11-0103(1a, b), (9) (McKinney 1973). And see the definitions of "food fish" and "shellfish" in the regulations relating to the licensing of marine hatcheries (6 NYCRR § 48.1 [1981]).

18. Clay II-1; Terry 13.

19. The information in this and the next two paragraphs is summarized from the Aquaculture Access Report.

would be close enough to shore to attract state or governmental regulations remains to be seen.

II. Allocation of Powers in the Federal System

"The common law pertaining to use of inland watercourses was received by the states in this country, not by the federal government, and the power to shape the contents of common law rights is reserved to the states, except as it may be affected by powers delegated to the federal government and exercised by it."[20] The federal government's jurisdiction over waters arises from the commerce power delegated to it in the United States Constitution.[21]

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. . . . This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders.[22]

Waters are deemed "navigable," for the purpose of defining the "navigable waters of the United States" subject to such control, "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[23] In determining navigability the courts have looked at the capacity for use, rather than the actual manner and extent of use.[24] The navigable waters of the United States also include all waters subject to tidal action.[25] Under

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20. Waite, Pleasure Boating in a Federal Union, 10 Buffalo L Rev 427, 430 (1961).

21. Art II, cls 2 and 13.

22. Gilman v Philadelphia, 70 US 713, 724-725 (1865).

23. The Daniel Ball, 77 US (10 Wall.) 557, 563 (1870).

24. United States v Pots-Net, Inc., 363 F Supp 812 (D Del 1973).

25. United States v Stoeco Homes, Inc., 498 F2d 597 (3d Cir 1974).

either test, the waters of Long Island Sound and Gardiner's and the Peconic bays are navigable. Accordingly, Long Island Sound and several of the larger bays around Long Island have been declared navigable waters of the United States for purposes of application of the commerce clause.[26] Once a body of water has been adjudged navigable, it remains so regardless of the action of natural forces and man-made alterations.[27]

The pervasive nature of "navigable waters of the United States," coupled with the extensive jurisdiction of the United States Corps of Engineers (the Corps) over activities obstructing navigation or impairing water quality, attracts federal regulatory authority in most any significant aquacultural project situated in or near water bodies.

The Corps' role in protecting navigation derives from section 10 of the Rivers and Harbors Appropriations Act of 1899, which prohibits the creation of "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States"; and makes it unlawful to build "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army, through the Corps]"; or "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army, through the Corps] prior to beginning the same."[28]

For the purpose of administering the Rivers and Harbors Act the Corps has defined the term "structure" to include "any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or

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26. The J. Duffy, 14 F2d 426, 426-427 (D Conn 1926), rev'd on other grounds, 18 F2d 754 (2d Cir 1927), cert denied, 275 US 528 (1927) ("the waters of Long Island Sound proper are territorial waters that our municipal law reaches," for purposes of enforcing the National Prohibition Act, and the Tariff Act of 1922); Village of Old Field v Schuyler, 13 NY2d 6, 12, 240 NYS2d 980, 982, 191 NE2d 460, 462 (1963) ("the waters of Long Island Sound are navigable waters within the jurisdiction of the United States," subject to federal laws restricting dredging).

27. State Water Control Board v Hoffman, 574 F2d 191 (4th Cir 1978); Whitehead v Jessup, 53 Fed 707 (CCNY 1893).

28. 33 USC § 403 (1976) (cited hereafter as the Rivers and Harbors Act).

obstruction."[29] Under this definition, a facility for growing seaweed, anchored to the water bottom, whether or not deemed a "floating vessel," and probably occupying at least a quarter of an acre of surface water, would constitute an obstruction attracting the jurisdiction of the Corps. A permit from the Corps would be required, in the form of either an individual permit or a letter of permission, depending upon the District Engineer's assessment of the scope, environmental impact and degree of public opposition to the proposed project.[30] A rearing pen or other type of facility for finfish culture would be less likely to impede navigation, but might nevertheless be deemed an "obstruction" requiring a permit from the Corps. The District Engineer for the New York District of the Corps is the person authorized to process and issue a section 10 permit for the Long Island Sound area.[31]

Under section 404 of the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977 (hereafter referred to, collectively, as the Clean Water Act), the Corps is responsible for acting on applications for permits for the discharge of dredged or fill material into "navigable waters" of the United States.[32] Though the discharge of "any pollutant, or combination of pollutants," into such waters is prohibited generally under the Clean Water Act, it may be allowed by permit granted by the Administrator of the Environmental Protection Agency, if the discharge meets the Agency's standards as well as all applicable requirements of section 404.[33] For the purposes of the Clean Water Act, the definition of the term "navigable waters" is not narrowed to traditional notions of navigability, as it is when used in the Rivers and Harbors Act, but embraces much broader categories of "waters of the United States" coming within the orbit of the federal commerce power.[34] Under 1974 regulations of the Corps, the Corps jurisdiction under both the Rivers and Harbors Act and Clean Waters Act was extended to nonnavigable

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29. 33 CFR § 322.2(b) (1983).

30. §§ 322.2(d),(e), and 325.5(b) (1983); cf id § 322.5(f),(g) (1983).

31. See id § 325.8(b) (1983).

32. 33 USC §§ 1311(a) (1976).

33. Id §§1311, 1342 (1976 and Supp 1981).

34. United States v Holland, 373 F Supp 665 (MD Fla 1974); and Natural Resources Defense Council, Inc. v Callaway, 392 F Supp 685 (D DC 1975). And see the discussion of this and related facets of the Corps jurisdiction in Finnell, The Federal Regulatory Role in Coastal Land Management, 1978 Am Bar Foundation Research J 169, 176 et seq.

swamps, marshes and other wetlands meeting specified criteria.[35]

Under provisions of the Clean Water Act and implementing regulations dealing specifically with aquaculture, the Administrator may "permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision."[36]

States meeting certain qualifications are authorized to assume regulatory authority under both section 404 and the pollutant discharge sections of the Clean Water Act.[37]

Federal jurisdiction over activities constituting interstate commerce is not exclusive. The police powers reserved to the states may also regulate activities affecting, but not unduly burdening, interstate commerce, or incidentally affect other maritime affairs; but in the event of a conflict between federal and state laws, the federal laws prevail.[38]

Local governments may exercise the state's police power through delegation by the state legislature or pursuant to home rule grants in state constitutions. In some respects the state and local governments share powers to regulate water-related activities. Questions regarding the boundaries of their respective jurisdictions do arise, however, from ambiguities or uncertainties in state enabling legislation. These will be treated below in the discussion of the powers of New York State and its local governments to regulate activities obstructing navigation.

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35. 33 CFR § 209.120 (1982). And see United States v Holland (nonnavigable mosquito canals and mangrove wetlands); and Finnell, supra note 34, at 187 et seq.

36. 33 USC § 1328 (Supp 1981). And see 40 CFR §§ 122-25 (1983), as amended by 45 Fed Reg 33290-588 (May 19, 1980). The regulations define "aquaculture project" as "a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals." 40 CFR § 122.25 (1983). And see §§ 125.10-11 for criteria for granting permits for aquaculture projects.

37. 33 USC §§ 1344(g) (Supp 1981).

38. Cooley v Board of Wardens of Port of Philadelphia, 53 US (12 How.) 299 (1851); Parker v Brown, 317 US 341 (1943); Askew v American Waterways Operators, Inc., 411 US 325 (1973).

III. State Regulation of Water Based Activities

A. The Extent of State Jurisdiction; the "Tidewaters" Exception

1. Regulation Limited to "Navigable Waters of the State"

New York State has exercised its reserved power over navigation through legislation dating back to 1784.[39] The various enactments have been assembled in three consolidations, designated the Navigation Law, adopted in 1897, 1909, and 1941.[40] They "brought together the general statutory provisions relating to the navigation of the waters under state control, except the canals," and in this effort the "term 'navigation' was used in the broadest sense and was made to include not only the regulation of vessels passing over the waters, but also the subjects of obstructions to navigation, the use of streams as public highways, tidewater navigation and the pollution of waters."[41]

1941. Until 1941 the legislature did not perceive a need to limit the locations of waters covered by the Navigation Law provisions governing the operation of vessels. Various sections of the predecessor Navigation Law of 1909 applied generally to "waters of this state,"[42] or to named waterways or other specific locations.[43] In the 1941 consolidation the provisions of the Navigation Law were applied uniformly to the "navigable waters of the state," with some exceptions. At the same time, the addition of the descriptor "navigable" introduced navigability as a limiting factor. The term "navigable waters of the state" was defined to include "all inland lakes and streams wholly included within the state and not privately owned which are navigable in

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39. See Schedule of Laws Repealed by the Navigation Law of 1909, in McKinney's Navigation Law xiii-xiv (1941).

40. 1897 NY Laws ch 592; 1909 NY Laws ch 42; 1941 NY Laws ch 941.

41. 1907 Report of Board of Statutory Consolidation 3816.

42. See, e.g., § 11, sailing rules; and § 50-a, location of buoys or beacons (1909 NY Laws ch 42, as amended). Earlier the Navigation Law had been made "applicable to all steam vessels navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States." 1897 NY Laws ch 592, § 1.

43. See, e.g., §§ 52-55, relating to the deposit of refuse, removal of gravel, ice blockage or pilotage fees in specified water bodies (1909 Laws ch 42, as amended); and 3 Rev Stats ch 20, tit. 10, §§ 16-18 (8th ed 1899), regulating obstructions in the waters of the Hudson River and other specified waters in the New York City area.

fact and are not connected by navigable channels with tidewater."[44] In turn, "navigable in fact" was defined to mean

> navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.[45]

1956. Fifteen years later the Joint Legislative Committee on Motor Boats observed that limiting the law to "navigable waters of the state" left "very few bodies of water . . . under State jurisdiction," for it excluded (1) all lakes and rivers not connected with tidewater by navigable channels (thus excluding such large lakes as Cayuga, Oneida and Seneca, and such rivers as the Hudson, Mohawk and Seneca); (2) lakes and streams which are not navigable in fact (an estimated 2,000 small bodies of water, including popular vacation areas in the Adirondacks and elsewhere); and (3) waters not wholly included in New York State (thus excluding portions of Lake Erie, Lake Ontario, and Lake Champlain).[46] As a result the "great bulk of the boating" in New York was in "the very waters which are excluded and the recent tremendous increase in boating and boat traffic is on the waters over which the State has no control."[47] The committee also noted

> that under the existing definition it is difficult for boatmen to determine the exact extent of State control and law enforcement officers have been hampered by the lack of a clear cut understanding of their jurisdiction. Moreover, under the present statute it has been almost impossible to determine just which boats must be registered with the Department of Public Works [under section 71 of the Navigation Law] and carry an assigned identification number.[48]

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44. Navigation Law § 2(4), as amended by 1941 NY Laws ch 941 (emphasis added) (McKinney 1941).

45. Id § 2(5).

46. Memorandum of the Joint Legislative Committee on Motor Boats, in Governor's Bill Jacket on 1956 NY Laws ch 596 (another version found in 1956 New York State Legislative Annual 54).

47. Id; and see People v Hart, 206 Misc 490, 133 NYS2d 98 (Co Ct, Wayne Co, 1954).

48. Joint Legislative Committee memorandum, supra note 46.

To remedy the situation the committee sponsored and the legislature enacted a bill amending the definition of "navigable waters" in section 2(4) of the Navigation Law to read as follows:

> "Navigable waters of the state" shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except tidewaters lying south of the parallel of the forty-first degree of north latitude and Long Island sound.[49]

The committee pointed out that the "41st parallel runs approximately through Hastings on Hudson"; that the "lower Hudson River and Long Island Sound are excepted from State jurisdiction because it is understood that the Coast Guard exercises active and adequate control over those areas"; and that the expanded definition would give the Department of Public Works (then the enforcement agency) "basic jurisdiction over all boating within the State except that on Long Island Sound and the lower Hudson River."[50] In the light of this legislative history, three features of the 1956 amendment bear on issues to be explored in this report.

(1) In altering the definition of "navigable waters of the state" and thus enlarging state jurisdiction under the Navigation Law, the legislature appeared to be concerned solely with the enforcement of boating regulations. The expanded definition similarly enlarged the jurisdiction of the state over waters subject to the Navigation Law's provisions restricting the placement of obstructions in navigable waters (the subject of section 32 of the Navigation Law, to be discussed later). Apparently the implications were not brought to the attention of the legislature or Governor.

(2) There is no evidence that the exception was intended to delineate state and municipal regulatory powers, or imply a fresh delegation of exclusive authority to local governments. The concern, rather, was with the division of authority between the state's Department of Public Works and the United States Coast Guard.

(3) The wording of the exclusionary clause — "except tidewaters lying south of the parallel of the forty-first degree of north latitude and Long Island sound" (emphasis added) -- invites problems of interpretation. The term tidewaters is not used to describe Long Island Sound. The clause did not say "tidewaters lying south of the parallel of the forty-first degree of north latitude and of Long Island Sound."

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49. 1956 NY Laws ch 596 (emphasis added).

50. Joint Legislative Committee memorandum, supra note 46. The Division of the Budget also noted that "jurisdiction over some waters of the State is split between the Coast Guard and the State." Governor's Bill Jacket on 1956 NY Laws ch 596.

Thus, one might ask whether the exemption of "Long Island Sound" extended only to waters within the Sound proper, or was meant to include, as well, tidewaters flowing to and from the Sound in its tributaries. Some clarification may be found in subsequent amendments, to be noted below.

1958. Following the 1956 amendment it came to the attention of Senator Elisha T. Barrett of Bayshore, Long Island, that all or portions of Little Peconic Bay, Gardiner's Bay, Fishers Island Sound and Block Island Sound were north of the forty-first parallel, thus not covered by the exception unless they were regarded as part of Long Island Sound.[51] The Department of Public Works had considered these waters to be part of the Sound, but this was subject to some doubt.[52] To resolve the problem Senator Barrett introduced a bill, enacted in 1958, further amending the Navigation Law definition of "navigable waters of the state" to exclude "tidewaters lying south of the parallel of the forty-first degree of north latitude and Long Island Sound, Little Peconic Bay, Gardiner's Bay, Fishers Island Sound and Block Island Sound."[53]

Again the legislature seemed to be preoccupied with the extent of state jurisdiction over boating and the division of responsibility between the state and the Coast Guard. The Attorney General, in addressing the proposed 1958 amendment, said that it would "release such bodies of water from State law and only Federal rules and regulations will be applicable."[54]

1959. Within one year the City of New York expressed dissatisfaction with the 1958 amendment and asked for a further revision "so as to extend the jurisdiction of the State over waters of the City of New York, waters excluded in the 1958 amendment's definition of "navigable waters."[55] It was explained that "[t]hese waters are presently policed by the coast guard but because of insufficient funds and personnel it can not properly police these waters and it has also

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51. Memorandum of Senator Elisha T. Barrett, in Governor's Bill Jacket on 1958 NY Laws ch 170.

52. 1958 NY Laws ch 170; and Memorandum of John W. Johnson, New York State Superintendent of Public Works, March 10, 1958, in Governor's Bill Jacket on 1958 NY Laws ch 170.

53. 1958 NY Laws ch 170.

54. Memorandum of Louis J. Lefkowitz, Attorney General, in Governor's Bill Jacket on 1958 NY Laws ch 170.

55. Memorandum of J. Burch McMorran, New York State Superintendent of Public Works, in Governor's Bill Jacket on 1959 NY Laws ch 840.

requested that State jurisdiction be extended to cover them."[56] The Joint Legislative Committee on Motor Boats obliged by sponsoring a further revision of the definition, which the legislature enacted in 1959. As so amended the definition read as follows:

> "Navigable waters of the state" shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except the waters of Long Island Sound lying within the boundaries of Westchester county and all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties."[57]

Note the following features of the amendment:

(1) The New York City waters were taken out of the exception by deleting the reference to "tidewaters lying south of the forty-first parallel."

(2) The waters of Long Island Sound were used as a reference point only to describe exempted waters within Westchester county.

(3) The boundaries of Nassau and Suffolk counties, rather than the waters of Long Island Sound, were referred to in describing the exempt status of waters in those counties.

(4) The ambiguity noted in the failure of the 1956 version to refer to tidewaters of the Sound may have been resolved — an issue to be discussed below.

(5) The clauses specifically excluding Little Peconic Bay, Gardiner's Bay, Fishers Island Sound and Block Island Sound were omitted. There is no evidence that the legislature intended to remove their exempt status; rather, the intent was probably to accord them exempt status as tidewaters within or bordering on Suffolk County.

(6) Again the ostensible reason for the legislation was to extend state jurisdiction over motor boating, not over other types of activities regulated by the state.

The amended description of waters subject to control under the Navigation Law was one of a package of measures sponsored by the Joint Legislative Committee on Motor Boats in 1959. The revisions were

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56. Id. And see Memorandum of Robert F. Wagner, Mayor of the City of New York, April 18, 1959, in Governor's Bill Jacket on 1959 NY Laws ch 840.

57. 1959 NY Laws ch 840 (emphasis added). See the Governor's approval memorandum in 1959 New York State Legislative Annual 463.

prompted by the finding of an "increase in boating upon the waters of the state and the rising number of accidents and conflicts resulting therefrom."[58] Among other reforms, the new program established a Division of Motor Boats within the Department of Conservation; established a new and improved procedure for the registration of motor boats; and encouraged enforcement by the counties of state boating regulations by allocating one half the annual motor boat registration fees to the counties.[59] A distinction must be drawn between local enforcement of state laws and the power of municipalities to adopt and enforce their own regulations. The 1959 amendments did not enhance local powers in the latter category.

1965. In 1965, for reasons similar to those given by New York City seven years earlier, various cities, towns and villages in Westchester County requested legislation bringing waters of Long Island Sound under their jurisdiction within the definition of "navigable waters" in the Navigation Law, thus removing the then existing Westchester County exemption.[60] Assemblyman Van Cott, the sponsor of one of the bills responding to these requests, explained that "Westchester County is not one of those counties which enforces the provisions of the navigation law," hence "the burden of enforcement falls to the various cities, towns and villages bordering Long Island Sound within Westchester County," for which they do not receive state aid.[61] The corrective legislation (1) provided state aid for cities, towns and villages enforcing boating laws where counties failed to act;[62] and amended section 2(4) of the Navigation Law to read as follows:

> "Navigable waters of the state" shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and

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58. 1959 NY Laws ch 838, § 1.

59. Id. The pertinent 1959 amendment did not grant such enforcement powers. Generally, it is the duty of all local peace officers, including county sheriffs, to enforce state laws, including boating regulations. See County Law § 650 (McKinney 1972) (county sheriffs and their deputies); Criminal Procedure Law §§ 1.20(34), 2.10, 2.20(6), 140.25 (McKinney 1982 and Supp 1983); and Navigation Law § 19 (McKinney 1983).

60. A similar effort in 1964 failed because of a technical deficiency in the bills passed by the legislature. See veto message on A Int 3161, S Pr 4581 (1964), in 1964 New York State Legislative Annual 568-569.

61. 1965 New York State Legislative Annual 270. Inasmuch as the waters under the jurisdiction of these municipalities were then exempt from state regulation under the Navigation Law, presumably the municipal enforcement activities were directed to local regulation of boating.

62. Amending Navigation Law §§ 79-a and 79-b (McKinney Supp 1983).

Suffolk counties.[63]

2. The Extent of "Tidewaters" in or Surrounding Long Island

Prior to 1959 it was not clear whether the exclusion from the Navigation Law definition of "navigable waters of the state" relating to the area in or around Long Island Sound applied to "tidewaters" or to waters of the Sound generally (deferring for the moment the question whether this is a difference without a distinction). In addressing the 1956 amendment, the Joint Legislative Committee on Motor Boats appeared to assume that the entire area of Long Island Sound was excluded from the definition of "navigable waters of the state."[64] Yet, in the version of its memorandum on the same amendment appearing in the New York State Legislative Annual, the committee described the enlarged definition as including all waters of the state "except tidewaters lying generally south of the northern tip of Manhattan Island."[65] Also of possible significance is the reference by the Attorney General to "the several large bodies of tidewaters such as Little Peconic Bay," in reviewing the proposed 1958 amendment.[66]

The matter was laid to rest when the 1959 amendment specifically referred to the "tidewaters" in and bordering on Nassau and Suffolk counties. Although the amendment was ostensibly aimed solely at changing the definition in its application to New York City waters, there was a reason for altering the definition in its application to the waters off Long Island: In deleting the language describing New York City waters the term "tidewaters" was removed (New York City waters having been embraced by the words "tidewaters lying south of the forty first degree of north latitude"). This brought into clear focus the question whether the exempt waters around Long Island should be described as "tidewaters" or simply as "waters." The draftsmen probably opted for the term "tidewaters" because they chose to define the excluded area as boundaries of the two counties rather than as waters of the Sound. In framing the Nassau-Suffolk exemption, had they referred to "waters" or "navigable waters" generally, they would have removed from the definition, hence from state jurisdiction for purposes of implementing the Navigation Law, all publicly owned inland lakes, rivers, streams and other waters in Nassau and Suffolk counties "which are navigable in fact or upon which vessels are operated," whether or

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63. McKinney Supp 1983.

64. See text accompanying notes 49-59 supra.

65. 1956 New York State Legislative Annual 54 (emphasis added).

66. Memorandum of Louis J. Lefkowitz, Attorney General, March 10, 1958, in Governor's Bill Jacket on 1958 NY Laws ch 170.

not they are "tidewaters." Arguably, the draftsmen (and so the legislature) meant to retain state jurisdiction over boating on inland waters of the two counties, even though the tidewaters of Long Island Sound were to be exempted.

The questions remain: What waters of Nassau and Suffolk counties generally, or of Long Island Sound specifically, are "tidewaters"? Are all the waters of Long Island Sound "tidewaters" within the scope of the exemption from state jurisdiction under the Navigation Law? If not, what is the extent of such "tidewaters"? How far do they reach into the Sound? Are the waters of the Atlantic south of Long Island, including those of Great South Bay, "tidewaters"? If so, are they within the exception?

Tiffany defines "tide waters" as "those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description." The term has been used as a synonym of "navigable waters," though under some definitions of "navigable waters" they are either more extensive or less extensive than "tidewaters." In an early Massachusetts case Judge Gray explained:[67]

> The term "navigable waters," as commonly used in the law, has three distinct meanings: 1st, as synonymous with "tide waters," being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose; or, 3d, . . . as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.[68]

If we were to apply Tiffany's definition of "tidewaters" to the waters of Long Island Sound, given the navigability-in-fact criterion for applying the Navigation Law's definition of "navigable waters," we would conclude that (1) all waters of the Sound affected by the ebb and flow of the Atlantic Ocean would be "tidewaters," thus specifically excepted under that statute; (2) if any waters of the Sound could not meet the statutory "navigable in fact" test, they would not be "navigable waters" but might nevertheless be "tidewaters," so in any

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67. 2 H.T. Tiffany, The Law of Real Property § 659 (3d ed 1939). For an opinion adopting Tiffany's definition see Sibson v State, 110 NH 8, 259 A2d 397, 399 (1967): The term "tidewaters" should not be confused with "tidelands." The word "tidelands, in its most common usage, denotes "those lands at the margin of tidal waters which are alternately covered and uncovered by the rise and fall of the tide, between the lines of mean high tide and mean low tide, or, as sometimes provided by statute, extreme low tide." 78 Am Jur 2d, Waters § 375. And see Walker v The State Harbor Commissioners, 84 US 648,650 (1878); and J. N. Pomeroy, The Law of Water Rights § 234 (1893).

68. Commonwealth v Vincent, 108 Mass 441, 447 (1871). And see 65 CJS, Navigable Waters § 1.

case would be exempted by the statute; and (3) if any of the waters of the Sound did not feel the ebb and flow of the tide, they might nevertheless be "navigable waters" subject to the provisions of the Navigation Law.[69]

Two lower courts in New York have adopted Judge Gray's definition of "tidewaters" -- "waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt" -- in cases involving alleged violations of state or municipal boating regulations on waters in Suffolk County.

In People v Abrams the court dismissed a charge of operating an outboard motor in violation of motor identification requirements of the Navigation Law, on the ground that the violation occurred in exempt tidewaters "located in the Great South Bay which body of water is affected by the ebb and flow of the sea."[70]

In upholding provisions of the Town of Islip's zoning ordinance restricting the use of waterfront lands on the Connetquot River, the court in Town of Islip v Powell, after referring to the same definition of "tidewaters," said that the "Connetquot is a tidal river bordering on and lying within the boundaries of Suffolk County and the Navigation Law definition [of "navigable waters"] would appear to exclude it from State control."[71] In a dictum not material to the issue in the Town of Islip case but of significance to the present study -- whether the waters of Long Island Sound proper are "tidewaters" -- the court observed that the "word 'tidewater' . . . is usually not applicable to the open sea but to coves, bays and rivers (Black's Law Dictionary [4th ed])."[72] We find no authority for the implication that waters of the open sea -- or, by extension, in the open areas of Long Island Sound -- would not be regarded as "tidewaters." This is not surprising. As suggested by Tiffany's and Judge Gray's definitions of "tidewaters," it would normally be assumed that seaward waters would be classified as "tidal," and the issues addressed by the courts would more likely relate to the

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69. See text accompanying notes 63 and 45 supra for the Navigation Law definitions of "navigable waters of the state" and "navigation in fact." In England "no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water . . . ." The Daniel Ball, 77 US (10 Wall) 557, 563 (1870).

70. 82 Misc2d 979, 980-981, 372 NYS2d 138, 140 (Dist Ct, Suffolk Co, 1975).

71. 78 Misc2d 1007, 1009, 358 NYS2d 987, 989 (Sup Ct, Suffolk Co, 1974).

72. Black's Law Dictionary does not cite any authority for this statement (5th ed 1979).

tidal character of landward bodies of water, such as bays, rivers and streams.[73]

The boundaries of Nassau and Suffolk counties extend "northerly into Long Island Sound at a right angle to the general trend of the coast until [they intersect] the boundary line between the states of New York and Connecticut."[74] Thus all the waters of Long Island Sound north of these counties lie within their respective borders, and if the waters are tidal -- as we surmise they are -- that part of the Sound is excluded from state regulatory jurisdiction under the Navigation Law.

The southern boundaries of Nassau and Suffolk counties are the mean high water mark of the Atlantic Ocean.[75] The southern boundary of New York state is "three geographical miles distant from the coast line"

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73. See Tiffany v Town of Oyster Bay, 234 NY 15, 21, 136 NE2d 224, 225 (1922), referring to the waters of Cold Spring Harbor as "navigable tide waters." And see People v Hart, 206 Misc 490, 492, 133 NYS2d 98, 100 (Co Ct, Wayne Co, 1954), holding that Lake Ontario came within the exception in the 1941 definition of "navigable waters of the state" because it was "connected by a navigable channel with tidewater, the St. Lawrence River flowing from Lake Ontario to the Gulf of Newfoundland." In other cases the New York courts have assumed that the following are "tidewaters": the Harlem River (Oblenis v Creeth, 67 Fed 303 [SDNY 1895]); Huntington Bay, Suffolk County (People v Anton, 105 Misc2d 124, 431 NYS2d 807 [Dist Ct, Suffolk Co., 1980]); Reynolds Channel, Long Beach, in the Town of Hempstead, Nassau County (People v Bianchi, 3 Misc2d 696, 155 NYS2d 703 [Dist Ct, Nassau Co, 1956]); Hempstead Harbor, Nassau County (People v Levine, 74 Misc2d 808, 343 NYS2d 816 [Dist Ct, Nassau Co, 1973], aff'd sub nom People v Wechaler, 79 Misc2d 103, 359 NYS2d 939 [Sup Ct, App Tm, 2d Dep't, 1974]); the Nissequogue River, Town of Smithtown, Suffolk County (People v Poveromo, 79 Misc2d 42, 359 NYS2d 848 [Sup Ct, App Tm, 2d Dep't, 1973]).

74. 1881 NY Laws ch 695. The towns of Oyster Bay, North Hempstead and Hempstead were transferred from Queens county to Nassau county when the latter county was formed in 1898 (1898 NY Laws ch 588). The 1881 law also extended the northerly boundaries of these towns to the New York - Connecticut line in Long Island Sound.

75. 1 New York Rev Stats, Pt 1 ch 1, tit. 1, § 1 (1829); Division of State Planning, New York State Department of State, Federal and State Coastal Boundaries and Jurisdictions in the New York Marine District (Complementing Map Series #2) 3-4 (August 1977) (cited hereafter as the Coastal Boundaries Report).

drawn from the mean low water line of the shore.[76] Presumably the waters within the three-mile strip are tidal.[77] The exclusion from the Navigation Law definition of "navigable waters of the state" covers "tidewaters bordering on," as well as tidewaters "lying within," the boundaries of Nassau and Suffolk counties.[78]

The courts in People v Texaco[79] dealt with the question "whether or not the County of Nassau has jurisdiction over the tidal waters adjacent to its [south] shore."[80] At issue was the authority of the county to include in its Fire Prevention Ordinance provisions requiring the installation of certain facilities at marine terminals used by boats discharging flammable or combustible liquids. Citing section 2(4) of the Navigation Law, the appellate court held "that the County of Nassau is authorized to regulate the tidewaters bordering on and lying within

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76 State Law § 7-a(1)(b) (McKinney 1984). Coastal Boundaries Report 3. The Submerged Lands Act, vesting in the states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States" (43 USC § 1311 [1976]), includes

> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and relictions;
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> (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and
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> (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined. (43 USC § 1301[a] [1976]).

77. See section 13-0103 of the Environmental Conservation Law, providing: "The marine and coastal district shall include the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the state, including the Hudson River up to the Tappan Zee bridge." McKinney 1973.

78. Navigation Law § 2(4) (McKinney Supp 1983).

79. 81 Misc2d 260, 365 NYS2d 661 (Dist Ct, Nassau Co, 1975), aff'd, 87 Misc2d 255, 383 NYS2d 788 (Sup Ct, App Tm, 2d Dep't, 1976).

80. 81 Misc2d at 264, 365 NYS2d at 665.

its boundaries."[81] The court did not have an occasion to identify the seaward line of the "bordering" waters. The alleged violation related to a dock "located at the head of the harbor of Jamaica Bay, a navigable tidal waterway," in the "tidal waters of the south shore of Nassau County."[82]

How far out do the waters "bordering on" these counties extend? To the three-mile limit of the marginal sea? To only a part of the marginal sea washing the counties' south shores? The jurisdiction of New York state extending to, and "exercisable with respect to, waters offshore from the coasts" of the state includes not only the three-mile marginal sea, but also the "high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this state may be party."[83] Might the bordering waters exempt from state regulation under the Navigation Law include, accordingly, waters beyond the three-mile limit that might be used for aquaculture? If the issue should be litigated, the courts would not necessarily come up with a categorical answer, such as a declaration that waters in the entire three-mile area would be deemed to border on one of the counties for the purposes of applying the Navigation Law definition. The courts may, instead, devise a rule of reason, delineating the reach of the exclusion based on the nature and purpose of the state regulatory power under review. We now turn to the regulatory provisions of the Navigation Law of possible relevance to aquaculture in or adjacent to Nassau and Suffolk counties.

B. Restrictions on Construction, Excavation or Fill in New York State Waters

1. Construction of Docks and Other Structures

Section 32 of the Navigation Law reads:

> It shall be unlawful to construct, in the navigable waters of the state, any wharf, dock, pier, jetty, or other type of structure without first obtaining a permit therefor in conformity with the provisions of section four

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[81] 87 Misc2d at 255, 383 NYS2d at 789.

[82] 81 Misc2d at 261, 365 NYS2d at 663.

[83] State Law § 7-a(1) (McKinney 1984). And see G. Tung, Jurisdictional Issues in International Law: Kelp Farming Beyond the Territorial Sea, 31 Buffalo L Rev 885 (1982).

hundred twenty-nine-c of the conservation law [now Environmental Conservation Law § 15-0503].[84]

Section 15-0503 of the Environmental Conservation Law (formerly section 429-c of the Conservation Law), referred to in section 32 of the Navigation Law, requires a permit from the Department of Environmental Conservation for the placement of dams and impoundment structures in a "natural stream or watercourse."[85] Subdivision 1 of section 15-0503 says:

> Except as provided in subdivision 4 of this section, no dam or impoundment structure, including any artificial obstruction, temporary or permanent, in or across a natural stream or water course, shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued [by the Department of Environmental Conservation] pursuant to subdivision three of this section.

Subdivision 3 of section 15-0503 establishes criteria to be considered by the Department of Environmental Conservation in its review and refers to applicable regulations of the Commissioner of Environmental Conservation.[86]

a. Are Docks and Other Types of Landing Places Subject to Regulation?

Prior to a 1983 amendment to section 15-0503 of the Environmental Conservation Law,[87] subdivision 1 required a permit from the Department of Environmental Conservation for the erection, construction, reconstruction or repair of "any permanent dock, pier, wharf or other structure used as a landing place on waters," in addition to the requirement of a permit for a dam or impoundment structure in or across a natural stream or watercourse. The memorandum of Senator Dunne, a

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84. McKinney Supp 1983 (emphasis added). Section 429-c of the Conservation Law became section 15-0503 of the Environmental Conservation Law in the 1972 recodification (1972 NY Laws ch 664, § 2).

85. McKinney Supp 1983. It may be noted in passing that the exceptions in subdivision 4 of section 15-0503 of the Environmental Conservation Law include a "farm pond erected upon lands devoted to farming for the purpose of . . . propagation of fish," unless specified embankment, capacity and other dimensions are exceeded (id).

86. Id.

87. 1983 New York Laws ch 442, effective July 13, 1983. The amendment was proposed by the Department of Environmental Conservation. See memorandum of Laurens M. Vernon, Chief Counsel, Department of Environmental Conservation, dated June 22, 1983, in Governor's Bill Jacket on 1983 NY Laws ch 442.

sponsor of the amendment, explained its purpose as follows:[88]

> This provision eliminates language in ECL § 15-0503(1) requiring a permit to build or repair a dock, wharf or other structure used as a landing place on water and amends ECL § 15-0503(4) to eliminate exemptions for certain docks, piers, wharves and structures from the permit requirement contained in § 15-0503(1). Docks, wharves and piers that are not open-work or open timber require filling, and therefore will still be subject to permit under § 15-0505.[89]
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> . . . .
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> Title 5 of Article 15 of the ECL has been in existence since 1966, essentially in its present form. During that period the program evolved from one which regulated all dock construction to one which only regulated permanent docks with over 200 square feet of top surface area (1975). With 6 years' experience under the new criterion, DEC has determined that docks, piers, wharves and other structures used as a landing place on water, and built with open-work supports, do not have a significant impact on water quality or the fishery resource, and therefore it is not necessary to continue the regulatory program.

This explanation of the purpose of the amendment to the Environmental Conservation Law -- to deregulate the construction of docks and other landing places in "waters"[90] -- is puzzling, in view of the failure of the legislature to eliminate the companion provision of section 32 of the Navigation Law requiring the obtaining of a permit for the construction of "any wharf, dock, pier, jetty, or other type of structure" in the navigable waters of the state. The two statutes could be reconciled by (1) construing section 32 of the Navigation Law as requiring a permit to build or repair docks, other landing places, or

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88. Found in Governor's Bill Jacket on 1983 NY Laws ch 442.

89. Section 15-0505, requiring a permit for excavation or fill, is discussed below. See text accompanying notes 110 et seq.

90. The term "waters" as defined for the purposes of article 15 of the Environmental Conservation Law includes both navigable and nonnavigable water bodies. Section 15-0107(4) of the Environmental Conservation Law says: "'Waters' shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction." McKinney 1973.

any other kind of structure in navigable waters of the state; while (2) construing section 15-0503 of the Environmental Conservation Law as applying solely to dams and impoundment structures in nonnavigable natural streams or watercourses. But this interpretation would hardly produce the result intended by the sponsors of the 1983 amendment. Docks and landing places would normally be located in navigable waters.

b. Assuming that Docks and Other Types of Landing Places Are Subject to Regulation, Would a Permit Be Required for an Aquaculture Facility Not Serving as a Landing Place?

Would an aquaculture facility in navigable waters not serving the purpose of a wharf, dock, or pier be subject to section 32 of the Navigation Law as some "other type of structure"? Assuming that the structure used for aquaculture were a raft or similar to a raft, anchored to the water bed or otherwise moored, one could argue that its purpose was not the same as that of a wharf, dock, pier or jetty, hence not embraced within the section. The argument would invoke two rules of statutory construction: the maxim "noscitur a sociis" ("it is known from its associates"), under which "the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it"; and the maxim "ejusdem generis" ("of the same kind"), under which the meaning of general language of a statute may be limited by specific phrases which have preceded it.[91]

A counter argument would be based on the assumption that the purpose of section 32 of the Navigation Law is to prevent obstructions to navigation from any man-built structure, and that the purpose would not be served by limiting the coverage of the section to docks or similar structures used as landing places. That would be consistent with the plain meaning of the phrase "or other type of structure" in section 32. Docks and other landing places are but one type of structure that may be located in navigable waters. The heading of section 32 lends support to this position. It reads "Construction of structures in or on navigable waters."[92] It does not specify docks or other kinds of landing places.

The issue is clouded by the fact that section 15-0503 of the Environmental Conservation Law, referred to in section 32 of the Navigation Law, deals specifically with a particular type of structure in particular types of waters, namely, a "dam or impoundment structure . . . in or across a natural stream or water course." Ordinarily, it would not matter whether the scope of the term "structures" in section 32 of the Navigation Law embraces a dam or

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91. McKinney Statutes (Book 1) § 239 (1971).

92. Emphasis added. "If . . . the legislative intent is not clearly expressed in the enactment, the courts may resort to the title as an aid in its interpretation." McKinney Statutes (Book 1) § 123 (1971).

impoundment structure in a navigable watercourse. A permit from the Department of Environmental Conservation would be required under either that statute or under section 15-0503 of the Environmental Conservation Law in any case. However, the exemption of the tidewaters of Nassau and Suffolk counties from section 32 of the Navigation Law (but not from section 15-0503 of the Environmental Conservation Law) would raise a problem of statutory interpretation in the case of a dam or impoundment structure in navigable tidewaters constituting a watercourse. We will focus on that problem later in reviewing the special provisions relating to the regulation of dams and impoundment structures.

c. Assuming that Generally a Permit Were Required under Section 32 of the Navigation Law for Aquaculture Facilities, Other than a Dam or Impoundment Structure, Obstructing Navigation, Would the Tidewaters Exemption for Nassau and Suffolk Counties Apply?

For the purpose of raising this issue we are assuming that a moored raft used for aquaculture would be subject to regulation under section 32 of the Navigation Law as a "structure" placed in navigable waters.

We have seen that by statutory definition section 32 of the Navigation Law does not apply to the "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties," because such tidewaters are specifically excluded from the Navigation Law definition of "navigable waters of the state." Yet section 32 of the Navigation Law provides that a permit for placing a structure in navigable waters shall be obtained "in conformity with the provisions" of section 15-0503 of the Environmental Conservation Law, which does not exempt the two counties from its coverage. Does this reference to the Environmental Conservation Law mean that a permit would be required for placing a moored raft, to be used for aquaculture, in any of the tidewaters of the two counties?

We think not. The activity regulated by section 32 of the Navigation Law -- the building of various types of "structures" -- is confined to "navigable waters of the state" as defined in the Navigation Law (as so defined, excluding the tidewaters of the two counties). The activity regulated by section 15-0503 of the Environmental Conservation Law — building a dam or impoundment structure — is confined to natural streams or watercourses. "Every provision of a statute must be construed as having been intended to serve some useful purpose."[93]

The two sections can be reconciled and each can be given effect if the "conformity" provision is construed as merely identifying the permitting agency (the Department of Environmental Conservation) and applicable permitting procedures for administering the Navigation Law

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93. McKinney Statutes (Book 1) § 98 (1971).

provisions.[94]

In the discussion later of the application of the excavation and fill provisions of the two statutes we will note that the issue was more complicated prior to the 1983 amendment removing from section 15-0503(1) of the Environmental Conservation Law provisions requiring a permit from the Department of Environmental Conservation for the erection of "any permanent dock, pier, wharf or other structure used as a landing place on waters."

d. Are State Agencies and Public Authorities Subject to the Permitting Requirements of Section 32 of the Navigation Law?

Must a state department or state public authority obtain the approval of the Department of Conservation to construct or place an aquaculture facility in or around Long Island Sound? Again a problem arises from the mixing of section 32 of the Navigation Law with section 15-0503 of the Environmental Conservation Law. The Environmental Conservation Law section imposes the permit requirement on "any person or local public corporation." Section 32 of the Navigation Law, using the passive approach, makes it "unlawful" generally to place the structures in navigable waters of the state.

Prior to a 1965 amendment the Conservation Law, in a predecessor of section 15-0503 of the Environmental Conservation Law, had provided that "[n]o structure for impounding water and no dock, pier, wharf or other structure used as a landing place on waters shall be erected or reconstructed by any public authority or by any private person or corporation without notice to the superintendent of public works."[95] The 1965 rewording, now found in section 15-0503 of the Environmental Conservation Law, was deliberately framed to exempt actions of state departments or state public authorities, but not municipal corporations

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94. E.g., the provisions of section 15-0503(3) prescribing criteria to be applied by the Department of Environmental Conservation in passing on applications for permits; authorizing the department to impose conditions on permits; and mandating compliance with applicable rules and regulations of the Commissioner of Environmental Conservation governing "permit applications, renewals, modifications, suspensions and revocations."

95. Conservation Law § 948 (1951) (emphasis added). The 1965 amendment transferred the provisions to a new section 429-c (1965 NY Laws ch 955).

or local public authorities.[96] Inasmuch as section 32 of the Navigation Law was amended at the same time, it might be asserted that the lack of a similar effort to remove state agencies from regulatory authority under that section implies an intent to include them. The argument would probably fail, in view of "the well-established rule that general legislation is inapplicable to the State or its agencies unless there is express language subjecting the sovereign to the terms thereof, . . . based on the fundamental principle . . . that general laws are presumed to be for the government of the citizens and not for the sovereign or its agencies."[97] If a state department or state public authority were to engage in aquaculture or construct aquaculture facilities for use by private persons, in our judgment it would not require permission under section 32 of the Navigation Law or section 15-0503 of the Environmental Conservation Law.

2. Dams or Impoundment Structures in Watercourses

a. Definition of Dams and Impoundment Structures

Section 15-0503(1) of the Environmental Conservation Law, quoted above,[98] requires a permit from the Department of Environmental Conservation for the construction by any person or local public corporation of a "dam or impoundment structure, including any artificial obstruction, temporary or permanent, in or across a natural stream or

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96. The Conservation Law, as amended in 1965 and revised in the 1972 recodification of the Environmental Conservation Law, excluded the "state" from the statute's definition of "person," as applied to the provisions of section 15-0503 and other sections of article 15 of the Environmental Conservation Law and its predecessor provisions. Environmental Conservation Law § 15-0107(1) (McKinney 1973). In any case, the "word 'person' does not in its ordinary significance embrace a State or government." Towner v Jimerson, 67 AD2d 817, 413 NYS2d 56, 58 (4th Dep't 1979), citing McKinney Statutes (Book 1) § 115 (1971), and General Construction Law § 37 (McKinney 1951). In response to objections by various state departments and authorities, the Governor had vetoed a 1964 bill similarly amending the Conservation Law because it required state public corporations to obtain permits before undertaking construction in waters in the state. Governor's Veto Memorandum No. 281, on S Int 919, Pr 4133 and A Int 1586, Pr 5679. See memoranda of the State Superintendent of Public Works, July 7, 1965, and the Joint Legislative Committee on Revision of the Conservation Law, March 22, 1965, in Governor's Bill Jacket on 1965 NY Laws ch 955. The State Office for Local Government objected that the 1965 amendment treated municipal corporations "differently from state agencies." Memorandum of Associate Counsel to the Office for Local Government, July 13, 1965, in Governor's Bill Jacket on 1965 NY Laws ch 955.

97. Port of New York Authority v Linde Paper Co., 205 Misc 110, 114-115, 127 NYS2d 155, 157-158 (Mun Ct of the City of NY 1953), citing higher New York and federal court decisions. And see Towner v Jimerson, supra note 96; and 55 NY Jur, State of New York § 2 (1967).

98. McKinney Supp 1982. See supra p 23.

water course." It is doubtful that a free floating or lightly anchored aquaculture facility would be deemed to be an "artificial obstruction" within the meaning of this section, if that general term takes its meaning from the particular words "dam or impoundment structure" that precede it, in view of the doctrines of ejusdem generis and noscitur a sociis noted above.[99] However, it is conceivable that an impoundment structure might form part of an artificial pond used for finfish cultivation along coastal waters. For the purposes of section 15-0503, a "dam or impoundment structure" is defined by the regulations of the Department of Environmental Conservation as including, but not limited to, "earth fills, with or without controllable outlet gates, and roads, bridges or fords which unduly impede the flow of water."[100] The facility might nevertheless escape regulation under section 15-0503 of the Environmental Conservation Law because the permitting requirement for dams and impoundment structures is limited to those found in a "natural stream or water course."

b. Definition of Natural Streams and Watercourses

The Department of Environmental Conservation's regulations implementing article 15 define the terms "stream" and "watercourse" as follows:

> (m) Stream means a watercourse or portion thereof, including the bed and banks thereof. Small ponds or lakes with a surface area at mean low-water level of 10 acres (4 hectares) or less and located in the course of a stream shall be considered part of a stream and subject to regulation under this Part. A stream shall not include a pond or lake having a surface area of greater than 10 acres (4 hectares) at mean low-water level.
>
> (n) Watercourse means that area of land within which or upon which the flow of water is ordinarily confined due to existing topography. It includes the area between the mean high-water lines on each side of a stream.[101]

As the terms "stream" and "watercourse" are thus construed by the department, the locations of dams or impoundment structures subject to a section 15-0503 permit include (1) large ponds, whether or not part of a stream; (2) small ponds not part of a stream; and (3) areas of streams

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99. See text accompanying note 91 supra.

100. 6 NYCRR § 608.1(d) (1979).

101. 6 NYCRR § 608.1(m,n) (1979).

or other watercourses other than those containing ponds.[102] Accordingly, impoundment structures or dams for ponds to be used for fish cultivation adjacent to or connected with coastal waters such as those of the Great Lakes, Long Island Sound, or the Atlantic Ocean could not be built without a permit from the Department of Environmental Conservation.

Generally, a "natural watercourse," as distinguished from a pond, denotes "a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply."[103] For the most part that definition and similar ones are applied in disputes distinguishing what are normally known as "streams" and "rivers" from other types of surface waters, usually in determining the rights and obligations of adjoining landowners arising from the drainage of surface waters, or determining whether riparian owners' rights attach to particular bodies of water.[104] Yet elements of the definition are instructive in distinguishing natural watercourses from larger bodies of water such as lakes and bays. Watercourses are inland waters that generally flow in one direction, in a channel with a perceptible current, towards the ocean, sea, a lake or another river.[105] "If the water spreads out so that the current becomes imperceptible or is lost, the water becomes a lake or pond, and is no longer a water course."[106] Accordingly, the New York Court of Appeals has held that a statute providing for the building and repairing of bridges over streams dividing adjoining towns "conferred no authority as to causeways over bays or lakes or other bodies of water."[107] Similarly, an Ohio court ruled that "Lake Erie is not a watercourse" subject to a statute

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102. Neither these regulations nor the provisions of article 15 of the Environmental Conservation define the term "ponds."

103. Barkley v Wilcox, 86 NY 140, 143 (1881); and see Jeffers v Jeffers, 107 NY 650, 651, 14 NE 316, 317 (1887), and Kennedy v Moog, Inc., 48 Misc2d 107, 111, 264 NYS2d 606, 612 (Sup Ct, Erie Co, 1965), aff'd, 26 AD2d 768, 271 NYS2d 928 (4th Dep't 1966), aff'd, 21 NY2d 966, 290 NYS2d 193, 237 NE2d 351 (1968).

104. Id; and see 7 Waters and Water Rights § 602.1 (R.E. Clark ed 1976), and 2 H.P. Farnham, The Law of Water and Water Rights 1554 (1904) (a "water course, considered solely by itself, must be such as to have those physical characteristics which give rise to the rights of riparian owners").

105. Chamberlain v Hemingway, 63 Conn 1, 27 A 239, 241 (1893); Black's Law Dictionary 1428 (5th ed 1979); Webster's Third New International Dictionary 2582 (1967); J.M. Gould, A Treatise on the Law of Waters § 101 (2d ed 1891).

106. 2 H.P. Farnham, supra note 116, at 1560; Trustees of Schools v Schroll, 120 Ill 509, 12 NE 243, 245-246 (1887) ("the word 'stream' has a well-defined meaning, wholly inconsistent with a body of water at rest.")

107. Matter of Freeholders of Irondequoit, 68 NY 376, 379 (1877), relating to Irondequoit Bay on Lake Ontario.

relating to the liability of a board of county commissioners for injury caused by a "watercourse" established by the board.[108]

c. Application of the Tidewaters Exception

We have noted that section 32 of the Navigation Law and section 15-0503 of the Environmental Conservation Law may both apply to the placement of a dam or impoundment structure in navigable tidewaters constituting a watercourse. This poses no problem outside of Nassau and Suffolk counties. However, since, on the surface of the statutes, the tidewaters of these two counties are exempted from regulation by the state under the Navigation Law but not under the Environmental Conservation Law, the statutory inconsistency must be resolved.

"It is a well established principle in the construction of statutes that, whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable."[109] From this canon of statutory construction one could argue that the high degree of specificity in section 15-0503 of the Environmental Protection Law, especially in the description of the classes of waters covered (natural streams and watercourses), evidences an intent by the legislature to override the more general provisions of section 32 of the Navigation Law, which applies to "navigable waters" generally, excepting only the tidewaters of Nassau and Suffolk counties. Based on that argument, the courts might tend to hold that the legislature meant to regulate the placement of dams and impoundment structures in all watercourses, including navigable ones in Nassau and Suffolk counties.

The fact that the legislature directed its attention to section 15-0503 of the Environmental Conservation Law in the 1983 amendment removing the docks and landing places provisions, had an opportunity then to exclude the tidewaters of the two counties from its coverage, but did not do so, could be cited as evidence of an intent to include them. A general rule of implication from legislative silence holds that "when the Legislature by the use of general language has given an act a general application, the failure to specify particular cases which it shall cover does not warrant the court in inferring that the Legislature intended their exclusion," but, "[o]n the contrary, in such cases, if

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108. Board of Commissioners of Lake County v Mentor Lagoons, Inc., 6 Ohio Misc 126, 216 NE2d 643, 645 (Ct Com Pleas, Lake Co, 1965). Yet the Great Lakes would seem to satisfy the definition of a watercourse, noted above, as including inland waters flowing in one direction, in a channel with a discernible current, towards the ocean, sea, a lake or another river. See text accompanying note 105 supra.

109. McKinney Statutes (Book 1) § 238 (1971). "The particular provision, in other words, is considered in the nature of an exception to the general where the two are incompatible, and so far as the particular intention is applicable, the general intention yields." Id.

the Legislature did not intend the act to apply to such cases, 'it would have been easy to have said so.'"[110] The problem with that argument is that the legislature apparently overlooked the tidewaters exemption at the same time it overlooked section 32 of the Navigation Law, so to ascribe to the legislature an intent to deal with the tidewaters exemption at all is too artificial to be credible.

It is possible, however, that a court would nevertheless exclude tidewaters in a Nassau or Suffolk county watercourse from the dam and impoundment provisions of section 15-0503 of the Environmental Conservation Law, purely on the basis of the long-standing policy of the state in removing itself from jurisdiction over such navigable waters. Support for that prognostication may be seen in the discussion in the next part of this report of the overlapping provisions of section 31 of the Navigation Law and section 15-0505 of the Environmental Conservation Law.

3. Excavation and Fill Restrictions

Although a dam or impoundment structure may consist of "earth fills" for the purposes of section 15-0503 of the Environmental Conservation Law, and earth fills might conceivably be used in the construction of piling, cribs or other facilities for aquaculture, they would more likely attract section 15-0505 of that law, applying to, or to water areas near, navigable waters.

Section 15-0505(1) of the Environmental Conservation Law provides, in part:

> No person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section. For the purposes of this section, fill shall include, but shall not be limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained by (1) crib work of wood, timber, logs, concrete or metal, (2) bulkheads and cofferdams of timber sheeting, bracing and piling or steel sheet piling or steel H piling, separated or in combination.[111]

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110. McKinney Statutes (Book 1) § 74 (1971).

111. McKinney Supp 1983.

Subdivision 3 of section 15-0505 requires a permit from the Department of Environmental Conservation for conducting any of the activities covered by the section, and prescribes criteria for passing on applications for permits.[112]

Section 31 of the Navigation Law provides:

> "No person or local public corporation shall excavate or place fill in the navigable waters of the state without first obtaining a permit therefor in conformity with the provisions of section four hundred twenty-nine-b of the conservation law [now section 15-0505 of the Environmental Conservation Law]."[113]

There is a difference between section 15-0505 of the Environmental Conservation Law and section 31 of the Navigation Law, despite the fact that each requires a permit for excavating or placing fill in navigable waters of the state. The definition of "navigable waters of the state" for the purposes of the Navigation Law exempts the tidewaters of Nassau and Suffolk counties.[114] However, as used in article 15 of the Environmental Conservation Law "navigable waters of the state" are defined by regulations of the Department of Environmental Conservation Law as meaning "all lakes, rivers, streams and other bodies of water in the State which are navigable in fact or upon which vessels with a capacity of one or more persons can be operated."[115] That definition does not exempt the tidewaters of the two counties.

The legislative history of the section 15-0505 of the Environmental Conservation Law indicates that it was not meant to exempt Nassau and Suffolk counties waters from its permitting requirements. Prior to 1975 the section applied to "navigable waters as defined by subdivision four of section two of the navigation law," the definition exempting the tidewaters of the two counties from regulation under the Navigation

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112. Id.

113. McKinney Supp 1983. Note that section 15-0505 regulates excavation and fill operations of any "person, local public corporation or interstate authority" (emphasis added), while section 31 of the Navigation Law applies only to persons or local public corporations. Section 15-0505 was probably aimed at the Port Authority of New York and New Jersey. The absence of the mention of interstate authorities in the Navigation Law is probably not significant, for they are caught by the Environmental Conservation Law provision. Interstate authorities are not likely to reach as far east on Long Island as Nassau or Suffolk counties. If they did, the tidewaters problem discussed in this section would arise.

114. Navigation Law § 2(4) (McKinney Supp 1983).

115. 6 NYCRR § 608.1 (1979). The definition does "not include waters which are surrounded by land held in single private ownership at every point in their total area." Id.

Law.[116] A 1975 amendment removed the reference in section 15-0505 of the Environmental Conservation Law to the restricted definition of the Navigation Law.[117]

Evidence of deliberate inclusion of Nassau and Suffolk county tidewaters in the Environmental Conservation Law section sharpens the conflict with the Navigation Law counterpart. If section 31 of the Navigation Law section does not apply to these tidewaters, there is no occasion to invoke it, so the problem of the meaning of the provision in the section for conformity with the Environmental Conservation Law does not arise. Yet section 15-0505 of the Environmental Conservation Law remains intact, and on its face it regulates excavation and fill operations in the two counties. In search of a solution to the problem, we turn to the record of a similar inconsistency between section 32 of the Navigation Law and section 15-0503 of the Environmental Conservation Law requiring permits for docks and other landing places, prior to the 1983 elimination of the requirement from the Environmental Conservation Law.

Amendments to sections 31 and 32 of the Navigation Law were included in a recodification of provisions of both the Navigation Law and Environmental Conservation Law relating to the protection of the state's waters, recommended by the Joint Legislative Committee on Revision of the Conservation Law and enacted in 1965.[118] Both sections 31 and 32 were amended to substitute the Water Resources Commission for the state Superintendent of Public Works as the permitting authority (for excavation and fill under section 31, and for landing places and dams and impoundment structures under section 32). Section 32 had exempted from its permit requirement docks of upland owners less than a specified distance from the shore line, or limited to a specified water depth. In the 1965 revision the exception was taken out of section 32 of the Navigation Law and placed in section 429-c of the Conservation

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116. Subdivision 1 of section 15-0505 required a permit for excavation or fill "in the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to navigable waters as defined by subdivision four of section two of the navigation law and that are inundated at mean high water level or tide." McKinney 1973.

117. 1975 NY Laws ch 349.

118. 1965 NY Laws ch 955, effective January 1, 1966.

Law (now section 15-0503 of the Environmental Conservation Law).[119] It is understandable, then, that the Joint Legislative Committee on Revision of the Conservation Law, in its memorandum supporting the 1965 recodification, observed: "Sections 31 and 32 of the Navigation Law are substantially amended to remove the substantive law provisions and make cross-references to new provision [sic] in the Conservation Law proposed by this bill (now §§ 429-b and 429-c)."[120]

From the reasoning of the Joint Legislative Committee that one would look to the substantive provisions of 15-0503 to determine which docks are or are not excepted from regulation, we might argue that by parity of reasoning the section's specification of the waters subject to the statute would also prevail over the more limited coverage in the Navigation Law (exempting the tidewaters of Nassau and Suffolk counties).

The issue arose both in the courts and before the New York Attorney General. In 1966 the Conservation Commissioner asked the Attorney General whether the provisions of section 429-c of the Conservation Law, the predecessor of section 15-0503 of the Environmental Conservation Law, applied to the tidewaters of the two counties. The Attorney General responded with the opinion that since section 429-c was not expressly limited to "navigable waters of the state," as defined in section 2(4) of the Navigation Law (containing the tidewaters exception), it applied to such tidewaters.[121] He reasoned that although section 429-c expressly excluded certain structures of specified

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119. The exemption was changed from "docks or piers to be constructed by the owner of the adjacent uplands" to a "dock, pier, wharf or other structure built on floats, columns, open timber, piles or similar open-work supports" of the same limited length or water depth (as amended later, limited to those having a top surface area of 200 square feet or less, in lieu of the length and water depth standards). Conservation Law § 429-c(4)(4), transferred to Environmental Conservation Law § 15-0503(4) by 1972 NY Laws ch 664, as amended by 1975 NY Laws ch 184. The 1965 amendment also exempted a "dock, pier, wharf or other structure under jurisdiction of the department of docks, if any, in a city or town of over one hundred and seventy-five thousand population." Conservation Law § 429-c(4)(3), as amended by 1969 NY Laws ch 853, and recodified as Environmental Conservation Law § 15-0503(4). Note that in framing these exceptions the statute picked up the words "dock, pier, wharf or other structure," without adding the phrase "used as a landing place" (the modifier formerly found in subdivision 1 of § 15-0503).

120. Memorandum of March 22, 1965, in Governor's Bill Jacket on 1965 NY Laws ch 955. In the same vein, the memorandum pointed out that "Section 31 [of the Navigation Law] is amended by this law and the substance transferred to new § 429-b."

121. 1966 Op Atty Gen 16.

dimensions or in particular locations, it did not exclude activities in Nassau and Suffolk tidewaters. He regarded as especially significant the fact that, in contrast, section 429-b of the Conservation Law (now section 15-0505 of the Environmental Conservation Law), relating to excavation and fill operations, applied solely to "navigable waters of the state as defined by Subdivision 4 of Section 2 of the Navigation Law."[122]

The issue came before the New York Supreme Court eight years later, in a challenge to a zoning ordinance of the Suffolk County Town of Islip barring commercial docks in residential districts.[123] The landowners against whom the town sought to enforce the ordinance argued that the town lacked the power to impose the restriction because the subject of regulation of the installation of docks had been preempted by the state under section 32 of the Navigation Law and section 15-0503 of the Environmental Conservation Law. Confronted with the 1966 opinion of the Attorney General, the court said that the Attorney General's attempt to distinguish sections 429-c and 429-b of the Conservation Law was "baseless."

> Because the cited sections of the Navigation Law and the [Environmental Conservation Law] deal with the same subject matter (and indeed they both delegate authority to the same public official to regulate that subject matter) they must be construed in pari materia . . . . The rule that statutes dealing with the same subject matter should be read together as far as possible applies with particular force where the two statutes are enacted at the same session of the Legislature . . . . In 1965, section 32 of the Navigation Law was amended to transfer regulatory authority over piers, docks, wharves and other structures in the navigable waters of the State to the conservation commissioner and at the same session of the Legislature and in the very same enactment . . . the Conservation Law was amended by the adoption of section 429-c containing reference to "waters" only. Had the Legislature intended to abolish the longstanding exemption for tidewaters in Nassau and Suffolk Counties by use of the term "waters" instead of "navigable waters" in section 429-c of the Conservation Law, it could have removed the latter term from section 32 of the Navigation Law when it amended it. To disregard an exemption so clearly expressed and so long maintained by focusing on the word "waters" would be to thwart the Legislature's obvious intent. The tidewaters of Nassau and Suffolk have been

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122. Id at 18.

123. Town of Islip v Powell, 78 Misc2d 1007, 358 NYS2d 985 (Sup Ct, Suffolk Co, 1974).

> and continue to be exempted from the State's jurisdiction over navigation. Any other "waters" in the two counties have not been exempt in the past and they are not now.[124]

If he did not deem himself bound by the Islip decision, by analogy to his 1966 opinion denying exemption to the two counties from the regulation of docks, it would be logical for the Attorney General to reject the exemption from the excavation and fill provisions of section 15-0505 of the Environmental Conservation Law. On the other hand, the Suffolk County Supreme Court would probably be inclined to uphold that exemption on the basis of long-standing tradition, following the reasoning of Islip. A lower court sitting in Suffolk County in 1980 reflected that bias in another case testing the applicability of state regulation of docks over Suffolk county tidewaters. In People v Anton, a Town of Huntington ordinance requiring town permission to construct a dam, or impoundment structure, or any dock or other structure used as a landing place, was held to be invalid as applied to defendants' construction of a dock, because the state had preempted the regulation of docks under section 32 of the Navigation Law.[125] The court rejected the argument, saying that although generally the regulation of docks and piers in navigable waters of the state under the Navigation Law is the exclusive prerogative of the state, by virtue of the definition of "navigable waters of the state" in that law, "the tidewaters of Nassau and Suffolk Counties must be deemed to be exempt from State regulation of docks and piers."[126]

The comparable federal excavation and fill restrictions should also be noted again here.[127]

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124. Id at 1011-1012, 358 NYS2d at 991. The court upheld the zoning ordinance. We will observe later in discussing the issue of Islip's zoning power that the court might have based its decision on another ground.

125. 105 Misc2d 124, 431 NYS2d 807 (Dist Ct, Suffolk Co, 1980).

126. Id at 126, 431 NYS2d at 809, citing Town of Islip v Powell, among other cases. The court made no reference to the companion provisions of the Environmental Conservation Law. Cf State v Trustees of the Freeholders and Commonalty of the Town of Southampton, — AD2d —, 472 NYS2d 394 (2d Dep't 1984), referred to in notes 153 and 174 infra.

127. See text accompanying note 28 supra. The Rivers and Harbors Act of 1899 makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army." 33 USC § 403 (1976).

C. "Floating Objects"

Prior to 1963 the Navigation Law prohibited the anchoring of any "unattended floating object . . . within the navigable waters of the state for marking fishing grounds or other purposes," with two exceptions.[128] The exceptions were (1) unattended floating objects "authorized under the United States laws, rules and regulations," and (2) "the placing of buoys or beacons . . . to mark obstructions to navigation, to designate bathing beaches, to designate vessel anchorages, or for any other purpose," if authorized by a revocable permit issued by the Commissioner of Conservation (prior to 1960, the Superintendent of Public Works).[129] The Navigation Law did not contain a blanket prohibition against placing in the state's navigable waters floating objects not anchored. The legislature amended the pertinent sections in 1962 mainly for the purposes of (1) enabling the state to conform to a uniform, national system of special markers adopted by most of the states and by the United States Coast Guard, for that purpose substituting the term "aids to navigation" for "buoys or beacons";[130] and (2) authorizing the granting of revocable permits for certain floating objects other than aids to navigation.[131]

Section 36 of the Navigation Law, containing the general prohibition, now reads:

> No unattended floating object shall be anchored within the navigable waters of the state for any purpose, except as same may be authorized under the United States laws, rules and regulations or by section thirty-five and thirty-five-a of this chapter [authorizing state permits for the placement of navigational aids and other floating objects] or by local ordinances as may be duly approved by the [conservation] commissioner [now the Commissioner of Environmental Conservation]. Any person finding such anchored object is authorized to remove the same.[132]

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128. Navigation Law § 36 (McKinney 1941).

129. Id. See 14 USC § 81-85 (1982), authorizing the Coast Guard to establish and maintain aids to navigation and requiring others to obtain Coast Guard permission to establish and maintain such devices; and see the pertinent regulations at 33 CFR Subchapter C, Parts 60-66 (1983). Subparts 66.05 and 66.10 prescribe the conditions for regulation by the states of aids to marine navigation in navigable waters of the United States not marked by the federal government with such aids.

130. 1962 NY Laws ch 431, amending Navigation Law §§ 35 and 36, effective January 1, 1963 (McKinney Supp 1983). See Memorandum of the Conservation Department, March 7, 1962, in the Governor's Bill Jacket on 1962 NY Laws ch 431.

131. Id, adding a new § 35-a; see text accompanying note 134 infra.

132. McKinney Supp 1983.

Section 35 of the Navigation Law, authorizing the granting of permits for "aids to navigation" generally (previously limited to "buoys or beacons") was supplemented by a definition of "aids to navigation" covering "buoys, beacons or other fixed objects in the water which are used to mark obstructions to navigation or to direct navigation through safe channels."[133]

A new section 35-a adding the category of non-navigational floating objects provides in part:

> The conservation commissioner [now the Commissioner of Environmental Conservation] may authorize, through the issuance of a revocable permit, the placing in the navigable waters of the state, of mooring buoys, bathing beach markers, swimming floats, speed zone markers, or any other floating object having no navigational significance, if in his opinion the placing of such floating object will not be a hazard to navigation.[134]

The 1962 amendment also added a definition of the term "floating objects," as used in these sections:

> "Floating objects" shall mean any anchored marker or platform floating on the surface of the water other than aids to navigation and shall include but not be limited to, bathing beach markers, speed zone markers, information markers, swimming or diving floats, mooring buoys, fishing buoys, and ski jumps.[135]

The "but not be limited" clause suggests that although it is a different species of floating objects, a raft or raft-like structure used for aquaculture might fall within the statutory definition of "floating objects" requiring a state permit (subject to the Nassau and Suffolk counties tidewaters exception), unless authorized under United States laws, rules or regulations. At the same time, it will be noted that any such structure which is not anchored would not be subject to the general prohibition or permit requirement.

The "floating object" provisions of the Navigation Law, as amended in 1962, are somewhat ambiguous in two respects:

1. The general prohibition applies to any anchored "unattended

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133. Navigation Law § 2(27) (McKinney Supp 1983).

134. Navigation Law § 35-a(1) (McKinney Supp 1983) (emphasis added).

135. Navigation Law § 2(28) (McKinney Supp 1983) (emphasis added).

floating object."[136] Section 35-a of the Navigation Law authorizing the granting of revocable permits does not use the modifier "unattended." This may be accounted for by the fact that the types of floating objects particularized in the statutory definitions would normally be unattended. We would speculate that some types of aquaculture facilities might be attended at times by persons operating them or looking to their security, and this might conceivably raise a question regarding the application of these provisions to aquaculture.

2. It is possible to construe section 36, when read together with section 35-a(1), as requiring a state permit for a non-navigational floating object whether or not the placement of the object has been authorized under a federal law or local ordinance. Support for this position might be found in a grant of authority to the Commissioner of Environmental Conservation "to make rules and regulations for the issuance of such permits,"[137] regulations that might be more restrictive than federal or local ones, and should therefore be enforceable by means of a state permit system. Additional support might be found in the statement in the department's regulations: "Only after authorization has been granted [for placement of a floating object of navigational significance] and in accordance therewith may such floating objects be lawfully placed."[138] If this is tantamount to interpreting the statute as requiring multiple permits, the interpretation would not necessarily be controlling on a court but would be given considerable weight under applicable rules of statutory construction.[139] One might also infer a general requirement of a state permit, in addition to any federal or local permit or permits, from the following specific exemption in section 35-a(6) of the Navigation Law of one class of floating objects: "The provisions of this section which pertain to the mooring of vessels shall not apply to areas in which local ordinances so pertaining have been duly approved by the conservation commissioner [now the Commissioner of Environmental Conservation] or in which areas federal laws or rules and regulations regulate the anchoring or mooring of vessels."[140] (We will soon turn to the question whether an aquaculture facility might be classified as a "vessel" under this or other provisions of the Navigation Law.)

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136. Navigation Law § 36 (McKinney Supp 1983) (emphasis added).

137. Navigation Law § 35-a(2) (McKinney Supp 1983).

138. 9 NYCRR § 448.4 (1971).

139. McKinney Statutes (Book 1) § 129 (1971).

140. McKinney Supp 1983.

One might construct a contrary argument -- that state approval is not required if federal or local permission for the placement of the floating object has been granted -- by reasoning that once the activity has been excepted from the statutory prohibition, it makes no sense for the statute to provide that the state agency "may authorize" the activity (the words of section 35-a). Arguably leading to the same conclusion is the use of the disjunctive "or" rather than the conjunctive "and" in the wording of the exception clauses in section 36 ("except as same may be authorized under the United States laws . . . or by section . . . thirty-five-a of this chapter or by local ordinances").

D. Regulation of the Operation of Vessels

The Navigation Law contains several provisions regulating the operation of vessels in the navigable waters of the state, and in some situations in waters generally excepted from the statute's definition of "navigable waters of the state."[141] As defined in the Navigation Law the term "vessel" means "any floating craft and all vessels shall belong to one of . . . two specified classes," labelled "public vessels" and "pleasure vessels."[142]

"Public vessel" means and includes "every vessel which is propelled in whole or in part by mechanical power and is used or operated for commercial purposes on the navigable waters of the state; that is either carrying passengers, carrying freight, towing, or for any other use; for which a compensation is received, either directly or where provided as an accommodation, advantage, facility or privilege at any place of public accommodation, resort or amusement."[143]

"Pleasure vessel" includes every other kind of vessel, with some

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141. Navigation Law § 172(18), specifically applying the oil spill prevention and control article to "waters of the state adjacent to Long Island Sound" (McKinney Supp 1983); § 33-c, regulating the disposal of sewage in "any waters of this state" (McKinney Supp 1983); and § 40, requiring vessels to carry specified equipment "while on the navigable waters of the state and any waters within or bordering the county of Nassau to a distance of fifteen hundred feet from the shore" (McKinney Supp 1983).

142. Navigation Law § 2(6) (McKinney Supp 1983).

143. Id.

specified exceptions.[144]

We doubt that a waterborne facility for cultivating marine animals or plants would be propelled by mechanical power; or that it could be classified as a "pleasure vessel," in view of the commercial objective. Even if the structure's movements were somehow influenced by some mechanical device, the context of the use of the term "vessel" in the Navigation Law suggests that its meaning is confined to waterborne vehicles used for commercial transportation purposes, or for moving people about water for non-commercial purposes; hence it would not apply to equipment used for cultivating marine plants or animals. Thus various regulations relating to the operation of vessels, such as specification of safety equipment for boats,[145] the displaying of lights on the "fore" and "aft" parts of vessels,[146] and speed limits[147] would be inapplicable.

E. Summary

1. Generally, a permit from the Department of Environmental Conservation must be obtained to place in navigable waters (except in the tidewaters of Nassau and Suffolk counties) any aquaculture facility consisting of a dock, other type of landing place, or any other type of structure apt to obstruct navigation. The application of permitting procedures in the Environmental Conservation Law does not destroy the tidewaters exemption. (See section 32 of the Navigation Law and section 15-0503 of the Environmental Conservation Law.)

2. Whether or not located in Nassau or Suffolk county tidewaters, the placement by a state agency of such a structure for aquaculture in navigable waters would not be subject to approval of the Department of Environmental Conservation. However, a municipal corporation would be subject to these permitting requirements. (See the same sections.)

3. In view of apparent inconsistencies of section 32 of the

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144. Id. A "crew racing shell" is specifically excluded, as are "rowboats and canoes" generally. Compare the provisions of section 33-c(1)(a) of the Navigation Law, regulating the disposal of sewage from "watercraft," defined as "any contrivance used or capable of being used for navigation upon water whether or not capable of self-propulsion," with some exceptions (McKinney Supp 1983); and the special definition of "vessel" in the oil spill prevention provisions as "every description, of watercraft or other contrivance that is practically capable of being used as a means of commercial transportation of petroleum upon the water, whether or not self-propelled." Id § 172[17] (McKinney Supp 1983).

145. Navigation Law § 40 (McKinney Supp 1983).

146. Id § 43 (McKinney Supp .

147. Id § 45 (McKinney Supp 1983).

Navigation Law and section 15-0503 of the Environmental Conservation Law, it is uncertain whether a permit would be required for building a dam or impoundment structure in navigable tidewaters of Nassau and Suffolk counties constituting a natural stream or watercourse. We believe a court would uphold the tidewaters exemption in this situation, but the decision could go the other way.

4. Ambiguities stemming from the linking of section 31 of the Navigation Law and section 15-0505 of the Environmental Conservation Law raise a similar question regarding the application of the tidewaters exemption to the regulation of excavating or filling of navigable waters. Despite indications to the contrary in the legislative history of these provisions, the courts might be inclined to uphold the exemption here.

5. An unattended, anchored raft or similar structure used for aquaculture could not be placed in navigable waters of the state (except in the tidewaters of Nassau and Suffolk counties) unless permitted by federal law; or by a state approved local ordinance; or by a revocable permit granted by the Commissioner of Environmental Conservation on a finding that it would not be a hazard to navigation. It is arguable that the commissioner could, or might be required to, grant a permit for such a structure even though the structure were approved by the federal or local law. (See sections 35, 35-a and 36b of the Navigation Law.)

6. The provisions of the Navigation Law for regulating the operations of "vessels" would probably not apply to rafts or similar structures used in aquaculture. (See sections 2[6], 40, 43, and 45 of the Navigation Law.)

IV. Local Regulation of Activities in Navigable Waters

A. Source and General Limits of Local Regulatory Authority

Local governments in New York, as in other states, may exercise only those powers delegated to them by the state legislature or by home rule provisions of the state constitution.[148] The delegated powers may relate to specific subjects, or be couched in general terms. In either category, the grant of power may be conditioned on conformity with specified standards. Various statutes in the first category, regulating specific types of activities in waters, will be discussed below. In New York the principal grant of police power in the second or general category authorizes local governments to adopt and amend local laws relating to the "government, protection, order, conduct, safety, health and well-being of persons or property therein."[149] To the extent such local laws relate to the "property, affairs or government"[150] (meaning local concerns) of a local government, they must be consistent with general laws enacted by the state legislature; and to the extent the local laws relate to matters other than local concerns, they must also heed any special state laws restricting local exercise of the power.[151]

Two questions are posed in testing, against those fundamental propositions, the validity of local legislation regulating aquaculture activities: (1) Whether or not the state legislature has acted on the subject, does the local government have the power to legislate on it? (2) If the local government is empowered to act, is its exercise of the power inconsistent with a state law? Inconsistency might be found if the local measure clashes directly with an explicit or clearly implied command or prohibition in a particular state statute.[152] Absent a direct conflict in the state and local enactments, the local measure might nevertheless be deemed "inconsistent" in violation of the constitutional stricture if the pattern of state legislation on the subject evinces

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148. Hunter v Pittsburgh, 207 US 161 (1907).

149. New York Constitution, art IX § 2(c)(10) (McKinney 1969); Municipal Home Rule Law § 10(1)(ii)(a)(12) (McKinney Supp 1983).

150. Id.

151. Id.

152. Wholesale Laundry Board of Trade, Inc. v City of New York, 17 AD2d 327, 234 NYS2d 862 (1st Dep't 1962), aff'd, 12 NY2d 998, 189 NE2d 623 (1963); Hyman, Home Rule in New York 1941-1965: Retrospect and Prospect, 15 Buffalo L Rev 335, 355 (1965).

state "preemption of the field."[153]

Two additional questions, different from but related to the inconsistency issue and sometimes confused with it by the courts and commentators, ask whether a local government is authorized to regulate activities (here, in particular, aquaculture activities) (1) on state-owned lands in which private parties have not obtained interests, or (2) on state-owned lands in which a private user has obtained some ownership interest or right.

These questions, as relevant, will be discussed in reference to three types of municipal legislation regulating activities on waters and underwater lands that might be involved in aquaculture development: the operation of vessels; the construction of docks or other structures; and multi-purpose land use controls, mainly zoning.

B. Regulation of Operation of Vessels

1. Vessel Zones of Counties, Cities or Villages

Section 46 of the Navigation Law provides in part:

> The board of supervisors or other legislative governing body of a county, or, should no action on the matter be taken by such board or body, the governing body of a city or incorporated village, by a three-quarters vote of its members, may establish a vessel regulation zone and within the limits prescribed by this chapter, adopt regulations for the use of a lake or or part of a lake or other body of water within the county, or in case of a city or incorporated village of the part of said waters adjacent thereto, if it shall deem that such establishment of a zone will promote the safety of the people and be for the best interests of the county, city or incorporated village.[154]

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153. S.H. Kress & Co. v Department of Health of the City of New York, 283 NY 55, 27 NE2d 431 (1940); Robin v Incorporated Village of Hempstead, 30 NY2d 347, 334 NYS2d 129, 285 NE2d 285 (1972); Hyman, supra note 152, at 355-357. See, for a recent illustration of operation of the rule, People v Kelsey, 112 Misc2d 927, 447 NYS2d 637 (Dist Ct, Suffolk Co, 1982), invalidating an ordinance of the Town of Huntington, Suffolk County, prohibiting wholesaling of shellstock without a town permit, on the ground that the state, in the Environmental Conservation Law article regulating dealings in shellfish and other species of fish and game, had occupied the field. Cf State of New York v Trustees of the Freeholders and Commonalty of the Town of Southampton, 99 AD2d 804, 472 NYS2d 394 (2d Dep't 1984), mentioned at note 174 infra.

154. McKinney Supp 1983.

A zone established under this provision may not extend beyond 1,000 feet from the low water mark.[155] The proposed zones and regulations are subject to the approval of the state Department of Environmental Conservation.[156]

The section does not specify the particular types of conduct that may be regulated within the zones. However, a requirement in section 46 that the local government establishing a vessel zone post a signboard bearing the "letters 'VESSEL REGULATION ZONE' with the rate of speed limited in that area" suggests that the principal if not the only purpose is to establish zones for enforcing particular speed limits. This argues for limiting the meaning of the term "vessel," as used in these provisions, to vehicles used for transportation, excluding an aquaculture facility.

If the section were pertinent to the instant inquiry, would it permit the establishment of vessel zones in the tidewaters of Nassau and Suffolk counties? The section applies to a "lake or other body of water." It does not use the term "navigable waters of the state," the term defined in the Navigation Law as explicitly excluding Nassau and Suffolk county waters.[157] The term "vessel," as used for the purposes of section 46, does include "public vessels" plying in "navigable waters of the state." But it also includes all other types of vessels not classified as public vessels, without specific mention of their use on navigable waters of the state.[158] In view of the doubtful application of section 46 to aquaculture equipment located on the waters, and overlapping powers granted to local governments in section 46-a of the Navigation Law (about to be noted here), we may be excused for not attempting to solve this problem of statutory interpretation.

2. Regulation by Municipalities of Certain Operations of Vessels

The provisions of section 46 of the Navigation Law authorizing local control within vessel zones were enacted in 1931.[159] Four years later a new subdivision was added to section 89 of the Village Law

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155. Navigation Law § 46 (McKinney Supp 1983).

156. Id.

157. Navigation Law § 2(4) (McKinney Supp 1983). See text accompanying note 44 supra.

158. Id.

159. 1931 NY Laws ch 379, adding §§ 68 and 69-a to the Navigation Law of 1909, ch 42, as subsequently amended and renumbered § 46 in the present Navigation Law (McKinney Supp 1983).

which, as subsequently amended, authorized every village to regulate the speed and operation of vessels "upon any waters within or bounding the village, to a distance of fifteen hundred feet from the shore," as well as the mooring or anchoring of vessels, and the disposal of sewage and garbage of vessels within the 1,500 foot zone.[160] Three years after that, in 1938, a new subdivision was added to the Town Law granting similar powers to towns.[161]

These provisions in the Village Law were transferred to section 46-a of the Navigation Law in 1972, which as further amended in 1982 now reads, in pertinent part:

> (1) The local legislative body of a city or the board of trustees of a village may adopt, amend and enforce local laws, rules and regulations not inconsistent with the laws of this state or the United States, with respect to:
>
> a. Regulating the speed and regulating and restricting the operation of vessels while being operated or driven upon any waters within or bounding the appropriate city or village, including any waters within or bordering a village in the county of Nassau or Suffolk, to a distance of fifteen hundred feet from the shore.
>
> b. Restricting and regulating the anchoring or mooring of vessels in any waters within or bounding the appropriate city or village to a distance of fifteen hundred feet from the shore.
>
> (2) No such local law, rule or regulation shall take effect until it shall have been submitted to and approved in writing by the commissioner of parks, recreation and historic preservation.
>
> The provisions of this section shall be controlling notwithstanding any contrary provisions of law.[162]

In addition to relocating these provisions the 1972 amendment effected two changes: (1) requiring the approval of the local regulations by the Commissioner of Parks and Recreation instead of by

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160. 1935 NY Laws ch 797, adding a new subdivision 63 to section 89 of the Village Law of 1909 (see Village Law, McKinney 1966).

161. 1938 NY Laws ch 797, adding subdivision 16 (later renumbered 17) to section 130 of the Town Law of 1932 (McKinney 1965).

162. 1972 NY Laws ch 888; further amended by 1982 NY Laws ch 357 (McKinney Supp 1983) (emphasis added).

the Commissioner of Conservation, and (2) specifically including waters within or bordering on Nassau and Suffolk counties. The 1982 amendment added the references to cities, and reflected the changed name of Commissioner of Parks, Recreation and Historic Preservation.

For reasons not revealed by the record available to us, the companion provisions granting similar authority to the towns to regulate the operations of vessels outside the boundaries of villages were not transferred to the Navigation Law. Those provisions, still in section 130(17) of the Town Law, differ from the Village Law counterpart in three respects: (a) The Town Law provisions apply to the regulation of vessels generally; they do not contain an explicit reference to waters of Nassau and Suffolk counties. (b) The Town Law provisions authorize the regulation of the "size and horse power of inboard and outboard motors" in the counties of Westchester, Saratoga, Warren and Suffolk -- arguably indicating an intent to apply the provisions of the entire section to waters of Suffolk County and, by the same token, the waters of Nassau County.[163] (c) The responsibility for state-level approval of the regulations of towns has been left with the Commissioner of Environmental Conservation.[164]

3. Summary

We are left with this scheme of local government regulation of the operation of vessels:

Under section 46 of the Navigation Law counties may establish vessel zones within 1,000 feet of their shores, in which they may regulate the speed of vessels and possibly other aspects of vessel operations. Villages and cities may establish such zones where counties do not do so. It is not clear whether the power extends to waters of Nassau and Suffolk counties. More than likely, the section would be construed as not applying to an aquaculture facility, in view of the limited classes of vessels covered.

Under section 46-a of the Navigation Law villages may regulate the operation or mooring of vessels within 1,500 feet of shore. The waters of Nassau and Suffolk counties are expressly included. Again, it is doubtful that an aquaculture facility would be regarded as a "vessel," in light of the particular context of the use of that term in the Navigation Law. In any case, on their face the two sections invite a conflict between county and village jurisdiction. If a county were to

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163. Town Law § 130(17)(1) (McKinney Supp 1983). And see People v Bianchi, 3 Misc2d 696, 155 NYS2d 703 (Dist Ct, Nassau Co, 1956), upholding an ordinance of the Town of Hempstead in Nassau County, promulgated under the authority of section 130(17) of the Town Law, rejecting the claim that federal controls over navigation in channels connected with tidewaters preempted the field and barred state and local regulation.

164. Town Law § 130(17)(2) (McKinney Supp 1983).

establish a vessel zone under section 46, would this bar a village within the county from regulating, under section 46-a, the speed or other aspects of the operations of vessels within that zone? The fact that the provisions of section 46-a were enacted later than those of section 46 could be urged as a basis for divining a legislative purpose to permit villages to regulate the operations of vessels whether or not the county has chosen to do so. From that proposition it would be argued that in the event of a conflict between village and county regulations as applied within 1,000 feet of shore, those of the village would prevail. A compromise position would reconcile conflicting county and village regulations by determining that the most restrictive of the two would prevail.

Under section 130(17) of the Town Law, towns may regulate the operation of vessels within areas outside of the boundaries of villages and cities. The same potential problem of a conflict with county regulations in vessel zones, adopted under section 46 of the Navigation Law, might arise; and arguments similar to those addressing conflicts between villages and counties could be made. But in respect of town regulatory jurisdiction, the question whether an aquaculture facility might be held to be a "vessel" might be more troublesome, assuming that under some circumstances an aquaculture facility were to be situated within 1,500 feet of a town's shoreline. Unlike the Navigation Law, the Town Law does not define the term "vessel."

At one time both section 130(17) of the Town Law and the predecessor of section 46-a of the Navigation Law (the former section 89[63] of the Village Law) limited the coverage of town and village regulation to "undocumented vessels." They were defined as including "a vessel commonly known as a houseboat and every vessel or floating craft propelled in any manner other than by hand and in the county of Suffolk every vessel propelled in any manner, except vessels having a valid marine document issued by the federal bureau of customs or any foreign government."[165] The United States Coast Guard, the Sheriff's Association, and the police departments of Nassau and Suffolk counties were troubled by the fact that the "exclusion of documented vessels . . . from these restrictions removes them completely from police control and permits them to operate without regard for the safety of others," reasoning that the "fact that a vessel owner has chosen to document his vessel rather than number it should not release the operator of a vessel from adhering to basic safety regulations."[166] In response, a bill was introduced in 1966 to substitute in the Village Law and Town Law provisions the general term "vessels" for "undocumented

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165. 1960 NY Laws chs 796, 797.

166. Memorandum of the Commissioner of Conservation, June 27, 1965, in Governor's Bill Jacket on 1966 NY Laws ch 939; and see the telegrams of John L. Barry, Police Commissioner of Suffolk County, June 27, 1966, and David S. Mack, Advisory Chairman of the Joint Legislative Committee on Motor Boats, June 30, 1966 (id).

vessels" and remove the definition of "undocumented vessels." The State Office for Local Government objected to the amendment because of the ambiguity inherent in the word "vessel," absent statutory definition.[167] The proponents of the change prevailed and the bill was enacted into law.[168]

The definition of undocumented vessels formerly subject to regulation under section 130(17) of the Town Law was confined to vessels that were propelled through the water, and houseboats. The removal of this definition in order to reach documented vessels should not be seen as expanding the meaning of "vessel" except as needed to reach documented vessels. The language of the present provisions -- e.g., "speed," "operation," "operated or driven upon" -- still strongly suggests an orientation toward vessels that ordinarily move about on the water or are readily capable of doing so, and are used for transportation. Also, the fact that the legislature in transferring the companion provisions for villages from the Village Law to the Navigation Law saw fit to apply the Navigation Law definition of "vessel" indicates the appropriateness of a like meaning of the term "vessel" in the Town Law.

If the word "vessels" in these statutes were to be construed more broadly to include non-navigational structures such as an aquaculture facility, the sections would have to be reconciled with section 35-a of the Navigation Law, noted earlier, which authorizes the Commissioner of Environmental Conservation to issue permits for placing in the navigable waters of the state "any . . . floating object having no navigational significance." The statement in section 46-a of the Navigation Law (formerly section 89[63] of the Village Law) that village regulations adopted under it may not be "inconsistent with the laws of the state or of the United States" alleviates the problem with respect to such regulations. This clause would probably be construed as according primacy to any regulations of floating objects, or permits for placing them, made or issued by the state commissioner, if in fact inconsistent with village regulations. Alternatively, a court might reason that villages are barred altogether from regulating non-navigational floating objects as vessels, on the ground that the state has preempted that part of the regulatory field.

The answer might not be the same if town regulations of the operation of vessels (construed as embracing non-navigational floating objects) are in conflict with actual or potential exercises of state power under section 35-a of the Navigation Law. There the reference to state and federal jurisdiction is worded differently. Town regulations of the operation of vessels under section 130(17) of the Town Law are

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167. Id, Memorandum of William E. Redmond, Associate Counsel, Office for Local Government, June 29, 1966.

168. 1966 NY Laws ch 939.

authorized "[e]xcept when prohibited by the laws of this state or of the United States." One might argue that the provisions of section 35-a of the Navigation Law granting regulatory powers to the state do not expressly prohibit, hence may not override, town regulations.

The point was noted by both the Attorney General and Office for Local Government in writing on the proposed 1966 amendment to the Village Law and Town Law. The Attorney General stated: "These statutory restrictions, while worded differently, make abundantly clear the legislature's intention not to have a village or town supersede the authority of this state or the United States over subject matters preempted by them."[169] The Office for Local Government's interpretation of the proposed amendment to section 130(17) of the Town Law differed. It observed that the contrasting wording of the two clauses in the two statutes "could lead to considerable confusion and result in differing regulatory powers for towns and villages"; and that, as an "example, if there is no express prohibition in state or federal laws, a town ordinance apparently could be inconsistent with such laws."[170]

C. Special Restrictions on the Placement of Docks or Other Structures in Waters under Local Jurisdiction

1. Relating to Tidewaters of Nassau and Suffolk County

Could a town in Nassau or Suffolk County enact an ordinance or local law specially aimed at restricting the placement of structures, explicitly or implicitly including aquaculture installations, within waters under its jurisdiction? A similar issue arose in People v Anton, testing an ordinance of the Suffolk County Town of Huntington requiring a town permit for the erection or reconstruction, in any underwater lands owned by the town or in private ownership, of any "dam, impounding structure or other structure, including but not limited to any artificial obstruction," or of any "dock, pier, wharf or other structure, temporary or permanent, used as a landing place on waters."[171] On the threshold issue, whether the town had been delegated authority to regulate such construction, the court relied mainly on the fact that the town owned the land under the waters in

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169. Memorandum of Louis J. Lefkowitz, Attorney General, July 5, 1966, in Governor's Bill Jacket on 1966 NY Laws ch 939.

170. Supra note 167.

171. 105 Misc2d 124, 125, 431 NYS2d 807, 808 (Dist Ct, Suffolk Co, 1980). Note the town's borrowing of the words of section 32 of the Navigation Law, as they read prior to the 1983 amendment, vesting similar authority in the Department of Environmental Conservation. See text accompanying note 84 supra.

which Anton had reconstructed a dock without a permit.[172] The court acknowledged that mere ownership of the underwater land would not be a sufficient basis for asserting town jurisdiction for regulatory purposes. But it reasoned that the Nicolls, Dongan and Fletcher patents from which that ownership was derived vested in the town both "ownership and control over these lands and waters [which] survived the formation of the sovereign State of New York."[173] The court found support for this proposition in the assertion "that the patents were intended not only to convey title to the land but to 'create corporate bodies' and thus 'clothe the inhabitants with the power of government' . . . [and] did establish the geographical boundaries of the township."[174]

The court also acknowledged that mere geographical "jurisdiction" and the general power of governance did not in themselves constitute a grant of authority to adopt the challenged regulation. In its search for such authority the court could find no specific, enumerated delegation of power on the subject in the Town Law. The court turned, instead, to the Navigation Law, and concluded

> that the specific exemption of the navigable waters of Nassau and Suffolk Counties from the provisions of the Navigation Law with respect to the State's control over the construction of docks, piers and wharves (Navigation Law, § 2, subd 4; § 32), must be construed to be in contemplation of the townships within Nassau and Suffolk Counties filling the jurisdictional void and regulating the construction thereof. In essence the townships in

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172. See text accompanying notes 125-126 supra.

173. 105 Misc2d at 126, 431 NYS2d at 809.

174. Id at 128, 431 NYS2d at 810, quoting from Trustees of the Freeholders and Commonalty of the Town of Southampton v Mecox Bay Oyster Co., 116 NY 1, 5 (1889). But see State of New York v Trustees of the Freeholders and Commonalty of the Town of Southampton, 99 AD2d 804, 472 NYS2d 394 (2d Dep't 1984), holding that upon a trial the facts might establish a proprietary or private character of underwater lands of the town held under colonial patents, allowing the town to limit freshwater fishing to town residents and otherwise regulating such fishing, without being preempted by state fishing regulations enacted in or pursuant to the Environmental Conservation Law. See supra note 153 and infra note 249. The special characteristics and problems of ownership and management of underwater lands under colonial patents to Long Island towns are reviewed in the Aquaculture Access Report.

> Nassau and Suffolk Counties, by virtue of this history of their creation, their respective patents and extended boundaries, and the State's acknowledgement thereof by exempting them from certain provisions of the Navigation Law, have been granted the implied power to enact ordinances regulating the construction of docks, piers, and wharves within their boundaries [citing cases].[175]

The cases cited for this proposition do not support the theory that, standing alone, the Nassau and Suffolk counties tidewaters exemption implies a power in those counties or their towns to regulate water-based activities. Rather, they turn on the question whether regulatory authority presumptively granted to the towns or county has been exercised inconsistently with some state law on the subject. In each of the cited cases the source of the municipal power was explicit, and the exercise of that power was held to be consistent with state law because the tidewaters exception had removed these communities from the state regulatory field. These cases upheld (a) local zoning of waterfront lands and the requirement of town permits for piers, wharves and docks, presumably pursuant to state zoning enabling laws;[176] (b) restrictions on the filling or dredging of state-owned underwater lands within a town's boundaries, pursuant to an explicit grant to towns of authority to regulate those activities;[177] (c) the required installation of certain equipment to contain oil spills, pursuant to fire prevention powers granted by the county charter (though citing, as dictum, a power impliedly derived from the tidewaters exemption in the Navigation Law);[178] or (d) regulation of water-skiing, based on general police powers of towns.[179]

The Anton court's reliance on the Nassau and Suffolk counties tidewaters exemption as a basis for the town's authority to regulate structures in waters under it's jurisdiction is misplaced. The fact that the legislature has excluded those waters from state jurisdiction under various provisions of the Navigation Law is not tantamount to a delegation to the towns of the power to regulate activities in their waters. The Anton court reasoned that the "statutory exception [from the definition of navigable waters of the state] has its basis in

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175. 105 Misc2d at 128-129, 431 NYS2d at 810 (emphasis in original).

176. Town of Islip v Powell, 78 Misc2d 1007, 358 NYS2d 985 (Sup Ct, Suffolk Co, 1974).

177. People v Poveromo, 79 Misc2d 42, 359 NYS2d 848 (Sup Ct, App Tm, 2d Dep't, 1978).

178. People v Texaco, 81 Misc2d 260, 365 NYS2d 661 (Dist Ct, Nassau Co, 1975), aff'd, 87 Misc2d 255, 383 NYS2d 788 (Sup Ct, App Tm, 2d Dep't, 1976).

179. People v Levine, 74 Misc2d 808, 343 NYS2d 816 (Dist Ct, Nassau Co, 1973), aff'd, 79 Misc2d 103, 359 NYS2d 939 (Sup Ct, App Tm, 2d Dep't, 1974).

history" -- referring to the history of colonial patents to Nassau and Suffolk County townships predating the formation of the state.[180] Our own research, reported on above, indicates that navigable waters of Long Island Sound within parts of Westchester County, as well as within Nassau and Suffolk counties, and navigable waters around New York City, were initially exempted from state control under the Navigation Law, not because of the history of grants of underwater lands to some townships, but because the principal focus of the legislation was on the regulation of boating and the United States Coast Guard was doing the regulating in those waters.[181]

If the Anton decision is questionable authority for the regulation by Long Island towns of the construction or placement of structures, including those used for aquaculture, in waters under their jurisdiction, we must look elsewhere for a source of authority. One is the general delegation of power to towns to adopt ordinances "[p]romoting the health, safety, morals or general welfare of the community, including the protection and preservation of the property of the town and of the inhabitants, and of peace and good order, the benefit of trade and all other matter related thereto."[182] Similar powers are granted to villages and cities.[183] As noted earlier, these sources of local government power are backed up by the constitutional grant of power to local governments generally (including counties other than those in New York City, in addition to towns, villages and cities) to enact local laws relating to the "government, protection, order, conduct, safety, health and well-being of persons or property therein,"[184] and the similar grant of power in the implementing provisions of the Municipal Home Rule Law.[185]

If on their face these general police power grants be deemed sufficient authority for local restrictions on aquaculture installations in the name of protection of the "general welfare," the question remains whether the restrictions would nonetheless be barred as inconsistent with state legislation, either in direct conflict with a state law or as an attempted invasion of a field of regulation preempted by the state. To the extent that the local restrictions might apply to tidewaters within or bordering on Nassau or Suffolk County, their exemption from

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180. 105 Misc2d at 126, 431 NYS2d at 809.

181. See text accompanying notes 49-56 supra.

182. Town Law § 130(15) (McKinney Supp 1983).

183. Village Law § 4-412(1) (McKinney 1973); General City Law § 20(13) (McKinney 1968).

184. New York Constitution art IX, § 2(c)(10). See text accompanying note 150 supra.

185. § 10(1)(ii)a(12) (McKinney Supp 1983).

provisions of the Navigation Law regulating the placement of floating objects or other structures in navigable waters of the state would bar any preemption claim. The cases cited in Anton, noted above, support this conclusion.[186]

2. Relating to Other Waters

Logic applied in reverse would suggest that municipal regulation of structures in non-exempt waters subject to state jurisdiction under the Navigation Law might be barred as an invasion of a field preempted by the state (or as being directly in conflict with a particular provision of the Navigation Law).

The Supreme Court so ruled in one early case testing an ordinance of a village outside of Long Island, providing that "no dam, bulkhead or similar structure shall be built, constructed, maintained or operated so as to cause a dangerous or unsafe condition," as applied to a dam impounding an inland stream.[187] The village contended that the ordinance was authorized under the general grant of power to villages to enact ordinances to protect the "property, safety and health of their inhabitants."[188] That did not decide the issue. The court said that the "serious and decisive question which must determine the right of the [village to enforce the ordinance] depends upon whether or not the Legislature, by the provisions of section 948 of the Conservation Law, has vested in the Superintendent of Public Works, in pursuance of the policy of the State, exclusive jurisdiction over structures impounding waters" (referring to the statute prohibiting the erection or reconstruction of impoundment structures or docks, piers, wharfs or other structures used as landing places, except on notice to the superintendent and subject to his regulations).[189] It was "clearly apparent" to the court that the village "board of trustees by the ordinance have attempted to supplement, while in fact they have usurped, the functions of the State."[190] The State Comptroller cited that case

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186. See notes 103, 105, 171, 173-75 and 180 supra; and see People v Levine, supra note 179, holding that in view of the Nassau and Suffolk counties tidewaters exemption in the Navigation Law, the Town of North Hempstead did not have to submit a water skiing ordinance to the Conservation Commissioner for approval under section 130(17) of the Town Law.

187. Village of Fleischmanns v Hyman, 164 Misc 175, 298 NYS 564 (Sup Ct, Delaware Co, 1937).

188. Then in sections 89(59) and 90; now found in section 4-412(1) (McKinney 1973).

189. 164 Misc at 177, 298 NYS at 568. Similar provisions are now found in section 15-0503 of the Environmental Conservation Law (McKinney Supp 1983). See text accompanying notes 85 supra.

190. 164 Misc at 179, 298 NYS at 570.

as precedent in rendering the opinion that in view of the provisions of section 32 of the Navigation Law prohibiting the construction of any wharf, dock, pier jetty, or other type of permanent structure in the navigable waters of the state, a village could not regulate the installation of private docks and piers upon such waters.[191]

D. Comprehensive Municipal Land Use Controls; Zoning

1. The Need for Controls

The crux of the Long Island coastal problem is

> conflict among competing uses. Recreational use of the shoreline conflicts with other uses and can actually change the marine environment. Parking lots, boat ramps, and docking facilities alter the shoreline. Beachfront owners and commercial resorts wish to limit access to their shoreline, whereas the public desires free access. People walking around or camping may destroy the delicate plant life in dune areas, salt marshes, and tidal pools. Commercial collecting of live organisms for sale to tourists may devastate natural populations of organisms. Power boats release oil and gas. Raw sewage from boats, beach facilities, and coastal resorts is often discharged straight into the water with no treatment. Sport fishing may deplete some species past the point of maximum sustainable yield and so lead to decreasing resources. Recreational boating does not mix well with commercial shipping. On top of all that is the heavy demand for safe and clean swimming areas . . . the region's most popular outdoor sport.[192]

This Long Island scene reflects the universal truth that "[a]ctual and would-be users of coastal lands and waters have demonstrated a capacity for getting in each other's way -- often for destroying the usability of an area for all but one of the many competing (but not

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191. 20 Op St Compt 529 (1964). And see 25 Op St Compt 76 (1969), citing Village of Fleischmanns and section 32 of the Navigation Law in support of the Comptroller's opinion that a village may not adopt a local law prohibiting the deposit of fill in any lake without approval of the village board of trustees. Cf People v Poveromo, 79 Misc2d 42, 43, 359 NYS2d 848, 850 (Sup Ct, App Tm, 2d Dep't, 1973), confirming the power of the Town of Smithtown to restrict the dumping of fill in the Nissequogue river, based on the Nassau and Suffolk counties tidewaters exemption and provisions of section 64(10-a) of the Town Law authorizing town boards to control "the filling or diversion of streams and watercourses" (McKinney 1965).

192. L.E. Koppelman, P.K. Weyl, M.G. Gross, D. Davies, The Urban Sea: Long Island Sound 100-101 (Praeger Publishers: New York, 1976).

inherently incompatible) interests."[193] It is a national phenomenon, recorded in a Congressional finding back of the federal Coastal Zone Management Act of 1972, that "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion."[194]

2. Source and Territorial Limits of Municipal Zoning Power

The answer to the question whether a local government may impose zoning or other similar land use restrictions[195] on offshore aquaculture activities depends on the answers to a series of subsidiary questions. Does the zoning power enjoyed generally by a local government extend to activities on or above underwater lands within its borders? Beyond its borders? If the local government's zoning authority is deemed to apply generally to water-based uses, is it being exercised in a manner inconsistent in any respect with state regulatory laws? If not, may the local zoning extend to water-based activities conducted by the state on or over underwater lands owned by the state? Or conducted by a private entity on or over underwater lands leased from the state?

In New York, local zoning powers are delegated to towns, villages and cities, not to counties.[196] However, the counties have limited authority to review some zoning and similar land use control decisions

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193. Delogu, Land Use Control Principles Applied to Offshore Coastal Waters 606, 59 Ky L J 606 (1971).

194. Coastal Zone Management Act of 1972, 16 USC § 1451(c) (1976). The proposed New York Coastal Management Program echoes these concerns, noting that its coasts are "severely threatened by competing demands." US Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management, and New York Department of State, State of New York Coastal Management Program and Final Environmental Impact Statement, vol 1, at II-1-3 (1982) (cited hereafter as the New York Coastal Management Program). The effect of state entry into the field of development controls through this program and its supporting legislation will be mentioned below.

195. The word "zoning" will be used here to denote the standard package of local land use controls (e.g., including subdivision controls), unless otherwise indicated by the context.

196. Town Law §§ 261 et seq (McKinney 1965, and 1983 Supp) (zoning limited to areas outside the limits of any incorporated village or city); Village Law § 7-700 (McKinney 1973); General City Law § 20(24),(25) (McKinney 1968, and 1983 Supp).

of towns, villages and cities.[197] The zoning enabling statutes do not distinguish between uplands and lands under water, and the courts have not questioned the use of local zoning power on the basis of that distinction.[198]

Absent specific, explicit authority derived from state statutes, New York local governments may not exercise zoning powers beyond their respective boundaries.[199] Although the underwater lands owned by towns bordering Long Island are largely confined to bays and harbors adjoining Long Island Sound,[200] the reach of their police powers may extend to underwater lands in the sound within their boundaries, though owned by the state, unless in conflict with state regulation and in excess of home rule powers.[201] The northern boundaries of north shore Long Island towns extend to the center of the sound.[202]

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197. General Municipal Law §§ 239-1 - 239-n (McKinney 1974), requiring referrals to a county agency of certain town, village and city zoning decisions, such as those involving land near municipal borders; and requiring a majority plus one of the zoning authority's members to override a negative recommendation by the county agency. However, section 1330 of the Suffolk County Charter gives that county's Planning Commission veto power over zoning changes within 500 feet of town or village boundaries. See Matter of Smithtown v Howell, 31 NY2d 365, 339 NYS2d 949, 292 NE2d 10 (1972); and see similar provisions in section 1608 of the Nassau County Charter (1980).

198. Town of Islip v Powell, 78 Misc2d 1007, 358 NYS2d 985 (Sup Ct, Suffolk Co, 1974); Piesco v di Francesca, 72 Misc2d 128, 338 NYS2d 286 (Sup Ct, Rockland Co, 1972); 2 R.M. Anderson, The American Law of Zoning § 9.13 (2d ed 1976); 1 R.M. Anderson, New York Zoning Law and Practice § 8.06 (2d ed 1973). Bassett, in his classic work on zoning, concluded that since land under water can be used for building purposes, it may be zoned, even "if its title is in the state or municipality." E.M. Bassett, Zoning 30 (1936). As illustrations of cities that "have zoned land under water, whether navigable or not and regardless of whether private land titles extend to the middle or to the edge of the stream," he cites the zoning by the City of Jamestown, New York, of part of a business district lying over a navigable stream; and zoning in the City of Rochester, New York, of land under the Genesee River. Id.

199. Incorporated Village of Port Jefferson v Consolidated Petroleum Terminal, Inc., 71 Misc2d 948, 337 NYS2d 636 (Sup Ct, Suffolk Co, 1972); People v Anton, 105 Misc2d 124, 431 NYS2d 807 (Dist Ct, Suffolk Co, 1980); 1 R.M. Anderson, New York Zoning Law and Practice § 5.15 (2d ed 1973).

200. See Aquaculture Access Report.

201. People v Anton, supra note 171; Town of Islip v Powell, supra note 198; and see text accompanying notes 149-51 supra, and the discussion of intergovernmental zoning conflicts, below.

202. See text accompanying note 74 supra.

3. Intergovernmental Zoning Conflicts; Classification of Problems

Various common legal issues cut across different factual situations in which the confrontation of aquaculture with local zoning laws involves intergovernmental tensions. Differentiating them at the outset may help dispel confusion in some of the judicial treatment of the applicable doctrines.

a. Municipal zoning regulations prohibiting the placement of an aquaculture facility on privately owned foreshore or underwater lands may be in direct conflict with state regulations or invade a field of regulation preempted by the state, thus subject to potential judicial condemnation under doctrines establishing state supremacy over the matter. This inquiry usually calls for the interpretation of the applicable statutes, against the backdrop of state constitutional provisions limiting state or local legislation in respect of local matters. This is the "inconsistency" issue.

b. If the aquaculture facility were being operated by a state agency on state owned land the issue may be framed in terms of "sovereign immunity," asking whether state involvement renders the use immune from local regulation.

c. If the aquaculture facility (e.g., a hatchery of a county or village) were owned and operated by one municipality in an upland or underwater land area within the boundaries of another municipality (e.g., a town), would the use be beyond the reach of the other's zoning power? This is another "sovereign immunity" issue.

d. If the aquaculture facility were owned and operated by a private entrepreneur on land leased to him by the state or a municipality, would the use be immune from another municipality's zoning regulation? A similar "sovereign immunity" issue would be raised.

e. Under a somewhat similar factual situation, the operator of the aquaculture facility may be using privately owned land (not land leased from the state or a municipality), but under a license granted by the state and under a state program for enhancing aquaculture. The operator might claim that he is, in effect, an agent of the state, thus entitled to whatever immunity from local regulation the state itself might enjoy as a superior sovereign. This, too, is a "sovereign immunity" issue. It is close to and may be easily confused with the inconsistency issue, to the extent it entails an interpretation and application of particular state statutes.

f. May a local government, say a Long Island town, ignore its own zoning ordinance in locating a town owned and operated aquaculture facility (e.g, a fish hatchery) on town land? If the town leases its land to a private aquaculturist, is the lessee immune from the town's zoning ordinance?

4. The Inconsistency Issue

In rendering the opinion that a village may not regulate the installation of private docks and piers upon waters within the state -- based on the theory that the subject of regulation is preempted by the state — the State Comptroller issued the following caveat:

> It is not our intention hereby to rule out a village exercise of police power as to such docks, in extreme cases involving a flagrant abuse of or threat to public safety, health and welfare, or possibly, in a proper instance, where a village might, by zoning ordinance, wish to establish a certain uniformity as to lakefront properties.[203]

In 1971 the State Comptroller made the point more directly in stating "that State preemption of regulation of construction along shorelines notwithstanding, village control of the use of shorelines and offshore facilities by means of a zoning ordinance and a special permit issued pursuant thereto is authorized."[204]

We have noted that the issue came before the court two years later in Town of Islip v Powell in a challenge to a zoning ordinance of the Suffolk County Town of Islip.[205] The ordinance provided "that 'underwater [land] shall be considered as being in the same district as the abutting upland' for a distance of 100 feet unless otherwise classified."[206] The town sought to enjoin the owners of a marina from conducting the business of renting floating docks attached to a pier or bulkhead. The docks were located on town-owned lands, in a residence zone. The use of docks for commercial purposes was not permitted in the zone. The defendant landowners asserted that the state had preempted regulatory authority over navigable waters, hence the zoning provisions were invalid. The argument was based on the provisions of section 32 of the Navigation Law and the companion section 15-0503 of the Environmental Conservation Law which prohibited the construction of docks, piers, wharfs or other structures, used as landing places,

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203. 20 Op St Compt 529, 532 (1964) (emphasis added).

204. 27 Op St Compt 154-155 (1971) (emphasis in original): "[W]e believe that a village is not without power to control the development of waterfront areas within its boundaries, including the use of offshore boating facilities and that a zoning ordinance . . . is a proper means of such control. To exclude offshore boating facilities from village use controls would raise the possibility of aesthetic havoc beyond planned village shorelines, thereby defeating the purposes of comprehensive municipal planning."

205. 78 Misc2d 1007, 358 Misc2d 985 (Sup Ct, Suffolk Co, 1974).

206. Id at 1007, 358 NYS2d at 987.

without a permit from the Department of Environmental Conservation.[207]

In rejecting the state preemption argument and upholding the zoning ordinance the court did not rely on the distinction between general zoning regulations of land use and special regulations restricting the construction of docks. Instead, the court focused on the issue whether these state statutes exempted navigable waters in or bordering on Nassau and Suffolk counties from state jurisdiction. In making the point the court in the Islip opinion issued dicta to the effect that neither the navigable waters in the two counties other than tidewaters, nor navigable tidal or non-tidal waters in other counties, would be exempt from state jurisdiction under the Navigation Law.[208]

The Islip court was confronted by a decision in an earlier case, Erbsland v Vecchiolla.[209] The Erbsland decision and opinions could not be ignored because that case reached the highest state court. The Islip court distinguished Erbsland on the ground, among others, that it concerned "navigable waters 'within the state's control and jurisdiction'," [210] not municipal jurisdiction as in the case of tidewaters within the Nassau and Suffolk counties exemption. The distinction related to the issue whether the local regulation was inconsistent with state regulation. Yet the Erbsland decision rested as well, if not more squarely, on another issue -- whether municipal regulation is barred because the regulated activities are conducted on state-owned land. We will return to Erbsland later in discussing that issue.

5. Exemption from Local Zoning of Uses Engaged in Directly by Governments

For the most part the courts do not distinguish between (a) the state and its political subdivisions in enunciating and applying rules for determining whether a municipality may regulate activities engaged in directly by a public agency, as distinguished from (b) activities of private lessees or licensees of government owned land. It is reasoned that the immunity of the state itself extends to its political subdivisions or agencies -- counties, cities, towns and villages, school districts, as well as to semi-independent public authorities or

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207. Id at 1008 et seq.

208. Id at 1009, 1012, 358 NYS2d at 988-989.

209. 35 AD2d 564, 313 NYS2d 576 (2d Dep't 1970), aff'd after remand sub nom Erbsland v Rubin, 33 NY2d 787, 350 NYS2d 653, 305 NE2d 775 (1973).

210. Town of Islip v Powell, 78 Misc2d at 1008, 1009, 358 NYS2d at 988.

other public benefit corporations[211] -- since they are all creatures or "agents of the state."[212] In reviewing the first category of doctrine we will, however, note some variations based on particular characteristics of some types of agencies.

Absent statutory guidance, the courts generally choose among three favored tests for determining the limits of government zoning immunity: (a) the eminent domain test, (b) a superior sovereign test, and (c) a test basing the result on whether the government's particular land use is governmental or proprietary in nature.

a. **The Eminent Domain Test**

Some courts reason that "the power of eminent domain is inherently superior to the exercise of the zoning power," hence "the mere grant of eminent domain power to a governmental unit automatically renders the unit immune from zoning regulation."[213] The argument for it rests on the assumption that the power to condemn land for an allowable public purpose assumes the power to use it for that purpose,[214] and that if a

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211. Section 65 of the New York General Construction Law designates "public corporations" as one class of corporations, and within the subclass of public corporations includes a municipal corporation, a district corporation, or a public benefit corporation. McKinney Supp 1983. Section 66 defines a "municipal corporation" to include a county, city, town, village and school district; a "district cor poration," to include "any territorial division of the state . . . which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division"; and a "public benefit corporation" as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." For the purposes of this report we will include in the subclass of public benefit corporations those operating exclusively within local or regional limits as well as those operating statewide. This subclass also includes entities more popularly known as "public authorities."

212. Comment, Governmental Immunity from Local Zoning Ordinances, 84 Harv L Rev 869, 877 (1971) (cited hereafter as 84 Harv L Rev).

213. Harv L Rev 869 (1971). And see Comment, The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses, 19 Syracuse L Rev 698, 700-02 (1968) (cited hereafter as 19 Syracuse L Rev); and Annotation, Applicability of Zoning Regulations to Governmental Projects or Activities, 61 ALR2d 970, 978 (1958), referring mainly to Georgia and Ohio cases.

214. Johnston, Recent Cases in the Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests, 8 Urban Lawyer 327, 329 (1975) (cited hereafter as Johnston).

zoning ordinance were permitted to bar the use, the authority resorting to eminent domain would be barred from carrying out many of its mandated functions.[215] These propositions are countered by the assertion that they go too far unless the zoning ordinance excludes the use from the entire jurisdiction of the zoning government, for as applied the zoning ordinance may permit the use in some appropriate zone if not the one chosen by the government user.[216] In addition, it has been observed that "zoning laws and the power of eminent domain are both the result of legislative delegation, and neither should automatically be accorded superiority unless that was the express intention of the legislature," and there is "nothing inherent in the power of eminent domain which requires that a governmental unit which has the power must automatically be exempt from zoning laws."[217]

The New York courts have not adopted the eminent domain approach. A lower New York court rejected it when it was advanced by an agricultural society claiming immunity, on that basis, from a village zoning ordinance.[218] The court responded:

> We are not dealing with a head-on collision between the power of condemnation and the zoning ordinance in question, because [the Agricultural Society] is not seeking to exercise its authority. [The Agricultural Society] is saying that just because it has the authority to condemn, whether it ever uses it or not, it is exempt from the zoning ordinance. [The Agricultural Society] is in error. I have found no case dealing with the applicability of zoning laws to one who merely possessed the power of condemnation. The New York cases all deal with zoning laws as they affect the exercise of that

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215. 84 Harv L Rev at 875.

216. Id.

217. Comment, Balancing Interests To Determine Governmental Exemption from Zoning Laws, 1973 U of Ill L Forum 125, 131 (cited hereafter as 1973 U of Ill L Forum). And see Note, Municipal Power To Regulate Building Construction and Land Use by Other State Agencies, 49 Minn L Rev 284, 299-300 (1964) (cited hereafter as 49 Minn L Rev); and Sales, The Applicability of Zoning Ordinances to Governmental Land Use, 39 Tex L Rev 316, 325 (1961). The powers of eminent domain and zoning may also be on equal constitutional footing, where the local zoning power is derived from a constitutional grant of home rule.

218. Union Agricultural Society at Palmyra, Inc. v Sheldon, 79 Misc2d 818, 361 NYS2d 598 (Sup Ct, Wayne Co, 1974).

power.[219]

b. The Superior Sovereign Test

Statements by some commentators and courts suggest an absolute immunity of state departments or political subdivisions from local zoning or other land use controls. This reasoning is particularly apt where the state itself, through one of its departments, wants to use its own land; and in some states is held to apply only to state agencies, not to municipalities.[220] Thus, Professor Anderson says that the "state of New York is not required to conform to the zoning regulations of the several municipalities," and the grant of zoning power to municipalities "does not include the power to limit uses by other municipalities or agencies of the state."[221] Otherwise, local governments could override and thwart state policy.[222] According to some courts, the rationale for that sweeping proposition lies in the simple premise that the state has "sovereign" status, and as such "is not subject to any legislation of its political subordinates."[223] A corollary theory rests on the basic fact adverted to earlier that local governments enjoy only those powers delegated to them. Combined with a second premise constituting a rule of statutory construction, it has been reasoned "that a statute in general words, by the provisions of which the sovereignty or any of the prerogatives of the State would be derogated, does not apply to or bind the State unless it is specifically mentioned therein or included by necessary implication," and "statutes in derogation of the sovereign

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219. Id at 820, 361 NYS2d at 600. In addition, the society contended "that its power to take by condemnation means nothing if, after the taking, its use of the property can be curtailed or forbidden by local zoning laws." Id at 820, 361 NYS2d at 601. The court indicated that even if the society had been exercising its condemnation power, it would not be exempt from the village zoning ordinance in the use of the condemned property, because the society was performing a proprietary rather than a governmental function, thus applying another test discussed below here.

220. 19 Syracuse L Rev at 700.

221. 1 R.M. Anderson, New York Zoning Law and Practice § 9.04 (2d ed 1973). Professor Anderson cited Erbsland (supra note 209) in support of this statement. See further reference to Professor Anderson's statement in the text accompanying note 277 infra. See also 2 R. M. Anderson, American Law of Zoning § 12.06 (2d ed 1976); 6 P.J. Rohan, Zoning and Land Use Controls § 40.03[2] (1983); and Annotation, Applicability of Zoning Regulations to Governmental Projects or Activities, 61 ALR2d 970, 973 (1958).

222. Nowack v Department of Audit and Control, 72 Misc2d 518, 520, 338 NYS2d 52, 54 (Sup Ct, Monroe Co, 1973). And see 1973 U of Ill L Forum at 126; and Johnston at 330.

223. 19 Syracuse L Rev at 700 (1968).

immunity of the State are strictly construed."[224] That was the conclusion drawn by the New York State Attorney General in rendering the opinion that local governments may not require permits for the construction of buildings by the State Dormitory Authority.

The theoretical justification for a rule of absolute state immunity is questionable. It assumes a primus inter pares stance; that unless explicitly provided to the contrary, delegations of powers to local governments may not be construed as permitting local interference with state policy. It overlooks the fact that in constitutions containing home rule grants to local governments, usually in the form of both affirmative grants and restrictions on state legislative interference in local affairs, the powers sometimes move directly to local governments, not in a hierarchical arrangement according primacy to the state legislature.[225]

Where there are overlapping territorial jurisdictions, some courts find significance in the relative political position or geographical or functional scope of the unit claiming immunity, thus favoring government agencies with responsibilities or territories transcending the regulating unit's boundaries.[226] Other than the state itself, the protected overlapping user entity may be a county, town, school district, public authority or other type of public benefit corporation. Thus a school district performing an educational function,[227] or county sewer district obeying a state mandate to abate water pollution[228] may be accorded immunity from zoning ordinances of a city, town or village.

The inquiry as to which of the contesting public units is the

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224. 1949 Op Atty Gen 138, 139; followed in 20 Op St Compt 238 (1964); and see 19 Syracuse L Rev at 700, and 1 R.M. Anderson, New York Zoning Law and Practice § 9.04 (2d ed 1973).

225. See 49 Minn L Rev at 289: The sovereign immunity doctrine "errs in assuming a hierarchy among governmental units in which bodies such as school districts and counties are 'agents of the state,' and thereby cloaked with state sovereignty, while municipal corporations are something less. This assumption is indefensible. Since the municipality also derives its powers from legislation it should have an equal claim to pre-eminence."

226. 84 Harv L Rev at 877-878; and see Comment, State Immunity from Zoning: A Question of Reasonableness, 31 U of Miami L Rev 191, 192 (1976) (cited hereafter as 31 U of Miami L Rev).

227. County of Westchester v Village of Mamaroneck, 22 AD2d 143, 255 NYS2d 290 (2d Dep't 1964), aff'd, 16 NY2d 940, 264 NYS2d 925, 212 NE2d 442 (1965).

228. Durand v Board of Cooperative Educational Services, 70 Misc2d 429, 432-433, 334 NYS2d 670, 675 (Sup Ct, Westchester Co, 1972), aff'd, 41 AD2d 803, 341 NYS2d 884 (2d Dep't 1973); Annotation, Zoning Regulation as Applied to Public Elementary and High Schools, 74 ALR3d 136 (1976).

superior sovereign is often presented as a problem of statutory interpretation, as the Attorney General indicated in his Dormitory Authority opinion noted above.[229] Of course, where the state legislature, generally the final arbiter, expressly or by clear implication subjects one government unit to regulation by others, there is no room for application of judicial sovereign immunity doctrine. This is illustrated by the holding in City of Ithaca v County of Tompkins, that although "[o]rdinarily a county, when performing a governmental function, such as the selection of building sites for county government offices, is immune from complying with the terms of the zoning ordinances of another local government within its boundaries," in providing that "any county, city, town or village is empowered to" regulate the alteration of historic buildings, in addition to any existing traditional zoning powers they might have, the legislature did not intend to render a county immune from a city landmark preservation ordinance.[230]

In some situations the courts purport to base their decisions on statutory interpretation, but "[i]mplicit in their statutory construction rules . . . is the belief that the functions served by state agencies" or by their political subdivisions are more important than the functions served by the zoning laws."[231]

Absent express or clearly implied legislative guidance, the courts may nevertheless cast the issue in terms of vaguely implied legislative intent, in looking to the general "legislative design in vesting municipalities with the authority to" engage in the land use activity in issue.[232] In this endeavor the New Jersey courts apply a rule of presumption: "where the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary."[233]

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229. See text accompanying note 224 supra.

230. 77 Misc2d 882, 883-84, 355 NYS2d 275, 276-77 (Sup Ct, Tompkins Co, 1974), referring to General Municipal Law § 96-a (McKinney 1977).

231. 1973 U of Ill Forum at 129.

232. Aviation Services, Inc. v Board of Adjustment of the Township of Hanover, 20 NJ 275, 119 A2d 761, 765 (1956), holding the township's zoning ordinance inapplicable to a town airport.

233. Id 119 A2d at 765. The court found no basis for the presumption there, "the element of superior governmental status" not being present," but nevertheless found a legislative intent to free the airport from the town's zoning controls. .cwl0

In other jurisdictions the courts just as easily indulge the "contrary presumption that the legislature intended municipal police power to reach the other state agencies as well as private parties."[234] Taking this position, the Florida court in City of Temple Terrace v Hillsborough Association for Retarded Citizens, said: "When the state legislature is silent on the subject, the governmental unit seeking to use land contrary to applicable zoning regulations should have the burden of proving that the public interests favoring the proposed use outweigh those mitigating against a use not sanctioned by the zoning regulations of the host government."[235]

The resort to canons of statutory construction may involve little more than an exercise in semantics. To accept the notion that the superior sovereign wins the contest is merely to find that the legislature intended it to win.

The sovereign immunity concept may be a factor in the resolution of intergovernmental zoning disputes by the New York courts, but they do not offer it is a decisive test. In any case, the test has been criticized because "'superior authority' in the political hierarchy does not necessarily imply superior ability in allocating land uses."[236] And the assumption that public benefits from the intruding governmental land use are greater than those accruing from the enforcement of zoning laws may be fallacious in given situations.[237]

The American Law Institute, in its Model Land Development Code, posits the greater importance of the objects of local zoning in expressly "including a government agency" in its definition of the persons (developers) subject to zoning.[238]

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234. 49 Minn L Rev at 292.

235. 322 So2d 571, 579 (Fla 1975), aff'd, 332 So2d 610 (Fla 1976). It may be significant that, as we will note later, the court adopted a balancing approach rather than a rigid superior sovereign test. See note 261 infra.

236. 84 Harv L Rev 869 at 878.

237. See 1973 U of Ill L Forum at 126.

238. The American Law Institute, A Model Land Development Code § 1-201(1) (1975). The commentary on the section explains that this is done "in order to make clear that, contrary to tradition in some jurisdictions, development undertaken by government is subject to local ordinances regulating development unless specifically exempted." Id at 13. "Government agency" is defined broadly to include any federal, state or municipal government or any instrumentality thereof. § 1-201(3). Impliedly, the Institute concedes that, in some jurisdictions at least, a sovereign immunity doctrine would require this legislative waiver.

c. The Governmental-Proprietary Distinction

Until recently, at least, the New York courts have adopted a governmental-proprietary test, reasoning that "broad principles of sovereignty require that a State or its agency or subdivision performing a governmental function be free of local control."[239] The criteria used by the courts to make the distinction are usually obscure; when articulated are difficult to apply; and in some situations lead to contradictory conclusions by different courts within a single jurisdiction.[240]

Professor Anderson observes:

> The great difficulty lies in determining which functions are governmental, and which are proprietary. The distinction is of ancient vintage, but it is neither clear nor stable. What is regarded as governmental for one purpose (for example, municipal tort liability) is not necessarily so regarded for a different purpose (for

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239. County of Westchester v Village of Mamaroneck, supra note 227, 22 AD2d at 148, 255 NYS2d at 294 (emphasis added), invalidating village zoning restrictions on the enlargement of a sewage treatment plant by a county sewer district. And see Oswald v Westchester County Park Commission, 234 NYS2d 465 (Sup Ct, Westch Co, 1962, not officially reported), aff'd, 18 AD2d 1139, 239 NYS2d 862 (2d Dep't 1963), holding that the county was performing a governmental function in establishing a "Sportsman's Center" on county-owned land, thus was not subject to town zoning restrictions. An example of a protected state department use is found in Matter of Hongisto v Mercure, 72 AD2d 850, 851, 421 NYS2d 690, 693 (3d Dep't 1979), declaring the Department of Correctional Services immune from town zoning restrictions sought to be applied to a mobile home development on state prison grounds, the "care and custody of prison inmates [being] a governmental function." In his opinion regarding the Dormitory Authority, mentioned above, the Attorney General deemed it significant that the statute creating the Authority declared that it would be "performing an essential governmental function." Supra note 224. Illustrative applications of the governmental-proprietary purpose test are found in D'Aristotile v City of Binghamton, 82 AD2d 945, 440 NYS2d 778 (3d Dep't 1981), expressing doubt as to whether an industrial development agency, a public benefit corporation, is "pursuing a governmental function when it acts as the vehicle to effectuate a zoning change to accommodate private commercial interests"; City of Rochester v Town of Rush, 71 Misc2d 451, 336 NYS2d 160 (Sup Ct, Monroe Co, 1972), holding that the town could not restrict dumping by the city in a site owned and maintained by the New York Environmental Facilities Corporation, a state public authority. Public schools are uniformally declared to be outside the reach of local zoning ordinances, since they are performing a governmental function for the state, pursuant to constitutional mandate on the state to provide public education. See Board of Education of the City of Buffalo v City of Buffalo, 32 AD2d 98, 302 NYS2d 71 (4th Dep't 1969); and Annotation, Zoning Regulations As Applied to Public Elementary and High Schools, 74 ALR3d 136 (1976).

240. 84 Harv L Rev at 870; 61 ALR2d 970, supra note 221, at 974-978; 19 Syracuse L Rev at 702-705; Johnston at 331.

example, condemnation of municipal land). And a proprietary function of a municipal government of 1955 may become a governmental function in 1965.[241]

Some courts regard the state or municipal use as governmental if conducted in response to a statutory mandate, and proprietary if performance of the function is merely permissive.[242] Other courts classify the function as proprietary if likened to the conduct of a private commercial enterprise, such as the sale of water by a public

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241. 2 R.M.Anderson, American Law of Zoning § 12.03 (2d ed 1976). Recently, in Washington County Cease, Inc. v Persico, 120 Misc2d 207, 214-19, 465 NYS2d 965, 973-74 (Sup Ct, Washington Co, 1983), aff'd, 99 AD2d 321 (3d Dep't 1984), the Trial Court, in reviewing the application of the governmental-proprietary distinction to cases involving waste disposal, noted that although the New York courts deemed waste disposal to be a proprietary function in 1933 (citing O'Brien v Greenburgh, 239 App Div 555, 268 NYS 173 [2d Dep't 1933], aff'd, 266 NY 582, 195 NE 210 [1935], holding that a town had to comply with its own zoning ordinance in locating an incinerator), by 1957 they had begun to regard the disposition of refuse and rubbish as a governmental function (citing, in addition to more recent cases, Nehrbas v Village of Lloyd Harbor, 2 NY2d 190, 159 NYS2d 145, 140 NE2d 241 [1957], holding that the village was not required to abide by its own zoning ordinance in constructing an incinerator). And see Annotation, Applicability of Zoning Regulations to Waste Disposal Facilities of State or Local Government Entities, 59 ALR3d 1244 (1974).

242. "A use is governmental if it is created pursuant to a duty imposed upon the sovereign to provide for the well-being and health of a community." Conners v New York State Association of Retarded Children, Inc., 82 Misc2d 861, 864, 370 NYS2d 474, 477 (Sup Ct, Rensselaer Co, 1975). See notes 314 and 326 infra. Earlier, the Appellate Division, Second Department, said that where "the municipality is executing the legislative mandate related to a public duty generally," it is performing a "governmental function," but if not acting under a mandate "it is exercising its private rights as a corporate body." O'Brien v Town of Greenburgh, supra note 241, 239 App Div at 558, 268 NYS at 176. But see Hewlett v Town of Hempstead, 3 Misc2d 945, 951, 133 NYS2d 690, 695-96 (1954), aff'd, 1 AD2d 954, 150 NYS2d 922 (2d Dep't 1956), distinguishing O'Brien in holding that the town could ignore its own zoning ordinance in constructing an incinerator in a residential zone, under the circumstances that though the project was optional as a legal matter, in view of the "risk to the general health of [the] inhabitants," in the "town of Hempstead with its present population and closely developed territory," it was "no longer an optional matter." The mandatory-permissive test could hardly apply to a function being performed by the state itself. See Western Regional Off-Track Betting Corporation v Town of Henrietta, 78 Misc2d at 170-171, 355 NYS2d 738, 740 (Sup Ct, Monroe Co, 1974), aff'd, 46 AD2d 1010, 363 NYS2d 320 (4th Dep't 1974), holding that the off-track betting corporation, a public benefit corporation, was performing the "governmental" purposes of deriving revenues for the support of government, and curbing unlawful bookmaking. (See note 349 infra.) And see 84 Harv L Rev 869 at 870; and 49 Minn L Rev at 295-96. Arden H. Rathkopf, in his treatise on zoning, places primary emphasis on the mandatory/permissive function test in discussing case law on the zoning of municipal property. 3 The Law of Zoning and Planning 53-1 et seq (1978).

water supply entity.[243] The author of a Harvard Law Review comment speculates:

> "Possibly inherent in the initial judicial classification of specific functions as governmental or proprietary was a balancing of the adjoining landowners' vested rights against the critical nature of the proposed violating facility. When considerations of alternative location and alternative cost strongly suggested exemption and the conflict with existing land uses was not dramatic, the function was deemed "governmental"; when the function was less essential and there were alternative locations for the proposed facility, the abutting landowners' and the municipality's interest in the zoning ordinance was considered more compelling than the potential service to the general welfare and the function was deemed "proprietary."[244]

The governmental-proprietary distinction has been criticized by the commentators, one of them referring to it as one of the "unhelpful epithets" applied by the courts in these cases, which "often serve as distracting surrogates for reasoned adjudication."[245] Other commentators and courts consider the test to be too mechanical, automatically disregarding legitimate municipal interests in land planning.[246] Some courts, disenchanted with the governmental-proprietary distinction, "have simply decided that any activity carried on by a governmental unit is a governmental activity."[247]

Recently, an Appellate Division of the New York Supreme Court,

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243. Canavan v City of Mechanicville, 229 NY 473, 476, 128 NE 882 (1920); Layer v City of Buffalo, 274 NY 135, 139, 8 NE2d 327, 329 (1937). And see 2 McQuillin, Municipal Corporations § 4.156 (3d ed 1979) ("a municipality, in the operation of a public utility, acts in its private and proprietary capacity rather than in a legislative or governmental capacity"); and 18 id § 53.103 (3d ed 1977) ("insofar as a city undertakes to sell water for private consumption it is engaged in a commercial venture, as to which it functions as any other business corporation," so may be liable for its torts).

244. 84 Harv L Rev at 872.

245. Id 869.

246. 1973 Ill L Forum at 133-34.

247. Id at 134, quoting from the opinion of the trial court in Oswald v Westchester Park Commission, supra note 239, at 468: "This whole subject becomes nebulous when it gets beyond activities which are obviously governmental, such as schools, courts, police, and fire departments. It may be that the distinction is disappearing from the law and that we are approaching the time when all lawful municipal functions will be regarded as governmental except perhaps in the area of tort liability."

apparently backed up the Court of Appeals, responding to growing criticism of the distinction by the Supreme Court of the United States and by commentators, appears to have discredited the distinction as a determinant in resolving intergovernmental disputes over the use or allocation of lands for public purposes.[248] In County of Nassau v South Farmingdale Water District, in holding that Nassau county could not, by virtue of a claimed paramount right to construct a sewerage system, force a town water district to pay for the relocation of the district's installations, the court described the governmental-proprietary distinction as "artificial, obsolete, and . . . irrelevant."[249] Four years later the Appellate Division, First Department, read into the County of Nassau opinion a reformulation of the governmental-proprietary test, rather than a discarding of it, in citing the case for the proposition that "[g]overnmental functions are now more liberally defined to include activities which are not undertaken for profit-making purposes, but, rather, as a public duty."[250] It is difficult to imagine any governmental function, whether or not traditionally regarded as being "proprietary" in nature, not taken as a matter of "public duty" — at least under a definition of "public duty" including any action deemed by the government to be undertaken in the public interest. Possibly the court was referring to a distinction between the performance of mandatory and permissive functions, noted above.[251]

We will return to the County of Nassau case in discussing the balancing of interests test.

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248. 62 AD2d 380, 387, 405 NYS2d 742, 746 (2d Dep't 1978), aff'd, 46 NY2d 794, 413 NYS2d 92, 386 NE2d 832 (1978). The court reasoned that the "abandonment of the rule of sovereign immunity [from tort liability] has virtually destroyed the only real basis for the creation of the distinction." The cases in the Supreme Court of the United States cited by the Appellate Division included City of Trenton v New Jersey, 262 US 182, 192 (1923), and Brush v Commissioner, 300 US 352 (1937), which had pointed to the derivation of the distinction from doctrines of municipal tort liability, drawn for the purpose of avoiding injustice from application of technical defenses based on the governmental character of municipal defendants.

249. County of Nassau v South Farmingdale Water District, 62 AD2d at 392, 405 NYS2d at 749. And see the dissenting opinion in State v Trustees of the Freeholders and Commonalty of the Town of Southampton, 99 AD2d 804, 472 NYS2d 394 (2d Dep't 1984), referred to at notes 153 and 174 supra.

250. Koch v Dyson, 85 AD2d 346, 369, 448 NYS2d 698, 712 (1st Dep't 1982).

251. See note 242 supra, and accompanying text.

d. The Balancing of Interests Approach

All three traditional tests — eminent domain, superior sovereign, governmental-proprietary -- have been criticized for (1) concentrating on the nature and source of the power exercised by the intruding government, rather than on the reasonableness of the activity;[252] and (2) tending "to view the competing assertions of power as being mutually exclusive," making the host jurisdiction virtually powerless to regulate its environment if immunity is declared, or banning the proposed public use altogether if immunity is denied, and disregarding the possibility in some cases that the two positions may be reconciled.[253]

If the traditional judicial tests are discredited, absent clear statutory guidance, the courts could, but would not likely, treat all governmental and private land uses alike in zoning disputes. Or they could characterize any legitimate function of a public entity as "governmental," granting immunity from local zoning across the board. They could design some new test for deciding whether all or special classes of public uses should be subject to local regulation. Or they could fashion a rule of reason, deciding each case on its facts in determining whether a public use in a particular location is worthy of exemption, when weighed against the public benefit of enforcing the local zoning law.

In recent years, commentators[254] and a few courts have been turning to the latter option, in favoring or adopting a balancing approach. Thus, in one leading Minnesota case the court held that a city was immune from a town zoning ordinance in replacing existing waste disposal facilities with a sanitary landfill, the court explaining that it was adopting "a balancing-of-public-interests test for the resolution of conflicts which arise between the exercise by governmental agencies of their police power and their right of eminent domain," in preference "to adherence to a less flexible 'general rule' based simply on the form of the opposing parties rather than the substance of their conflict."[255] In another leading case, though holding that that the State University at Rutgers could build student housing facilities without complying

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252. Johnston at 332, pointing out that the host government is contesting the specific exercise of the other unit's power, not its basic power to engage in the activity.

253. Id, noting: "This approach results in thwarting one police power for the sake of implementing another. In some disputes, the competing powers are indeed inherently incompatible. However, this is not true in all circumstances."

254. See 84 Harv L Rev at 883-86; Johnston at 338 et seq; 1973 U of Ill L Forum at 140-41; 31 U of Miami L Rev 195 et seq.

255. Town of Oronoco v City of Rochester, 293 Minn 468, 471, 197 NW2d 426, 429 (1972).

with township zoning restrictions, a New Jersey court observed that the "question of what governmental units or instrumentalities are immune from municipal land use regulations, and to what extent, is not one properly susceptible of absolute or ritualistic answer."[256] And in Lincoln City v Johnson, in deciding that a city could locate a sanitary landfill outside of its boundaries without complying with a county zoning ordinance, the trial court eschewed the traditional tests and instead applied the "better rule, the rule allowing for the greatest flexibility and fairness, . . . the newly emerging 'balancing of interests' rule."[257] In holding that a state agency was subject to a county zoning ordinance in seeking to locate a public parking lot and ancillary facilities for patrons of a state fishing and recreation facility on an adjacent river, the court in Brown v Kansas Forestry, Fish and Game Commission reviewed, then rejected, the traditional tests, and adopted the "balancing of interests test" as "better [promoting] the public interest."[258] For support, the Kansas court cited and summarized cases in Missouri, Virginia, Pennsylvania, New Jersey, Hawaii, Delaware, Florida and Minnesota in which that test was preferred over the traditional ones.

The balancing approach places on the developer government the burden of rebutting a presumption of nonimmunity.[259] The Lincoln City court spelled out the procedures to be followed and standards to be applied in using the technique:

> This rule requires that one governmental unit (intruding unit) be bound by the zoning regulations of another governmental unit (host unit) in the use of its extraterritorial property purchased or condemned, in the absence of specific legislative authority to the contrary. If the proposed use is nonconforming the intruding unit should apply to the host unit's zoning authority for a specific exception or for a change in zoning whichever is appropriate. The host zoning authority is then in a position to consider and weigh the applicant's need for the use in question and its effect upon the host unit's zoning plan, neighboring property, environmental impact, and the myriad other relevant factors to be considered for modern land use planning and control. If the intruding unit is dissatisfied with the decision of the host zoning authority it may seek appropriate judicial review, wherein

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256. Rutgers, The State University v Piluso, 60 NJ 142, 286 A2d 697, 701 (1972).

257. Lincoln City v Johnson, 257 NW2d 453, 457 (SD 1977).

258. Brown v Kansas Forestry, Fish and Game Commission, 2 Kan App2d 102, 576 P2d 230, 238 (1978).

259. 84 Harv L Rev at 884-85.

> the . . . court can balance the competing public and private interests essential to an equitable resolution of the conflict. In addition to the zoning factors considered by the host authority the trial court can consider the applicant's legislative grant of authority, the public need therefor, alternative locations in less restrictive zoning areas and alternative methods for providing the needed improvements. If, after weighing all pertinent factors the court finds the host government is acting unreasonably, the zoning ordinance should be held inapplicable to the proposed improvement.[260]

Another formulation of standards, that of the New Jersey court in Rutgers, The State University v Piluso, identifies as the "most obvious and common ones," the "nature and the scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests."[261] One writer emphasizes process in his formulation of criteria, in stating that the court should consider whether the zoning plan provides alternative sites; if so, whether the intruding government weighed the alternatives in selecting the location in dispute; whether there has been "any independent supervisory review of the proposed facility" by a higher governmental authority (such as a state planning commission); and whether the government developer "made reasonable attempts to minimize the detriment to the adjacent landowners' use and enjoyment of their property."[262]

The New York Court of Appeals has not yet abandoned the governmental-proprietary test in deciding whether a state or other governmental agency's own use of its land is subject to municipal zoning controls, but has recently indicated in another context that it might follow the lead of other state courts and switch to the balancing technique in passing on such zoning disputes.

A balancing approach seems to have been taken in the majority opinion in County of Nassau v South Farmingdale Water District, noted

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260. 257 NW2d at 457-58.

261. 60 NJ 142, 286 A2d 697, 702 (1972), criteria endorsed in 1973 U of Ill L Forum at 140, and applied by the court in Brown v Kansas Forestry, Fish and Game Commission, 2 Kan App2d 102, 576 P2d 230, 238 (1978). The Rutgers criteria were quoted and relied upon by a Florida court in holding that the determination whether a governmental agency (there referring to a nonprofit corporation operating a home for the mentally retarded) should be made by applying a balancing of interests test. City of Temple Terrace v Hillsborough Association for Retarded Citizens, Inc., 322 So2d 571, 574-75 (Fla 1975), aff'd, 332 So2d 610 (Fla 1976) (see supra note 235).

262. 84 Harv L Rev at 883-84.

earlier as a sign the courts of this state may be turning away from the governmental-proprietary test. In deciding whether the county in constructing sewers should pay the cost of removal of water mains and pipes of the town water district, which were located under a state road, the majority of the Appellate Division, Second Department, could find "no sound reason why the cost of removing these water mains and pipes . . . should not be paid for by the body which has created the conflict and necessitated the relocation"; thought it "inequitable" to make the relatively smaller group of water district taxpayers bear the cost of the larger number benefited by the county sewerage improvements; and believed it "not unreasonable to anticipate that by imposing this cost upon the county, it will be more circumspect in planning its facilities in a manner to minimize the cost and to avoid conflicts which resulted in this and similar litigation."[263]

However, the precise theoretical basis for the decision is far from clear. Although the opinion devoted several pages to a criticism of the governmental-proprietary test, at one point the court appeared to adopt it, in declaring that the water district was performing a governmental function.[264] Yet the court broke new ground in hinting at three criteria that might be applied in determining whether in a given case the activities of one political subdivision should be subject to regulation by another governmental unit. One is the fairness consideration underlying the above noted statement that it would be inequitable for the unit with fewer taxpayers to bear the costs. The others are a relative importance test and first user test suggested in the following statement in the majority opinion: "Indeed, it can be argued that governmental authorities considered the supplying of water to be of even greater importance than the construction of sewerage facilities, in view of the fact that the defendant municipal water district was created in 1931 to supply water as an alternative to wells and that the county has only recently assumed the responsibility of creating sewerage facilities in the very same areas, as an alternative to cesspools."[265]

The New York Court of Appeals may be more receptive to abandonment

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263. Id at 392-393, 405 NYS2d at 749.

264. Writing for the majority, Mr. Justice Suozzi said: "Ultimately, a governmental function can be defined as one which 'was historically engaged in by local government . . . is uniformly so furnished today . . . could not be performed as well by a private corporation . . . is within the imperative public duties imposed on a municipality as agent of the State' (Fahey v City of Jersey City, 52 NJ 103, 108-109, 244 A2d 97, 100)"; and, "[a]pplying these guidelines to the case at bar leads to the inevitable conclusion that the supplying of water by the municipal water district for consumption must be treated, in the context of this case, as a governmental, rather than a proprietary, function of a municipality." 62 AD2d at 390, 405 NYS2d at 747.

265. Id at 392, 405 NYS2d at 748-749.

of the mechanical governmental-proprietary distinction in deciding the issue of applicability of municipal zoning ordinances to land uses by private parties furthering state purposes, a subject we will reach shortly.

e. Arbitrariness of the Government Developer as a Basis for Decision

The court in the Kansas Forestry, Fish and Game Commission case suggested another type of inquiry possibly leading to a denial of immunity of the government developer from a municipal zoning ordinance. The Kansas court reasoned:

> The overall mission being carried out by the commission in this case is the furnishing of recreational facilities for all the people of the state, or at least those who desire to fish in the Big Blue River. This is a public purpose. . . . Obviously the commission must be, and is, vested with wide discretionary authority in locating its facilities for such a purpose. The county, on the other hand, has an obligation to make land use decisions within its jurisdiction which take into account both local concerns and the broader public good. It is apparent that either body may act in an arbitrary and unreasonable manner, favoring its own constituency at the expense of the other. The real questions are where the decision-making authority should be lodged, and if a claim of arbitrariness is to be made who should have the presumption of reasonableness and who the burden of proof.[266]

It seemed to the court that in the case before it, "on balance, the initial decision on reasonableness can be made more expeditiously and with greater discernment by the local zoning authority," indicating an obligation on the part of the state commission to seek a rezoning from the local authorities.[267] The court left open the question of who should bear the burden of proof on judicial review, saying:

> If rezoning is arbitrarily denied, that decision can be reviewed by the courts at the commission's behest through normal channels. If, on the other hand, we were to hold that the commission's status as superior sovereign immunizes it from the normal zoning processes as it urges, then the burden of going forward with a lawsuit would fall on either the county or the affected landowners. In such a suit they would be required to show arbitrariness on the

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266. 576 P2d at 238; see note 258 supra.

267. 576 P2d at 239.

part of the commission.[268]

This suggests that in any case in which another government is resisting application of a zoning ordinance, the zoning municipality may argue that the other government, in choosing the site in question, is acting beyond its authority, thus shifting the focus away from the reasonableness of the zoning body's action. That argument was probably made in a New York case holding that the Division of Youth of the New York State Executive Department did not have to comply with a city zoning ordinance in operating a youth rehabilitation center.[269] Although the court ruled that the Division of Youth was "entitled to an exemption from the zoning ordinance," based on sovereign immunity reasoning, the court went on to say:

> There is nothing before the court bearing on plaintiffs' claim that the State acted in an arbitrary and capricious manner in the purchase and use of the property and that due consideration was not given to the character of the neighborhood and that less objectionable methods of accomplishing the same results could have been found. No evidentiary facts were submitted from which a finding could be made directly or by inference that the defendants acted in bad faith or so capriciously and arbitrarily as to be unreasonable. The courts do not judge administrative discretion and "it is the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes, in the absence of a clear violation of some constitutional mandate." (Gaynor v Rockefeller, 15 NY2d 120, 130 . . .).[270]

6. Private Users of Government Owned Lands

The City of Rye, located in Westchester County on Long Island Sound, had prosecuted Erbsland and others (the defendants) for violating the city's zoning ordinance.[271] As part of their commercial boatyard operation, the defendants had installed floats about 54 feet offshore of

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268. Id.

269. Nowack v Department of Audit and Control of the State of New York, 72 Misc2d 518, 338 NYS2d 52 (Sup Ct, Monroe Co, 1978).

270. Id at 520, 338 NYS2d at 54.

271. Erbsland v Vecchiolla, 35 AD2d 564, 313 NYS2d 576 (2d Dep't 1970), aff'd after remand sub nom Erbsland v Rubin, 33 NY2d 787, 350 NYS2d 653, 305 NE2d 775 (1973). See text accompanying note 209 supra.

an existing bulkhead.[272] The floats were located within Milton Harbor, "an arm of Long Island Sound."[273] The site lay within the boundaries of the city, and within a residential zoning district. The floats were anchored to bottom lands owned by the state. The defendants had obtained a permit from the Corps of Engineers to install the floats. They had also applied to the New York State Commissioner of General Services for an easement upon subsurface lands for the purpose of constructing the proposed facilities, but they installed the floats before obtaining official action on the application.[274] In a separate proceeding brought to restrain the prosecution, the defendants took "the position that the lands under water are under the exclusive jurisdiction of the State of New York and the United States [and] that since [they intended] to procure a lease from the State of New York, title will be undisturbed and State sovereignty will continue."[275]

The lower court disagreed and upheld the zoning ordinance. The court acknowledged that state land is normally immune from municipal regulations, but reasoned that the immunity does not extend to "functions and activities which are proprietary in nature," purporting to draw support from the statement in the first edition of Professor Anderson's text on New York zoning law that

> where the land is within the municipality but owned by the state, it may be included in a zoning district, but the use restrictions will not be enforceable against the state. In the event such land is disposed of by the state and subjected to private reclamation and development, it would appear that the land would be subject to the restrictions imposed upon all land of the zoning district in which it is situated.[276]

Although the Appellate Division refused to dismiss the proceeding because the prosecution also alleged zoning violations relating to upland uses, it disagreed with the lower court ruling regarding the city's jurisdiction over the harbor area. The Appellate Division said:

> Navigable waters are within the sole jurisdiction and control of the State of New York, except to the extent of any delegation of power to the United States . . . , with

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272. Facts stated in the lower court opinion, 59 Misc2d 965, 966, 302 NYS2d 75, 76-77 (Sup Ct, Westchester Co, 1969).

273. Id at 965, 302 NYS2d at 76.

274. Id at 966, 302 NYS2d at 76.

275. Id.

276. Id at 967, 302 NYS2d at 77 (citing 1 R.M. Anderson, Zoning Law and Practice in New York State § 8.06 (1973) (similar to remarks in his second edition).

> the State of New York having title to the land thereunder (State Law, § 7-a). Further, the Commissioner of General Services is empowered to grant rights and easements to the State lands under navigable bodies of water (Public Lands Law, § 3) . . . . Accordingly, the paramount authority of the State to control uses upon a navigable body of water prevents the City of Rye from exercising jurisdiction. Any other result would have the effect of nullifying rights which the State has the authority to grant (Public Lands Law, § 3; cf Jewish Consumptives' Relief Soc. v Town of Woodbury, 230 App Div 228, aff'd 256 NY 619).[277]

The Appellate Division's reasoning is puzzling. First the court speaks of the state's "sole jurisdiction and control." Are "jurisdiction" and "control" synonymous? The citing of section 7-a of the State Law suggests that "jurisdiction" means "ownership," a term that is not always synonymous with "control." Section 7-a of the State Law is entitled "Jurisdiction and ownership of offshore waters and lands thereunder."[278] Subdivision 1 of section 7-a provides that the "jurisdiction of this state shall extend to and over, and be exercisable with respect to," specified waters, including the marginal sea extending three miles out from the state's coasts.[279] Subdivision 2 declares that the "ownership of the waters and subsurface lands enumerated or described in subdivision one of this section shall be in this state unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law."[280] The exclusion of lands held by another entity by virtue of an instrument of conveyance divides state and municipal jurisdiction in terms of ownership rights.

The Appellate Division's reference to section 3 of the Public Lands Law reinforces its reliance on state ownership rather than on the state's regulatory power.[281] Section 3, as it read at the time the case was decided, vested in the Office of General Services the "general care and superintendence of all state lands" not vested in some other state agency, and authorized him to grant short-term leases, or rights and

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277. 35 AD2d at 564, 313 NYS2d at 578 (emphasis added).

278. McKinney Supp 1983.

279. Id.

280. Id.

281. Public Lands Law § 3(1) (McKinney Supp 1983).

easements in and to state lands, including underwater lands.[282]

In granting short-term leases, easements or other rights to use underwater lands or waters the Commissioner of General Services could exact conditions limiting the uses to which the lessee or grantee might put the land. These restrictions would derive from the state's status as owner of the underlying title to the land, rather than from the state's inherent police powers. We have seen that police powers of the state relating to activities on or under navigable waters have been vested in the Commissioner or Department of Environmental Conservation under the Navigation Law and Environmental Conservation Law, not in the Commissioner of General Services.[283]

The question arises: if use limitations are not stipulated or implied in the lease or grant, would the mere fact that the private developer acquired his leasehold or other rights in the land from the state entitle him to invoke the state's immunity from local zoning? In a given case the answer might be found in (a) a legislative pronouncement on the issue, or (b) in an application of common law doctrine.

a. Legislative Treatment of the Problem

i. Short-Term Leases, and Rights and Easements, Granted by the Commissioner of General Services

Erbsland was asserting rights under an easement obtained from the state. In 1969, when the trial court rendered its decision in Erbsland, subdivision 2 of section 3 of the Public Lands Law authorized the Commissioner of General Services to lease for terms not exceeding one year state lands not appropriated to any immediate use, and to "grant rights and easements in perpetuity or otherwise in such lands, including lands under water," without requiring competitive bidding.[284] The subdivision said nothing about compliance with municipal zoning ordinances.

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282. Yet, along with section 3 of the Public Lands Law, the Appellate Division cited the Jewish Consumptives' Relief Society case, which did not involve land owned or controlled by the state, but decided an inconsistency issue, invalidating a town zoning ordinance banning sanitariums from the town, on the ground that the local ordinance was inconsistent with state laws licensing such facilities.

283. See part III supra.

284. See the version of Public Lands Law § 3(2) in 1962 NY Laws ch 643. In 1970, the subdivision was amended to authorize the granting of rights and easements in "all state lands," whether or not appropriated to an immediate use. 1970 NY Laws ch 379; and see Memorandum of the Executive Department on the 1970 amendment, noting requests by utilities and others for easements across appropriated state lands. 2 McKinney's Session Laws of New York 1970, at 2924-25. The Appellate Division and Court of Appeals decisions in Erbsland were rendered subsequent to the effective date of the 1970 amendment.

In 1981, subdivision 2 of section 3 of the Public Lands Law was amended to extend the maximum term of leases on unappropriated state lands from one to five years, and add the following stipulation protecting local government interests: "The use to which such leased property shall be put shall be consistent with local land use regulations."[285] The amendment did not impose a similar condition on the granting of other rights or easements under that subdivision.

ii. Long-Term Leasing by the Commissioner of General Services

Subdivision 4-a of section 3 of the Public Lands Law, added in 1971, authorized the Commissioner of General Services to lease for up to 99 years to any responsible person or corporation upon sealed bids, "for a term not to exceed ninety-nine years, . . . interests in real property including but not limited to air rights, subterranean rights and others, when such are not needed for present public use.[286] The statute adding section 3(4-a) to the Public Lands Law also effected companion amendments to the Highway Law[287] and Real Property Tax Law, the latter providing that interests granted under subdivision 4-a would be subject to local real property taxes.[288] The enactment included a declaration of legislative purpose, stating that in constructing roads and other improvements the state has removed valuable lands from municipal tax rolls; the "proper development of air rights as well as development under the subsurface area and adjacent, unused surface properties would provide sources of exceptional revenue to the municipalities to serve as a substitute for the loss of taxes for the realty involved"; and the development of air rights is "a necessity for future planning in our large metropolitan areas and in our smaller communities so that commercial buildings, multiple dwellings, commercial parking areas, recreation areas and unlimited diversified uses can be

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285. 1981 NY Laws ch 424. The memorandum of the Office of General Services on the amendment explained that "substantial increase of profitability as well as service to the public will be enabled by extending the authorized lease term to five years"; and said that the new condition regarding municipal jurisdiction "would restrict the State's intrusion upon localities by requiring that such leases must be consistent with land land use regulations." 2 McKinney's New York Session Laws 1981, at 2450-51.

286. 1971 NY Laws ch 1016.

287. 1971 NY Laws ch 1016, § 3. The addition of the companion subdivision 18 to section 10 of the Highway Law applied to "property rights in air space, unused surface or subsurface space" in state-owned land under the jurisdiction of the Commissioner of Transportation. In commenting on the legislation the Attorney General noted discrepancies in the use of the term "subterranean" rather than "subsurface," and the absence of any reference to "surface" space in section 4-a of the Public Lands Law. Memorandum of June 22, 1971, in Governor's Bill Jacket on 1971 NY Laws ch 1016.

288. Real Property Tax Law § 546(1) (McKinney Supp 1983).

created which would provide tax revenue to the municipality.[289]

This declaration, and comments made at the time the bill adding subdivision 4-a was before the Governor, suggest that the primary if not the exclusive object was to allow new commercial development, with high tax potential, using air rights and subsurface rights over, under or adjacent to highways.[290] Underwater lands were not mentioned by those who wrote on the 1971 legislation. If they were included, it is not likely that they would be suitable for aquaculture.

In any case, we mention subdivision 4-a of section 3 of the Public Lands Law in the instant context because it declared that "the development of any leasehold granted pursuant to this subdivision shall be subject to the zoning regulations and ordinances of the municipality in which said property is located."[291]

iii. Conveyances by the State to Municipalities of Air Space, Subsurface Rights and Areas; Leasing by the Municipalities

In 1980 the legislature added section 34-b to the Public Lands Law empowering the Commissioner of General Services to convey the "right, title and interest of the state . . . in and to the air space and air and subsurface rights, easements therein and lands adjacent thereto," to municipal corporations to allow them to obtain revenues from leasing such interests.[292]

If the clause "but not limited to air rights, subterranean rights and others" in section 3(4-a) of the Public Lands Law were construed to allow the state itself to lease interests other than air rights and subterranean rights, including interests in underwater lands, it may be significant that the "but not limited to" clause is omitted from the companion provisions of section 34-b authorizing municipal leasing of

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289. See note to section 3 of the Public Lands Law in McKinney Supp 1983.

290. See memoranda of the State Division of the Budget, Department of Transportation, and Attorney General in Governor's Bill Jacket on 1971 NY Laws ch 1016. The Attorney General noted that the only areas mentioned in the heading of the 1971 bill were "air space, subsurface areas and lands adjacent thereto."

291. McKinney Supp 1983.

292. 1980 NY Laws ch 829. See McKinney Supp 1983, at 28, for legislative findings regarding the revenue production objective, similar to those accompanying the 1971 amendment adding subdivision 4-a to section 3 of the Public Lands Law.

air and subsurface space and lands adjacent thereto.[293]

Whether or not as a practical matter section 34-b of the Public Lands Law has any implications for leasing of underwater or shorefront lands for aquaculture, it is pertinent to observe in the present context that it contained the requirement, similar to that adopted in the later amendment to section 3(4-a) of the Public Lands Law, that the "development of any property interest by the lessee or developer of said air space and air and subsurface rights and adjacent areas from the municipality shall be subject to the zoning regulations, ordinances and planning requirements of the municipality in which said property is located." It will be noted that the words "and planning requirements" were not included in the section 3(4-a) version; and that whereas these clauses in both section 3(4-a) and section 34-b of the Public Lands Law referred to "zoning" regulations, section 3(2) of that law required the leases to be consistent with "land use regulations."[294] The differences in these references to reserved local powers could be significant in given situations. Thus, "planning requirements" might be construed as embracing provisions of a municipal master plan not incorporated in a zoning ordinance; and "land use controls" might be interpreted to include subdivision controls, which may be more restrictive than, or in any case different from, zoning restrictions.

iv. Grants by the Commissioner of General Services of Underwater Lands to Adjacent Upland Owners

Prior to September 1983, subdivision 7 of section 75 of the Public Lands provided that the Commissioner of General Services "may grant in perpetuity or otherwise, to the owners of the land adjacent to the land under water specified in this section, to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners, or for public park, beach, street, highway, parkway, playground, recreation or conservation purposes, so much of said land under water as he deems necessary for that purpose."[295] A 1983 amendment expanded the commissioner's authority to include a "lease for terms of up to twenty-five years," in addition to making a "grant" of underwater land, to

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293. The Office of General Services remarked that it was "unnecessary" to add subdivision 4-a to section 3 of the Public Lands Law, because the Commissioner of General Services already had the power to "grant rights and easements in perpetuity or otherwise in and to all State lands" under subdivision 2 of the same section. Memorandum of June 18, 1971, in Governor's Bill Jacket on 1971 NY Laws ch 1016. The writer overlooked the fact that a lease under subdivision 2 could be negotiated but would be limited to five years, while a lease under subdivision 4-a required bidding but could be for a term of from five to 99 years.

294. See text accompanying note 285 supra.

295. McKinney Supp 1983.

adjacent owners.[296] The statute prohibits the making of any such grant or lease "to any person other than the proprietor of the adjacent land.[297]

The permissible purposes of a grant or lease under this subdivision would, arguably, include aquaculture operations. They would "promote the commerce of this state," and should be within the scope of a grant or lease for the purposes of "beneficial enjoyment," which is "[t]he enjoyment which a man has of an estate in his own right and for his own benefit, and not as trustee for another."[298]

Section 75(7) does not contain a provision subjecting the grantees or lessees to zoning or other local land use controls. The legislature did not amend this section to include such a provision, when it incorporated the requirement in its 1971 enactment of section 3(4-a), or 1980 enactment of section 34-b, or 1981 amendment to section 3(2) of the Public Lands Law, or when it amended the provision itself in 1983. The legislature "will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation."[299] The legislature did, however, express a concern for local prerogatives in one part of subdivision 7. Where the boundary line of the underwater land and adjacent land lies within a public road or street, and the commissioner is unable to locate the owners of the adjacent land, the commissioner may make such grants or leases to "owners of the land adjoining the road or street inshore of such land under water" (subject to riparian rights of others). However, any such grant or lease is subject to the consent of any county, city, town or village that may hold title to the road or street; provided, however that the consent is not necessary if the local government, upon receiving notice of the proposed action, "fails to file a remonstrance with the commissioner or, having filed such remonstrance, fails to present to the commissioner sufficient proof or other reasons satisfactory to the commissioner why the grant[300] should not be made."

One might argue, from a comparison with the treatment of the problem in other statutes and the express deference to local authority

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296. 1983 NY Laws ch 628, effective on the 60th day after the approval date of July 24, 1983.

297. Id.

298. Black's Law Dictionary 142 (5th ed 1979).

299. McKinney Statutes (Book 1) § 191 (1971). "The Legislature will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation."

300. The draftsmen of the 1983 amendment neglected to add "or lease" at that point.

in some situations under the subdivision itself, that subdivision 7 of section 75 should be construed as exempting the grantee or lessee from zoning ordinances.

In respect of an outright "grant" to the upland owner, subservience to municipal zoning regulations could be asserted on the basis of the fact that the transaction severs the state's ownership interest in the land, thus removing it from the reach of the state's sovereignty, except to the extent the state retains a trustee's interest in protecting public user rights in the navigable waters. It would be reasoned that it would be anomalous to subject a shorefront owner to zoning restrictions on that part of his land lying just above high water mark, while leaving him free to ignore such restrictions on the part of his land lying just below high water mark (the part acquired from the state as underwater land).[301] The force of that logic would be weakened if the underwater land in question were leased from the state by the adjacent owner. That situation is in the same category as others in which lessees of state lands have claimed, and in some cases have obtained, zoning immunity on the basis of the state's continuing interest in the land and in its use -- a subject to be discussed below.

v. Leasing by the Department of Environmental Conservation and Suffolk County for Shellfish Cultivation

Section 13-0301(1) of the Environmental Conservation Law empowers the Department of Environmental Conservation to "lease state owned lands under water for the cultivation of shellfish," with the exception of lands lying within specified distances from shores, or containing natural shellfish beds.[302] The statute expressly prohibits the Commissioner of General services from granting lands for shellfish cultivation. It is silent on the question whether the use of the leased land is subject to municipal zoning regulations. The issue has not arisen. The department has not granted any leases under the statute.

Under a 1969 special law and earlier special laws the state ceded to Suffolk county lands under the waters of Gardiner's and the Peconic bays and authorized the county to lease such lands (except for specified areas) for shellfish cultivation.[303] The 1969 Act expressly provided that "nothing in [the] act shall interfere with the right of the commissioner of general services to grant lands and easements under water to owners of adjacent uplands, pursuant to the provisions of the public lands law," or of the state legislature to make such grants regardless of upland ownership, or to grant franchises for specified

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301. Compare the facts in Erbsland, text accompanying note 271 supra.

302. McKinney 1973. For an analysis of these provisions and those of the special laws ceding under water lands to Suffolk county for leasing for shellfish cultivation, see Access to Aquaculture Report.

303. 1969 NY Laws ch 990, and 1884 NY Laws ch 385, as amended.

purposes. These acts set out detailed conditions governing the leasing, yet make no reference to zoning or other land use controls.

Although the objective of the delegation of leasing power to the Department of Environmental Conservation was not mentioned in the enabling statute, we may reasonably surmise that it was similar to the objective stated in the legislative declaration and findings expressed in the 1969 Suffolk county leasing act -- that shellfish "constitute an important asset to the economy of the area," and "[i]t is in the best interest of the people of the state generally and those of the area in question particularly that the lands under said waters should be surveyed and managed to promote the cultivation of shellfish," and it is the "intent of this act to a accomplish that purpose."[304] The possible significance of these declarations in the application of common law concepts of zoning immunity of lands serving public interests will be noted below.

In sum, the legislative scheme (a) expressly recognizes municipal land use power over unappropriated or state underwater lands leased by the Commissioner of General Services on a negotiated basis for terms not exceeding five years (under section 3[2] of the Public Lands Law); but (b) does not expressly recognize municipal land use power over (i) certain unneeded state lands leased on a competitive bid basis for terms of from six to 100 years (under sections 3[4-a] or 34-b of the Public Lands Law), or (ii) state lands in which persons hold rights or easements, other than leasehold rights, granted by the commissioner (under section 3[2] of the Public Lands Law), or (iii) lands granted or leased for up to 25 years by the commissioner to riparian or littoral owners (under section 75[7] of the Public Lands Law). Nor does the legislative scheme refer to local land use control powers in authorizing the Department of Environmental Conservation or Suffolk county to grant leases for shellfish cultivation.

Absent legislative direction, would land or interests in land leased or granted by the state or Suffolk county for aquaculture purposes nevertheless be subject to municipal zoning?

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304. Id § 1.

b. Judicial Rules of Statutory Construction; Inconsistency; Preemption

Professor Anderson, in his national treatise on zoning, says that the "immunity of the state from local zoning regulations does not extend to a lessee of state lands who is using such lands for a private purpose."[305] This imports a private-public purpose distinction, indicating that if the lessee's activity provides some public benefit desired by the state, it would be entitled to the state's immunity from local zoning. In the case cited by Professor Anderson, Youngstown Cartage Co. v North Point Peninsula Community Coordination Council, the state acquired land for future highway construction, but having no immediate use for it leased it to the Cartage Company.[306] The Maryland court did not concede that the providing of a public benefit would necessarily immunize the lessee from zoning restrictions. The court said that the "public benefit test" would not be applicable to the case before it.[307] Rather, the court adopted a public use criterion, and held that the Cartage Company was subject to county zoning regulations because the public did not have a right to use the leased premises.[308]

The basic test adopted by the New York courts is broader than the Maryland "public use" standard.

In Little Joseph Realty, Inc. v Town of Babylon, the New York Court of Appeals resorted to "governmental-proprietary" rhetoric in deciding whether a lessee from a town could ignore the town's own zoning ordinance,[309] but in fact rested its decision on another criterion. Following the unsuccessful effort of a private landowner to obtain a rezoning of its land to permit the construction of an asphalt plant, the town acquired the land, then leased most of it to one Posillico, who planned to build an asphalt plant on it. The court recited "the general rule" it had enunciated earlier, that a "local government may carry out its governmental operations without regard to zoning restrictions, but it is subject to the same restrictions that are imposed on a

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305. 2 R.M. Anderson, American Law of Zoning § 12.06 (2d ed 1976). And see supra note 276.

306. 24 Md App 624, 332 A2d 718 (1975).

307. 332 A2d at 721.

308. 332 A2d at 720.

309. 41 NY2d 738, 395 NYS2d 428, 363 NE2d 1163 (1977).

nongovernmental landowner when it acts in a proprietary capacity."[310] However, the court stopped short of determining whether, if asphalt manufacturing were undertaken by or on behalf of the town, it would be engaging in a proprietary function. The court said that "even the manufacture of asphalt, as for public road building, may very well be" a governmental function," but

> in the case now before us, the plant did not manufacture asphalt for use by, or for sale to, the town or its constituent agencies. It was operated solely by and for the commercial benefit of Posillico as a private entrepreneur. The lease, therefore, could not serve to clothe Posillico with immunity from the zoning laws[311]

In the lease cases, then, the Court of Appeals is acknowledging, though it may not admit it, that in lieu of the governmental-proprietary inquiry, the decisive issue is whether the lessee is acting as surrogate in discharging a governmental function of the government lessor. Of course, the two issues would merge if it were determined that the delegated function of the state or municipal landlord were proprietary, rather than governmental.

The lower New York courts appear to be satisfied to confer the government's immunity on the lessee if the lessee is assisting in performing a function of the government lessor for the benefit of the public. Thus they adopt a "public purpose" criterion, though in doing so some of the courts still invoke "governmental-proprietary" terminology. The two concepts may not be synonymous. The lessee may be engaged in an activity normally deemed to be proprietary in nature, typically operating a business, yet one that serves the public objectives of the government lessor -- a public purpose. The point is illustrated in People v Rodriguez, declaring that New York City's fire prevention regulations were not applicable to the owner of an airport hotel leased from the Port Authority; the court reasoning that "the key question is whether the lessee is performing functions in behalf of the Port Authority and implementing the purposes for which the Port Authority was created," and answering it in the affirmative based on the finding that the "hotel has the very purpose referred to in the statutes [from which the Port Authority derived its powers] and is needed to implement the stated functions of the Port Authority" of operating an

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310. Id at 742, 359 NYS2d at 431, 363 NE2d at 1166, citing Nehrbas v Incorporated Village of Lloyd Harbor, 2 NY2d 190, 159 NYS2d 145, 140 NE2d 241 (1957). Later we will examine separately the question whether a municipality may ignore its own zoning ordinance, and indicate that the analysis may or perhaps should differ from that used in deciding intermunicipal zoning conflicts.

311. Id.

airport.[312]

The facts in Conners v New York State Association of Retarded Children, Inc. were more calculated to lead to judicial confusion of the public purpose test with the governmental/proprietary test.[313] The state leased to the Association, a nonprofit organization, premises located in a residential district in the City of Troy, and used them for a hostel for the mentally retarded. The plaintiff sought to enjoin the use on the ground that the city's zoning ordinance did not permit it in a residential district. The governing statute empowered the Commissioner of Mental Hygiene "to operate or cause to be operated community residential facilities as hostels for the mentally disabled."[314] Having stated that the "issue raises the ancient dichotomy of distinguishing between governmental and proprietary functions of State and local governments," the court easily concluded that the leasing of the premises by the state "was in furtherance of a legitimate State purpose and the operation of the subject premises is governmental in nature and thereby exempt from the provisions of the zoning ordinance of the City of Troy"; and the "governmental nature of the subject premises is not altered or changed or made proprietary merely because the residents pay for services."[315] The court could have stopped after the word "purpose."[316]

To state that the central inquiry is whether the lessee is performing a function of and for the governmental lessor is to invite the inquiry: assuming the lessee is in fact performing such a function, does it make a difference whether the function is the primary one of the lessor, or merely incidental to its main objective? The issue was raised in People v Witherspoon, where the Long Island Rail Road operated by the Metropolitan Commuter Transportation Authority, a state public authority, leased land on its right of way to Transportation Displays,

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312. 115 Misc2d 866, 454 NYS2d 796, 798 (Crim Ct of City of NY, Queens Co, 1982).

313. 82 Misc2d 861, 370 NYS2d 474 (Sup Ct, Rensselaer Co, 1975).

314. Id at 863, 370 NYS2d at 476, citing Mental Hygiene Law § 11.33, now found in § 41.33 (McKinney 1978).

315. Id. The court did not regard this reasoning as dispositive of the case. See text accompanying note 325 infra. The court denied a preliminary injunction, but without prejudice to the bringing of a special proceeding, under article 78 of the Civil Practice Law and Rules, to review "the considerations employed by the defendants in the purchase and dedication of the premises" at the site. 82 Misc2d at 865, 370 NYS2d at 478.

316. Equally gratuitous was the court's resort to the mandatory-permissive distinction, in saying that a "use is governmental if it is created pursuant to a duty imposed upon the sovereign to provide for the well-being and health of a community," and it "is nonarguable that the State . . . has a duty to provide for the unfortunate among us." 82 Misc2d at 864, 370 NYS2d at 477.

Inc., which in turn leased part it to Witherspoon as a site for outdoor advertising signs.[317] The court held that Witherspoon was subject to sign restrictions in the Town of Babylon zoning ordinance. Although the Public Authorities Law permits the Metropolitan Commuter Transportation Authority to "do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority," the "prime purpose for the legislation was the guarantee of the continued operation of the railroad; the right to manage, direct and control the real property is incidental thereto";[318] and the use of the premises in question "for the erection and maintenance of commercial advertising signs" was merely incidental to the goal in chief -- the continued operation of the formerly tottering railroads."[319] The court unnecessarily (in our view) strained to fit this test into the traditional governmental-proprietary inquiry, in reasoning that the Authority's management activities are "governmental" to the extent they were directed to the actual operation of the railroad, but where only incidental to the operation, the function is "proprietary."[320]

In Foster v Saylor, the Appellate Division, Fourth Department, held that the lease of an unneeded school for private industrial and office use " is subject to local zoning regulations."[321] For its authority the

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317. 52 Misc2d 320, 275 NYS2d 592 (Dist Ct, Suffolk Co, 1966).

318. Id at 322, 275 NYS2d at 596, citing section 1266(8) of the Public Authorities Law (emphasis that of the court).

319. 323, 275 NYS2d at 596 (emphasis that of the court).

320. Id at 322-33, 275 NYS2d at 596.

321. 85 AD2d 876, 877, 447 NYS2d 75, 77 (4th Dep't 1981). Earlier in the same year a trial court in the same Judicial Department reached a contrary conclusion, in holding that the lessee of an abandoned school was immune from village zoning regulations, basing the decision largely on the provisions of section 403-a of the Education Law authorizing such leasing, though the statute said nothing about the zoning status of the lessees' uses. Village of Camillus v West Side Gymnastics School, Inc., 109 Misc2d 609, 440 NYS2d 822 (Sup Ct, Onondaga Co, 1981). In addition to relying on that statute, the Camillus court reasoned that the production of revenues from such leasing was a governmental purpose. Presumably, if appealed, the Camillus decision would be overruled, having been rendered in the judicial department in which Foster was litigated. However, an observation of the Camillus court may be instructive. The court noted that the State Education Department, in recommending the legislation authorizing such leasing, construed the provisions in the state requiring the selection of lessees offering the "most benefit" to the district as meaning "monetary benefit." Id at 613, 440 NYS2d at 825.

court merely cited the Little Joseph and Nehrbas cases,[322] without further explanation.

In 1979 the State Comptroller had provided a more enlightening explanation in rendering the opinion

> "that the leasing of unneeded school district real property, in and of itself, cannot be characterized as either a governmental or a proprietary activity. Rather, we believe it is necessary to examine the purpose of the lease in order to determine whether a governmental or proprietary activity is involved (see Little Joseph Realty, Inc. v Babylon, 41 NY2d 738 [1977]).
>
> For example, where a municipality or school district leases its property in furtherance of a municipal or school district purpose, a governmental activity would be involved, just as if the activity were being directly carried out by the municipality or school district, and the property would remain exempt from local building codes and zoning ordinances. However, the leasing of presently unneeded municipal or school district property solely as a revenue producing measure is a proprietary activity, and the property so leased would not be exempt from local building codes and zoning ordinances, unless of course the activity to be conducted by the lessee was of an independent governmental nature.[323]

In effect, the State Comptroller is asking two questions: (1) Focusing on the activity of the lessee, he asks: is the lessee acting for the school district in the performance of a school district function? (2) Shifting the focus to the act of the school district in leasing, that is, looking at leasing as a school district function, he asks: if the purpose of the leasing function is revenue production, should it be characterized as "proprietary," so as to subject the use of the property to zoning regulations? In the school leasing context he would not credit revenue production as a basis for clothing the lessee with zoning immunity.[324]

There is a suggestion in Conners v New York State Association of

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322. Supra notes 309 (Little Joseph) and 241 (Nehrbas). For further analysis of Foster v Saylor, see text accompanying notes 364-66 infra.

323. Opinion of the State Comptroller No. 79-481 (1979). And see 1979 Op Atty Gen (Inf) 234, rendered about three weeks later, reaching the same conclusion and repeating the words in the above quoted opinion of the State Comptroller.

324. Cf People v New York Racing Association, 116 Misc2d 587, 457 NYS2d 668 (Sup Ct, App Tm, 2d Dep't, 1982), noted below (see text accompanying note 349 infra).

Retarded Children, Inc., mentioned above in the discussion of the governmental-proprietary dichotomy, of a shift to a balance of interests test. The Conners court stated that merely declaring a function to be "governmental" may not be determinative:

> It does not follow . . . that because a use is governmental in nature and thereby less restricted than a proprietary use, that the sovereign can arbitrarily select a site in any community for the operation of the facility in furtherance of the governmental purpose. . . . The sovereign must act reasonably and rationally under the circumstances so that the governmental purpose may be achieved with the least amount of invasion or diminution of private rights. The State, in co-operation with the local community, is not absolutely free to locate any governmental use in any location without a showing that less objectionable means are not available. Herein . . . the record is barren of any evidentiary proof that the subject use could not be carried out in any other location in the City of Troy. There is nothing before this court that would aid it in determining whether the defendants acted arbitrarily or capriciously in the purchase and use of the property and that due consideration was not given to the character of the neighborhood and that less objectionable methods of accomplishing the same result could have been found.[325]

It is not clear whether the Conners court (1) was applying something like a balancing of interests test in measuring the general obligation of state agency officials to avoid acting capriciously in selecting sites -- a standard state administrative law issue; or (2) was focusing instead on the rationality of the initial zoning decision of the local authorities barring the state agency's use from the zoning district in question — a typical zoning law issue. The distinction can make a difference in the assignment of burdens and presumptions of proof. If a state official can reasonably choose between sites A and B, neither being a permitted use in its zoning district, his choice of either would withstand a claim of arbitrary action. However, if he chooses site A and an application of the balancing of interests test aimed at determining the optimum zoning result demonstrates a preference for site B, the state agency would lose. The court appears to have taken the first route, an attack on the exercise of discretion by the state officials, placing the burden on the challenger to prove arbitrariness.

This analysis is further supported by the Conner court's borrowing from the opinion in Nowack v Department of Audit and Control of the

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325. 82 Misc2d at 864, 370 NYS2d at 477. See supra notes 313-16 and accompanying text.

State of New York,[326] in describing the inquiry as a search for arbitrary or capricious administrative action, and referring to a lack of evidence regarding the considerations that went into the state officer's choice of the site. In addition, the Conners court, in reserving the complainant's right to review the exercise of the state agency's action in choosing the site, mentioned the form of special proceeding provided by law for judicial review of administrative action.[327]

In concluding that the question of rationality of the state official's action remained, the Conners court cited as authority the New York Court of Appeals opinion in People v Renaissance Project, Inc.[328] The facts in Rennaisance belong in the next category to be discussed below, cases in which the questioned land use is that of a private party on its own land, not on land leased from the state or a municipality.

The application of these judicial tests to municipal attempts to regulate operations under shellfish cultivation leases granted by the Department of Environmental Conservation or Suffolk County should not be difficult.

The Department of Environmental Conservation "may lease state owned underwater lands for the cultivation of shellfish, except such lands within five hundred feet of high water mark."[329] The fact that the state's underwater lands may be within the political jurisdiction of a municipal government does not bar the leasing. The Attorney General so indicated in an opinion rendered in 1900 confirming the power of the Forest, Fish and Game Commissioners to lease for shellfish cultivation, under a predecessor statute, underwater lands within territory previously annexed to the City of New York.[330] Whether its reasoning were based on the fact of state ownership of the leased lands or on the implied expression in the statute of a state policy of encouraging shellfish cultivation, a court would probably invalidate municipal zoning provisions restricting or barring such leasing. The court would, accordingly, hold that the local measure is inconsistent with section 13-0301 either because the zoning was in direct conflict with the state law or because the state had preempted the field.

In 1884 the state legislature "ceded" to Suffolk county "[a]ll the

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326. 72 Misc2d 518, 338 NYS2d 52 (Sup Ct, Monroe Co, 1973); see text accompanying notes 269-70 supra.

327. Conners, 82 Misc2d at 865, 370 NYS2d at 478. See supra note 315.

328. 36 NY2d 65, 364 NYS2d 885, 324 NE2d 355 (1975).

329. Environmental Conservation Law § 13-0301(1) (McKinney 1973; and see text accompanying note 303 supra.

330. 1900 Op Atty Gen 195.

right, title and interest which the people of the state of New York have in and to the lands under water of Gardiner's and Peconic bays in the county of Suffolk . . . for the purposes of oyster culture, to be managed and controlled by the board of supervisors" of the county.[331] Commissioners of shell fisheries appointed by the county board of supervisors were authorized to "sell and convey" parcels of underwater lands in these bays for the purposes of oyster culture.[332]

In 1969 the legislature authorized the county to "lease lands under water ceded to it by the state for the purpose of shellfish cultivation, except such lands as are within one thousand feet of the high water mark or where bay scallops are produced regularly and harvested on a commercial basis," and excepting lands previously granted under the 1884 Act which had not reverted or escheated to the state.[333]

The 1969 Act did not state, as had the 1884 Act, that the ceded lands are "to be managed and controlled by the board of supervisors" of the county. However, the later Act did grant to the county authority to enact a local law, prior to leasing the lands, regulating specified aspects of the leasing, and "such other matters as are appropriate, including the use of lands not leased."[334]

A 1906 amendment to the 1884 Act added a section instructing the supervisors of Suffolk county "to divide the said land among the towns of Southold, Riverhead, Southampton, East Hampton and Shelter Island for the purposes of jurisdiction and taxation only," but in no way affecting "the title to the lands under water in said bays."[335] In addition, the supervisors were required to establish the boundary lines of the towns, and the school commissioner for the affected district was required to

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331. 1884 NY Laws ch 385, § 1.

332. Id § 3, as subsequently amended and incorporated in section 6 (see 1923 NY Laws ch 192).

333. 1969 NY Laws ch 990, §§ 2, 4.

334. Id § 5. However, notwithstanding this grant of regulatory authority to the county, the statute reserved to the state Department of Conservation powers to "(a) regulate and control the use of certain types of vessels and equipment for harvesting shellfish, requirements for re-seeding, and the right to enter upon such leased lands for re-seeding or making shellfish population surveys, and (b) enforce all laws relating to such lands under water which have been or shall be designated, surveyed and mapped out pursuant to law as [natural] oyster beds or shellfish grounds."

335. 1906 NY Laws ch 640, adding section 10 to 1884 NY Laws ch 385.

delineate appropriate boundaries for school tax purposes.[336]

If the grant of town "jurisdiction" over the bays were construed as embracing police power jurisdiction, it would have to be reconciled with the provisions of the same laws granting general powers of "management," "control," and regulation to the county. A court would probably construe the two types of provisions in such a way as to harmonize and give effect to both.[337] This would be done by construing these laws as either (a) denying the exercise of town police powers relating to any aspect of the use of the waters and underwater lands of the bays; or (b) confining the exercise of such power to regulations that did not interfere with the county's leasing of the underwater lands for the purpose of shellfish culture. In either case, the towns could not impose zoning restrictions interfering with the use by county lessees of the underwater lands and waters of the bays for planting and harvesting shellfish.

The declaration of legislative intent in the 1969 Act supports the position denying municipal zoning power to interfere with the county's leasing, in stating: "It is in the best interest of the people of the state generally and those of the area in question particularly that the lands under said waters should be surveyed and managed to promote the cultivation of shellfish. It is the intent of this act to accomplish that result."[338] A court would not likely construe the provisions in question to permit frustration of that intent by town zoning authorities.

In any event, provisions for the referral to Suffolk county of certain municipal zoning actions would give the county some leverage to

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336. Id, providing: "[I]t shall be the duty of the school commissioner for the district, including the said towns, to set off for the purpose of taxation for school purposes, so much of the land under water within said boundary lines of the several towns adjoining the said bays as shall be contiguous to the school districts now existing in said towns." The authority to levy town and school taxes on grantees was derived or confirmed by the declaration in section 6 of the 1906 amended version of the statute that the "lands so granted or assigned and all rights therein are hereclared to be real property, for the purposes of taxation and for all other purposes." The legislature, in enacting the 1969 law seems to have assumed that in view of the shift in that law from the making of grants to the making of leases for shellfish cultivation, town and school taxes could no longer be levied on the leased lands for the owner, the county, would normally be tax exempt. In section 8 of the 1969 Act, headed "Disposition of fees and rents; payments in lieu of taxes," the legislature required the county treasurer to apportion among and pay to the towns 75% of the rents received by the county from the leasing.

337. McKinney, Statutes (Book 1) § 98 at 223 (1971): "Generally, it is the duty of courts to harmonize conflicting provisions of a statute, or to reconcile apparent contradictions, so as to give effect to each and every part of the statute . . . ."

338. 1969 NY Laws ch 990, § 1.

resist town interference with its shellfish leasing program. Section 1323 of the Suffolk County Charter requires the referral to the county's planning commission of municipal zoning actions applying to real property within 500 feet of "any bay in Suffolk County."[339] If the planning commission disapproves the municipal zoning action, it may take effect "only upon the vote of a majority plus one of all the members of the referring body in a resolution that sets forth its reason for rejecting the planning commission's report."[340] The laws ceding the underwater lands of Gardiner's and the Peconic bays to Suffolk county do not permit the grant of shellfish leases on lands within 1,000 feet of high water mark. The charter provisions requiring a referral of municipal zoning actions touching real property within 500 feet of the bays would be pertinent in the instant context only if such provisions were construed as embracing the entire area of such bays.

In addition, the Suffolk County Charter gives the county planning commission a veto power, if exercised by a two-thirds vote of the commission after a public hearing, over municipal zoning actions relating to land within 500 feet of a town or village boundary.[341] This could conceivably allow the county to block town zoning restrictions on the leasing of underwater lands within that distance of a town boundary located within one of the bays demarcated for town jurisdiction or tax purposes.

7. Private Users of Privately Owned Land; the State Agency Theory

We are informed by logic that in applying the doctrine immunizing public land uses from zoning regulations, it is not easy to distinguish between (a) the performance of a state function by a public agency on its own land or by a private organization on land leased from the state, and (b) the same state function performed by a private organization on privately owned real property. Yet the New York authorities do make the distinction in some situations. They hold that although the siting of buildings of a school district is not subject to zoning restrictions,[342] and based on the position taken by the Court of Appeals in the Little

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339. Suffolk County Charter § 1323(a)(6) (1975), as added by Local Law No. 28-1972.

340. Id § 1325(c).

341. Id § 1330.

342. Union Free School District No. 14 of the Town of Hempstead v Village of Hewlett Bay Park, 198 Misc 932, 102 NYS2d 81 (Sup Ct, Nassau Co, 1950), aff'd, 279 App Div 618, 107 NYS2d 858 (2d Dep't 1951), app denied, 279 App Div 746, 109 NYS2d 175 (1951); Durand v Board of Cooperative Educational Services, 70 Misc2d 429, 334 NYS2d 670 (Sup Ct, Westchester Co, 1972), aff'd, 41 AD2d 803, 341 NYS2d 884 (2d Dep't 1973); and see Annotation, Zoning Regulations as Applied to Public Elementary and High Schools, 74 ALR3d 136 (1976).

Joseph case the State Comptroller would accord a private school on school district land a similar privilege,[343] the New York courts hold that "municipalities may place reasonable zoning restrictions upon [educational] uses carried on by private educational institutions."[344]

As a practical matter, the distinction based on the factor of land ownership has not been significant in a line of New York cases questioning the applicability of zoning ordinances to residential care facilities of private organizations located on their own property. In a series of cases culminating in Group House of Port Washington, Inc. v Board of Zoning Appeals of the Town of North Hempstead,[345] the New York courts held that group homes licensed under the Social Services Law or Mental Hygiene Law could not be barred from residential districts on the basis of restrictions on "family" size or composition if they were "the functional and factual equivalent of a natural family."[346] It was in this context that Judge Jones of the Court of Appeals introduced the balancing of interests concept referred to in Conners v New York State Association of Retarded Children, Inc., discussed above.[347]

In People v Renaissance Project, Inc.,[348] a certified agency subject to the jurisdiction of the New York State Drug Abuse Control Commission was convicted of the offense of occupying a building in a single-family district of the Village of Tarrytown as a narcotics rehabilitation center or half-way house. Responding to the agency's reliance on the court's position in defining "family" broadly to include

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343. See text accompanying note 323 supra. With a slightly different twist, the court in Matter of Jewish Board of Family and Children's Services, Inc. v Zoning Board of Appeals of the Town of Mount Pleasant, 79 AD2d 657, 657-68, 433 NYS2d 840, 841 (2d Dep't 1980), held that the plaintiff private organization operating schools on its own land was not subject to the town zoning ordinance under the circumstance that the state legislature (by 1939 NY Laws ch 879) had constituted the schools as a union free school district enjoying "all the powers and privileges" of such a district under the Education Law.

344. Summit School v Neugent, 82 AD2d 463, 466, 442 NYS2d 73, 76 (2d Dep't 1981), citing Matter of Wiltwyck School for Boys v Hill, 11 NY2d 182, 227 NYS2d 655, 182 NE2d 268 (1962), where the court noted that the private nonprofit organization was "actually performing functions belonging to the State and with which the State is vitally concerned — education of and related aid to delinquent, neglected and dependent children" (11 NY2d at 192, 227 NYS2d at 660-61, 182 NE2d at 272); and Matter of New York Institute of Technology v Le Boutillier, 33 NY2d 125, 350 NYS2d 623, 305 NE2d 754 (1973), holding that the college's desire to expand must yield to the village zoning ordinance.

345. 45 NY2d 266, 408 NYS2d 377, 380 NE2d 207 (1978)

346. Id at 272, 408 NYS2d at 380, 380 NE2d at 209.

347. See text accompanying notes 313 and 325 supra.

348. 36 NY2d 65, 364 NYS2d 885, 324 NE2d 355 (1975).

half-way houses,[349] Judge Jones said:

> There is, however, no sufficient evidence in the very meager record now before us on which to predicate the arguments respondents [including the agency] make on brief. While there is some testimony as to the nature of respondents' program, it does not follow, of course, that the promoters of every worthwhile community project thereby, ipso facto, become entitled to set their project down in any location of their choosing in any municipality they may select. The fact that there may be found strong support for the present program in the provisions of the Mental Hygiene Law does not alter the situation . . . .
>
> . . . . The record is barren of proof as to whether there are other zoning districts within the Village of Tarrytown or even nearby in which a half-way house such as Renaissance's would be permitted, as to the character of such districts, or as to their suitability to the full achievement of Renaissance program objectives.[350]

In view of the respondents' failure of proof, the court remitted the case for determination of the facts, and explained that in so doing "we take pains to note the very limited precedential significance of our present determination. The underlying issue -- the permissible scope of municipal regulation by zoning enactment of half-way houses incident to a narcotic rehabilitation program -- is not reached (cf 14 NYCRR 1005.45)."[351] However, even if the dictum seeming to favor a balancing of interests approach were to be credited, it is difficult to understand how it could negate the result called for by the regulations cited by Judge Jones. As the Appellate Division noted about two months later in sustaining the Rochester Board of Zoning Appeals' denial of a special exception permit for the operation of a drug rehabilitation program, the regulations of the state supervisory agency, the Drug Abuse Control Commission, provided that to "qualify for approval every applicant and every agency shall demonstrate to the satisfaction of the commission, its compliance with all applicable . . . local laws, ordinances, rules,

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349. Specifically, in the then most recent decision in City of White Plains v Ferraioli, 34 NY2d 300, 357 NYS2d 449, 313 NE2d 756 (1974).

350. 36 NY2d at 69-70, 364 NYS2d at 887, 324 NE2d at 357.

351. Id at 70, 364 NYS2d at 888, 324 NE2d at 358. The case was remitted for a determination of the facts.

regulations and orders pertaining to health, welfare and safety."[352] The court was referring to 14 NYCRR § 1005.45, the regulation cited by Judge Jones in Renaissance Project.

In describing the "underlying issue" as "the permissible scope of municipal regulation by zoning enactment of half-way houses,"[353] Judge Jones was focusing on an inconsistency or state preemption issue, rather than on the narrower, technical issue of interpretation of the word "family" in zoning ordinances. The Appellate Division in the Rochester case was more direct, in declaring that the pertinent provisions of the Mental Hygiene Law showed "no clearly defined intent to preempt reasonable local regulation of the location and construction of these centers."[354] These declarations illustrate the application of inconsistency or preemption theory to land uses by private entities on their own grounds, concentrating on a search for "legislative intent," as an alternative to less flexible approaches based on interpretations of the term "family," or resort to the governmental-proprietary distinction, or a vaguely defined state agency notion.[355]

This is not to suggest that the courts are always clear in sorting out the theories relied on in these zoning situations. The mixing of theories is illustrated in cases examining the zoning status of private horse racing associations or corporations. In Town of Brookhaven v Parr

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352. Matter of Ibero-American Action League, Inc. v Palma, 47 AD2d 998, 366 NYS2d 747, 748 (4th Dep't 1975). That regulation was repealed in 1978, the year the state legislature established a new procedure for siting community residential facilities. Mental Hygiene Law § 41.34, enacted by 1978 NY Laws ch 468, to be mentioned below in the discussion of statutory formulas for resolving these conflicts.

353. See text accompanying note 351 supra.

354. Matter of Ibero-American Action League, Inc. v Palma, 47 AD2d 998, 366 NYS2d 747, 748 (4th Dep't 1975). See supra note 352 and accompanying text.

355. And see Abbott House v Village of Tarrytown, 34 AD2d 821, 822, 312 NYS2d 841, 843 (2d Dep't 1970), voiding the village zoning ordinance as applied to a home for neglected and abandoned children licensed, supervised and financed in large measure by the State Board of Social Welfare, "insofar as it conflicts and hinders an overriding State Law and policy," thus "exceeding the authority vested in the Village"; and Hepper v Town of Hillsdale, 63 Misc2d 447, 449, 311 NYS2d 739, 741 (Sup Ct, Columbia Co, 1970), invalidating a town ordinance barring a rehabilitation establishment for treating drug addicts, on the ground that the state had "pre-empted this area of concern." Cf People v St. Agatha Home for Children, 47 NY2d 46, 416 NYS2d 577, 389 NE2d 1098 (1979), cert denied, 444 US 869 (1979), holding that a facility for the care of juvenile delinquents, having been established at the behest of the county, and certified by a state agency, pursuant to section 218-a of the County Law, could not be barred by a conflicting town zoning ordinance.

Company of Suffolk, Inc.,[356] the court held that the construction of a quarter horse race track by a private company licensed by the New York State Racing and Wagering Board was not subject to the town zoning ordinance, because the regulatory field had been preempted by a state statute declaring that state requirements relating to the place in which quarter horse racing may be conducted "shall be construed and deemed to be exclusive of and shall supersede any provisions of [any] other general or special statute, local law or ordinance in any wise relating thereto."[357] However, the court was not content to rest its holding on that ground. It made much of the constitutional exception to the ban on gambling to permit "pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government," and the fact that the "Legislature has proceeded to implement and expand its interest in racing, primarily as a growing source of revenue by imposition of a tax on the gross wagers at and off the track."[358] The court also noted that the Court of Appeals had "unanimously accepted the view that the statute passed constitutional muster by broadly construing the requirement that a reasonable revenue was being derived for support of government."[359]

Twelve years later the New York Racing Association, Inc., a private nonprofit organization incorporated with the approval of the State Racing and Wagering Board, sought immunity from the New York City Zoning Resolution for the operation of a flea market by a lessee of part of the Racing Association's Aqueduct Racetrack.[360] The Racing Association argued that the "State has indicated its intent to pre-empt regulation of the racetrack," and that in any case "immunity is conferred because the leasing of the premises for operation as a flea market was a governmental function," arguing that the "governmental function" was the production of revenues from the leasing of the flea market.[361] The court disagreed with both propositions, reasoning that "at least where it is acting in furtherance" of the "State purpose" for which it was

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356. 76 Misc2d 378, 350 NYS2d 529 (Sup Ct, Suffolk Co, 1973), modified, 47 AD2d 554, 363 NYS2d 640 (2d Dep't 1975).

357. 1970 NY Laws ch 1023, § 81.

358. 76 Misc2d at 380, 350 NYS2d at 531. The court was referring to the New York state constitution art IX § 1.

359. Id, citing Saratoga Harness Racing Association, Inc. v Agriculture and New York State Horse Breeding Development Fund, 22 NY2d 119, 291 NYS2d 335, 238 NE2d 730 (1965). See Western Regional Off-Track Betting Corporation v Town of Henrietta, 78 Misc2d 169, 170-71, 355 NYS2d 738, 740 (Sup Ct, Monroe Co, 1974), aff'd, 46 AD2d 1010, 363 NYS2d 320.

360. People v New York Racing Association, Inc., 116 Misc2d 587, 457 NYS2d 668 (Sup Ct, App Tm, 2d Dep't, 1982).

361. Id at 588, 457 NYS2d at 669-70.

formed, "conducting races and race meetings, improving the racing facilities, increasing the conveniences available to patrons and serving the best interest of racing generally and improving the breed of horses," the Racing Association "would not be subject to local zoning ordinances" (citing Brookhaven v Parr); thus decisions of the Racing Association regarding the placement of racetracks and ancillary facilities, which were subject to the approval of the State Racing and Wagering Board, "could not be frustrated by a local legislation"; however, "the leasing of the parking field for use as a flea market is not cloaked with immunity of any sort."[362]

In response to the argument that "the leasing brings revenue to the State, which is surely one of its stated purposes," the court said:

> However, its revenue raising activities are limited to racing-connected events [citing the enabling statutes and the Little Joseph case]. This is not the case here. To hold otherwise in this case would be to sanction any and every use of the racetrack facilities approved by the [Racing Association] without any regard for local zoning ordinances. Such a cavalier approach to local sensibilities was not contemplated by the enabling legislation.[363]

For the purpose of analysis we have posited a distinction between private land uses on privately owned land and private land uses on land leased from the state or one of its political subdivisions or agencies. The courts have not indicated that this distinction would, in itself, make the difference in deciding whether the use is immune from zoning restrictions. This is demonstrated by examining the treatment of leases of publicly owned school lands for private, non-educational purposes, together with the use of privately owned land by the owner or a lessee for a purpose serving some public objective.

In Foster v Saylor a private lessee of an unneeded publicly owned school building using it for industrial and office purposes was denied zoning immunity, despite explicit statutory authority for such leasing for the purpose of providing school districts with sorely needed revenues.[364] Both the Foster court and opinions of the State

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362. Id, 457 NYS2d at 670. The quoted purposes are recited in the law providing for the incorporation of nonprofit racing associations subject to the approval of the State Racing and Wagering Board, now found in section 202 of the Racing, Pari-Mutuel Wagering and Breeding Law (McKinney 1982).

363. Id.

364. See text accompanying notes 321-22 supra.

Comptroller and Attorney General[365] reaching the same result in the school leasing situations cited the Little Joseph case as authority. The basis in Little Joseph for recognizing municipal zoning jurisdiction was the finding that the leased plant "was operated solely by and for the commercial benefit of [the lessee] as a private entrepreneur,"[366] meaning not for any purpose of the town. The State Comptroller and Attorney General both invoked the governmental-proprietary test, although the Little Joseph rationale did not rely on that test.

In Town of Brookhaven v Parr, where the questioned activity was conducted by a private organization on its own land, immunity was granted on the basis of the fact that the legislatively endorsed objective was raising revenues.[367] Similarly, the ultimate statutory purpose of revenue production as a basis for zoning immunity was impliedly confirmed in the New York Racing Association case. However, the Racing Association could not take advantage of it because leasing for a flea market was not the method of revenue production contemplated by the legislature. The sanctioned method of revenue production was wagering on horse races conducted on the organization's premises.

The racing organization and school leasing cases can be reconciled by focusing on the nature of the use of the land and determining whether the use comports with an articulated governmental objective, whether or not owned by a public agency or a private entity, whether or not conducted by a lessee or the landowner itself, and whether or not revenue production is a legitimate function of the organization or school. Thus flea markets and industrial and office uses of school space may not be subject to zoning, but horse racing may. The reverse might be true if the operation of industries and commercial establishments, including flea markets, were declared state purposes, and pari-mutuel betting on horse races were still prohibited.

This analysis may be reconciled with the position of the New York courts in the group home cases. There, too, the courts do not expressly find significance in the distinction between uses on leased state land and licensed uses on privately owned land. In Conners v New York State Association of Retarded Children, Inc.,[368] holding that a hostel operated on land leased by the state to a private organization was not subject to a city zoning ordinance, the court relied on cases in which

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365. See supra note 323 and accompanying text.

366. 41 NY2d at 742, 395 NYS2d at 428, 363 NE2d at 1166 (emphasis added). See text accompanying notes 356-57 supra.

367. See text accompanying note 358 supra.

368. 82 Misc2d 861, 370 NYS2d 474 (Sup Ct, Rensselaer Co, 1975); see text accompanying notes 313-16 and 325 supra.

the use was that of a private organization on its own land.[369] The Conners court seized upon the dictum of Judge Jones in Renaissance Project, where the proposed use was on land owned by a private organization, that the finding of a governmental purpose did not alone qualify for zoning immunity.[370] Taken out of context, the Renassaince Project dictum is inconsistent with the proposition that the mere furtherance of a state or municipal purpose by the private land user warrants freedom from zoning restraints (the dictum of Little Joseph). But in context the Renaissance Project dictum can be explained on the basis of a combination of two theories: (1) Generally, the field of site selection for rehabilitation facilities for drug addicts may be preempted by the state; and the preemption may be explicit, as the court in Matter of Ibero-American Action League, Inc. v Palma pointed out later.[371] (2) Despite a showing of state preemption the agency performing the public function may not act arbitrarily; it is impliedly obligated to avoid unreasonable impacts on community environments in selecting sites for its facilities.[372] Depending on whether a government official plays a role in approving the site selection, the second issue may be similar to that in Conners and Ibero-American, described here as a standard one of alleged abuse of administrative discretion.

To sum up our analysis of the potential zoning vulnerability or immunity of privately conducted activities (such as aquaculture) on privately owned land:

(1) We start with the premise that agencies performing functions in furtherance of a legislatively articulated public objective are entitled to some degree of special protection from local land use controls; and it is up to the legislature to decree otherwise if it wishes to dilute or eliminate that protection in respect of particular types of functions.

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369. Including White Plains v Ferraioli, 34 NYS2d 300, 357 NYS2d 449, 313 NE2d 756 (1974), and other similar cases in which the circumstance that the activity was in furtherance of a state purpose was factored into the issue of construction of the term "family"; and Matter of Wiltwyck School for Boys v Hill, 11 NY2d 182, 227 NYS2d 655, 182 NE2d 268 (1962), where a similar factor entered into the question whether the privately operated institution for emotionally disturbed juvenile delinquents qualified as a "school" under the zoning ordinance. See text accompanying notes 345–49 supra.

370. 82 Misc2d at 864, 370 NYS2d at 477.

371. 47 AD2d 998, 366 NYS2d 747 (4th Dep't 1975). See text accompanying notes 352 and 354 supra.

372. Such as locating a sanitary landfill site in the middle of a single family residence district for spite.

(2) This calls for a review of the applicable statutes to determine whether the questioned land use is one contemplated by and furthering a purpose of the state,[373] and not merely peripheral to a state objective.

(3) If there are doubts on that score, whether that issue is regarded as one of statutory construction or as one of state preemption or inconsistency makes little difference. In either situation the courts have ample leeway to base their decisions on policy factors, generally weighing and if possible reconciling competing state and local objectives -- all in the name of ascertaining legislative "intent."

(4) Using this approach the result can be reached without invoking questionable distinctions between "governmental" and "proprietary" functions or between "public" and "private" purposes; or conclusory uses of the concept of "sovereignty"; or selective reliance on "eminent domain" powers.

8. Applicability of a Municipality's Zoning Regulations to its Own Land within its Own Borders

As indicated in the mention of the Little Joseph case, the courts have not assigned significance to the difference between municipal zoning of another public agency's land and municipal zoning of its own land, in applying immunity doctrines.[374] Nor have they distinguished

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373. We do not claim that the inquiry central to this analysis — whether the private entity is conferring a public benefit regarded by the state as worthy of protection from local interference — is easy to apply. The mere fact that an activity conducted by a private entity on its own land serves the public welfare does not necessarily accord it complete immunity from land use controls. The differences may be of degree rather than of kind, in terms of governmental reliance on the organization to perform the public function; the extent of government control over its exercise; and the extent municipal land use restrictions generally are viewed as prejudicial to the achievement of the state's objectives (euphemistically cast in terms of "legislative intent"). The case of private schools is illustrative. Although they share the educational function with publicly operated schools, they may not enjoy the same status in land planning. See, Anderson § 9.11 (2d ed 1973), and Annotation, Zoning Regulations as Applied to Public Elementary and High Schools, 74 ALR3d 136 (1976), and Annotation, Zoning Regulations as Applied to Private and Parochial Schools Below the College Level, 74 ALR3d 14 (1976). Generally the issues are treated as standard zoning ones, giving weight to the public character of the land use in determining the reasonableness of the zoning restrictions (e.g., leading to judicial denunciation of ordinances totally excluding schools, and similarly churches and public utility facilities, from the community or from areas of the community needing their services).

374. See text accompanying notes 309-11 supra.

the zoning municipality's own use of land[375] from use of its land by a private lessee.[376] Similarly, they have not deemed it significant that the private use was on privately owned land, rather than on land leased from the municipality, where the activity is blessed with a government permit.[377]

There is, of course, a practical difference between the application of the municipality's ordinance to its own use or a use sanctioned by it, and the application of the ordinance to another public agency's land use. Generally, in respect of its own activities within its own borders, the governing body that selects the location is the same one that enacted the zoning ordinance. It is capable of amending its zoning ordinance, if necessary, to legitimize the use in the chosen location. One would expect the courts to impose a duty on the zoning authorities to do just that if they are to escape their own zoning restrictions. The New York courts have not taken that tack, though in one case the fact that the municipality enacted the supporting zoning amendment was the critical determinant. In Hewlett v Town of Hempstead,[378] a neighbor objected to the building of an incinerator in a resident district, on the face of it a violation of the town's zoning ordinance. The court was confronted with the earlier holding in O'Brien v Town of Greenburgh, prior to its being discredited by Nehrbas, that the incineration of garbage was a proprietary, not a governmental function, hence was not

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375. Nehrbas v Incorporated Village of Lloyd Harbor, 2 NY2d 190, 159 NYS2d 145, 140 NE2d 241 (1957), holding that the village would not be prevented by its own zoning ordinance from remodeling a building in a residential district, for the "governmental" functions of housing village offices, garbage trucks and highway maintenance equipment. And see Barnathan v Kramer, 44 Misc2d 203, 253 NYS2d 144 (Sup Ct, Nassau Co, 1964), holding that the town zoning ordinance could not prohibit the erection of a water tank by a park water district of the town; and Bischoff v Town of East Hampton, 47 Misc2d 615, 617, 263 NYS2d 61, 63 (Sup Ct, Suffolk Co, 1965), holding that the town acted "in the performance of its governmental duties," hence was not bound by its own zoning ordinance, in setting up signs at highway intersections noting the locations of motels and restaurants.

376. See Little Joseph Realty, Inc. v Town of Babylon, 41 NY2d 738, 395 NYS2d 428, 363 NE2d 1163 (1977), citing the Nehrbas analysis, involving the municipality's own use, as authority for part of its reasoning (see text accompanying notes 309-11 supra).

377. See Ruderman v Town Board of the Town of Rosendale, 58 AD2d 939, 397 NYS2d 21, 22 (3d Dep't 1977), where the proprietor of a sludge disposal facility, operating under a town permit, was held to be beyond the reach of the town's zoning ordinance, given explicit recognition by a town board resolution of the "essential community service" being provided by the permittee ("the resolution makes it apparent that the town itself has undertaken to provide the septic disposal area through the device of a permit and with private enterprise as its agent").

378. 3 Misc2d 945, 133 NYS2d 690 (Sup Ct, Nassau Co, 1954), aff'd, 1 AD2d 954, 150 NYS2d 922 (2d Dep't 1956).

entitled to zoning immunity.[379] The Hewlett court was able to distinguish O'Brien on the basis of an amendment to the town zoning ordinance, adopted prior to undertaking the incinerator project, stating that "[n]otwithstanding any other provisions of this Ordinance, buildings, structures, and premises necessary for use and occupancy by the Town or the County of Nassau for public or municipal purposes are hereby permitted in any use district."[380] At one point the court treated that circumstance as one of the considerations to be weighed in the balancing of competing public interests:

> Finally, the court feels constrained to point out that in a case of this sort it must be mindful of the respective equities involved. In this regard it is significant that a municipality has proceeded step by step in procuring an amendment to the law, creating a new district, acquiring land as a site for the erection of an incinerator and thereafter proceeding with the sale of bonds and the erection of an incinerator at a cost of $2,500,000, all of which was well publicized within the geographical area interested in and to be served by such project.[381]

There may be practical reasons for a court to avoid burdening the municipality with the necessity of making formal changes in their zoning ordinances to validate their own land development activities, or endorsed private uses, incompatible with their surroundings. The courts

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379. O'Brien v Greenburgh, 239 App Div 555, 268 NYS 173 (2d Dep't 1933), aff'd, 266 NY 582, 195 NE 210 (1935). See supra notes 241-42, 310 and 375 for references to the O'Brien and Nehrbas cases. Basset cited O'Brien for a test of "necessity," regarding it either as a substitute for, or as synonymous with, the "governmental-proprietary" concept:

> The question occasionally arises, however, whether the zoning regulations can prevent a public building which is deemed necessary by the department having authority over a given field of public administration. For instance, the town authorities may lay out residence districts on the map and exclude fire houses. The fire district authorities may insist that adequate fire protection demands a fire house in the residence district. The need of a public building in a certain location ought to be determined by the federal, state, or municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance. However, this recognition of the public need would not extend to matters that are in no way necessary. For instance, a fire house might be necessary in a particular residential locality but no reason based on necessity might exist to prevent compliance with regulations regarding height and yards. (E.M. Bassett, Zoning 31 [1936]).

380. 3 Misc2d at 947-48, 133 NYS2d at 692.

381. Id at 951-52, 133 NYS NYS2d at 696.

may be aware of possible political considerations making the zoning authorities wary of openly inviting neighbor objections in the course of rezoning, special permit or variance proceedings. Similarly, the courts may be aware of the possibility, under some zoning laws, of special voting requirements for making zoning changes, requirements that may make the difference between approval or defeat of the land use project.[382]

Judicial reliance on "governmental-proprietary" or other familiar epithets in these intramunicipal cases is as questionable as in situations involving intergovernmental zoning conflicts. For the most part our analysis of doctrine in the intergovernmental categories applies to the intramunicipal situations. But there is a difference. In making its siting decision the municipality is in effect changing its zoning ordinance, something it has the power to do. Hence a court might ask: "Why not? What's the difference?" Yet this difference supports a contrary argument, namely, that because the municipality itself is in a position to resolve the matter -- it does not have to confront a potentially inconsistent state law or policy over which it has no control -- the burden should be on the municipality to follow the prescribed procedures for amending its zoning ordinance, or suffer the consequences of invalidity of its siting decision. We lean toward the latter argument.

382. See section 265 of the Town Law, providing that in case of a protest against a proposed zoning change signed by the owners of 20% or more of area of the land subject to the change or of immediately adjacent land within 100 feet of the affected area or directly opposite it, a favorable vote of at least three fourths of the members of the town board is necessary to adopt the amendment.

V. Special Area Controls

Coastal lands appropriate for siting aquaculture facilities in New York may be subject to controls designed to protect environmentally sensitive areas, or to promote planned development of water dependent uses. We present here a brief summary of salient features of those controls and some aspects particularly relevant to aquaculture, but do not undertake to anticipate and discuss all the legal problems aqaculturists might confront in locating their operations in such areas.

A. Tidal Wetlands

The Tidal Wetlands Act[383] was enacted in 1973 to further "the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state."[384] The statute's definition of "tidal wetlands" includes "(a) those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters; (b) all banks, bogs, meadows, flats and tidal marsh subject to such tides," and the "intertidal zone" upon which specified types of aquatic plants grow or may grow.[385]

The Act directed the Commissioner of Environmental Conservation to make an inventory of all tidal wetlands in the state.[386] Pending the completion of the inventory, the Act prescribed a moratorium period during which a permit from the Department of Environmental Conservation was required for the alteration, by any "person," of "the state of any tidal wetland or of any area immediately adjacent to such wetland as the commissioner may reasonably deem necessary to preserve in order to effectuate the policies and provisions of" the Act.[387] As used in this and other provisions of the Act, the term "person" is defined to "mean any individual, public or private corporation, political subdivision, government agency, department or bureau of the state, bi-state authority, municipality, industry, co-partnership, association, firm,

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383. Environmental Conservation Law art 25, §§ 25-0101 et seq (McKinney Supp 1983), added by 1973 NY Laws ch 790.

384. Id § 25-0102 (McKinney Supp 1983).

385. Id § 25-0103(1) (McKinney Supp 1983).

386. Id § 25-0201 (McKinney Supp 1983).

387. Id § 25-0202 (McKinney Supp 1983).

trust, estate or any other legal entity whatsoever."[388]

Upon completion of the inventory the Commissioner of Environmental Conservation may enter into cooperative agreements with any county, city, village or town, or a combination of them, providing for state personnel and financial assistance in the furthering of the policies of the Act.[389] The cooperative agreement must reserve to the municipal government "the right to operate or lease for operation shellfish beds lying within the area" covered by the agreement."[390]

The Commissioner of Environmental Conservation is required to promulgate "land-use regulations" for use of the inventoried wetlands, and in doing so is to "be guided by factors including, but not limited to, the public policy set forth in this act as well as the present and potential value of the particular wetland for marine food production, as a wildlife habitat, as an element of flood and storm control, and as a source of recreation, education and research."[391] "No permits may be granted by any local body, nor shall any construction or activity take place at variance with these regulations."[392] The statutory listing of activities subject to such regulations expressly exempts the "depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping . . . where otherwise legally permitted."[393] However, the regulations would apply to virtually every activity an aquaculturist would undertake in constructing facilities for his operation.[394]

One could argue that as a practical matter the statutory exemption of "aquaculture" is meaningless unless the construction of essential ancillary facilities are also exempt, hence the statute should be read

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388. Id § 25-0103(4) (McKinney Supp 1983).

389. Id § 25-0301(1-3) (McKinney Supp 1983).

390. Id, subd 4.

391. Id § 25-0302(1) (McKinney Supp 1983) (emphasis added).

392. Id.

393. Id § 25-0401(3) (McKinney Supp 1983) (emphasis added).

394. Id subd 2. They include "any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area."

as placing such construction beyond the regulatory reach of the commissioner. The Commissioner of Environmental Conservation has not adopted that interpretation. His regulations define "aquaculture" to mean "the cultivation and harvesting of products that naturally are produced in the marine environment, including fish, shellfish, crustaceans and seaweed, and the installation of cribs, racks and in-water structures for cultivating such products, but shall not mean the construction of any building, any filling or dredging or the construction of any water regulating structures."[395] The Commissioner of Environmental Conservation, however, may grant a permit to erect a structure on or adjacent to a tidal wetland area for aquaculture use, but the applicant will have to suffer the time and money costs of the permit procedure, and bear the burden of persuading the commissioner that the public benefits from his cultivation of fish or plants will outweigh the harm from the resulting destruction of natural organisms in the wetlands.

No person may conduct any of the activities specified in the statute as being subject to regulation unless he has obtained a permit from the Commissioner of Environmental Conservation.[396] The statute states that the permit "shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located."[397] That provision, along with the provision that "[n]o permits may be granted by any local body, nor shall any construction or activity take place at variance with these regulations,"[398] and the "except where otherwise limited" clause in the definition of exempt aquaculture, establish a system in which local land use or other regulations may be more, but no less, restrictive than the commissioner's regulations.

B. Freshwater Wetlands

Two years after the enactment of the Tidal Wetlands Act, and to some extent modeled on it, the New York legislature enacted a Freshwaters Wetlands Act to restrict development within or adjacent to freshwater wetlands, and thereby protect such lands and their benefits

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395. 6 NYCRR § 661.4 (1977) (emphasis added). See the letter of William H. Swan to Anthony S. Taormina, Director of Marine and Coastal Resources, Department of Environmental Conservation, September 16, 1976, recommending the elimination from this definition of the words "but shall not mean the construction of any building." (Letter in the files of the New York Sea Grant Institute, Albany, New York.)

396. Environmental Conservation Law § 25-0401(1) (McKinney Supp 1983).

397. Id.

398. Id 25-0302(1) (McKinney Supp 1983).

from loss or impairment.[399] The statutory definition of freshwater wetlands includes (a) "lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation" of specified types; (b) "lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet and provided further that such conditions can be expected to persist indefinitely, barring human intervention"; (c) lands and waters substantially enclosed by aquatic or semi-aquatic vegetation," as set forth in the preceding categories, "the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation"; and (d) "the waters overlying the areas set forth" in categories (a) and (b) and "the lands underlying" category (c) areas.[400]

Similarities to the Tidal Wetlands Act include the mandate of preliminary inventorying and mapping by the Commissioner of Environmental Conservation;[401] the inclusion of governmental entities in the definition of regulated persons;[402] the requirement of an interim permit for the development of a freshwater wetland pending completion and formal adoption of the inventory and maps;[403] authority of the commissioner to enter into cooperative agreements with local governments;[404] and, generally, the definition of activities subject to

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399. Environmental Conservation Law art 24, §§ 24-0101 et seq (McKinney Supp 1983), enacted by 1975 NY Laws ch 614.

400. Id § 24-0107(1) (McKinney Supp 1983).

401. Id § 24-0301 (McKinney Supp 1983), an inventory identifying individual freshwater wetlands with an area of at least 12.4 acres (100 hectares), or which, if less than that size, are deemed by the commissioner to be of "unusual local importance for one or more of [specified] benefits," or are located within the Adirondack Park and meet the definition of wetlands in the law relating to that area. Procedures are established for hearings on the designation of included freshwater wetlands and notification to affected landowners. Unlike the Tidal Wetlands Act, this Act did not call for a moratorium pending the inventorying and mapping.

402. Id § 24-0107(6) (McKinney Supp 1983). "'Person' means any corporation, firm, partnership, association, trust, estate, one or more individuals, and any unit of government or agency or subdivision thereof, including the state."

403. Id §24-0703(5) (McKinney Supp 1983).

404. Id § 24-0901 (McKinney Supp 1983), but not exempting local government operations of, or leasing for, shellfishing (an activity confined to tidal waters).

regulation, and the exemption of "shell-fishing" and "aquaculture."[405]

In a major departure from the Tidal Wetlands Act, the state defers to local regulatory jurisdiction in granting to each local government (defined as including a city, town, village or county) the option to adopt and implement a "freshwater wetlands protection law or ordinance in accordance with" the Act.[406] Upon the failure of a city, town or village to legislate, by the time the Department of Environmental Conservation files the applicable freshwater wetlands map, or by September 1, 1977, whichever is later, "it shall be deemed to have transferred the function to the county."[407]

A local freshwater wetlands protection ordinance or law may not "be less protective of freshwater wetlands or effectiveness of administrative and judicial review, than the procedures set forth" in the Freshwater Wetlands Act, nor may it affect the activities exempted by the Act (including the "aquaculture" exemption).[408] The modifying reference to "procedures" reflects the fact that the Act does not expressly prescribe minimum standards for freshwater wetlands development, though some standards could be inferred from the Act's

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405. Id § 24-0701(1,2,3) (McKinney Supp 1983). The definition of "aquiculture" (sic) in the commissioner's regulations setting forth permit requirements is the same as his definition of "aquaculture" for the purposes of the Tidal Wetlands Act. 6 NYCRR § 663.2(e) (1980). See text accompanying note 385 supra.

406. Environmental Conservation Law § 24-0501 (McKinney Supp 1983). The definition of local law is found in § 24-0107(4) (McKinney Supp 1983). A county local law or ordinance adopted under the Act may not apply to areas within the boundaries of any city, town or village which has adopted its own freshwater wetlands law or ordinance. Id. The Commissioner of Environmental Conservation "by rule, may exempt from local implementation . . . those freshwater wetlands which, by reason of their size or special characteristics of unique environmental value or by reason of common characteristics, are appropriately administered pursuant to this article by the department [of Environmental Conservation] alone." Id § 24-0505 (McKinney Supp 1983).

407. Id§ 24-0501(1) (McKinney Supp 1983). A city, town or village may volunteer to transfer the function to the county or the Department of Environmental Conservation if it certifies that "it does not possess the technical capacity or the procedures effectively to carry out the requirements" of the Act. Id § 24-0503(1) (McKinney Supp 1983). Or if the commissioner makes such a finding he may supersede the local government and have the department exercise the function or transfer it to the county. Id subd 2. It would appear that either event could take place beyond the initial option period.

408. Id § 24-0501(2) (McKinney Supp 1983).

broad definition of activities subject to regulation.[409] In any case, the Act explicitly reserves to local authority the regulation of freshwater wetlands not designated as such on the maps adopted by the Commissioner of Environmental Conservation;[410] the Act "shall not be deemed to remove from any local government any authority pertaining to the regulation of freshwater wetlands under the county, general city, general municipal, municipal, municipal home rule, town, village, or any other law";[411] and the Act provides that "[o]n any land that is being developed pursuant to a planned unit development ordinance or local law where freshwater wetlands are to remain as open space, development activities shall be permitted in areas contiguous to such wetlands if the local government affirms that such activities will not despoil said wetland."[412]

C. Coastal Erosion Hazard Areas

New York's Coastal Erosion Hazard Areas law,[413] given the short title of (and to be referred to here as) the Shoreowner's Protection Act,[414] was enacted in 1981 to identify "erosion hazard areas" and regulate development or other activities in them "to protect natural protective features or to prevent or reduce erosion impacts."[415] The statute's definition of "erosion hazard area" includes "those areas of the coastline" (a) which are "determined as likely to be subject to

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409. Id § 24-0701(2) (McKinney Supp 1983), similar to the listing in the Tidal Wetlands Act counterpart provision; see note 382 supra. Part 663 of the commissioner's regulations under the Act establishes standards governing the issuance of permits by the Department of Environmental Conservation. 6 NYCRR § 663.1(a)(3) (1980). The regulations do not contain standards governing the issuance of permits by local governments.

410. Id § 24-0507 (McKinney Supp 1983).

411. Id § 24-0509 (McKinney Supp 1983). Though the section is somewhat ambiguous on the point, the laws referred to here would seem to include generally phrased state zoning and other land use control enabling provisions, not just those (if any) expressly referring to freshwater lands.

412. Id § 24-0701(8) (McKinney Supp 1983). This provision and the prohibition against local tampering with the statutory exemptions indicate the existence of some minimum standards to be followed by local governments in their freshwater wetlands protection regulations.

413. Environmental Conservation Law art 34, §§ 34-0101 et seq (McKinney Supp 1983), added by 1981 NY Laws ch 841.

414. 1981 NY Laws ch 841, § 1. See note following section 34-0101 in McKinney Supp 1982 at 184.

415. Environmental Conservation Law § 34-0102(1,2) (McKinney Supp 1983).

erosion within a forty-year period,"[416] or which "constitute natural protective features, the alteration of which might reduce or destroy the protection afforded other lands against erosion, or lower the reserves of sand or other natural materials available to replenish storm losses through natural processes."[417]

The term "coastline" means "the lands adjacent to the state's coastal waters, including lakes Erie and Ontario, the St. Lawrence and Niagara rivers, the Hudson river south of the federal dam at Troy, the East river, the Harlem river, the Kill van Kull and Arthur Kill, Long Island sound and the Atlantic ocean, their connecting water bodies, bays, harbors, shallows and marshes."[418]

The Commissioner of Environmental Conservation, in cooperation and consultation with the concerned governments, is charged with the task of identifying and mapping erosion hazard areas.[419] Following the completion of prescribed hearing procedures and designation of the areas, and within six months from the filing of the area maps with the clerks of the respective cities, towns,[420] or villages in which the areas are located, the clerk of each such local government must "submit to the commissioner an erosion hazard area ordinance or local law applicable to that portion of such area located within its jurisdiction."[421] The local ordinance or local law is subject to the Commissioner of Environmental Conservation's certification of consistency with minimum standards and other regulations promulgated by him under the Shoreowner's Protection Act.[422] He is required to revoke his certification if he determines that the local government "has failed to administer or enforce such ordinance or local law to adequately carry

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416. Id § 34-0103(3)(a) (McKinney Supp 1983). The definition prescribes the method for determining the inland boundaries of such areas.

417. Id, subd 3(b).

418. Id subd 4.

419. Id § 34-0104 (McKinney Supp 1983).

420. For the purposes of the Shoreowner's Protection Act, the jurisdiction of a town is limited to that portion lying outside the area of any incorporated village. Id § 34-0103(7) (McKinney Supp 1983).

421. Id § 34-0105(1) (McKinney Supp 1983).

422. Id. Provisions are made for extension of the six months period, public notification and review, and the submission and review of amendments, and revocation of the commissioner's approval for failure to adequately administer the local legislation. Id subds 2-4. Section 34-0108 (McKinney Supp 1983) prescribes minimum standards the commissioner must follow in issuing rules and regulations under the Act.

out the purposes and policies" of the Act.[423]

The Act expressly disclaims any intent to confer new regulatory powers on the local governments, except to validate the limiting of the regulations to the portions of their jurisdictions within the erosion hazard areas.[424] Thus the local governments are expected to resort to their existing zoning, subdivision control, site plan approval, or other police powers.

It will be noted that the Shoreowner's Protection Act differs from the Tidal Wetlands Act in making local regulation mandatory rather than voluntary. Accordingly, in following the Tidal Wetlands Act scheme of turning to higher jurisdictions upon the failure of local governments to assume the responsibility, the Shoreowner's Protection Act requires the county to adopt and enforce an erosion hazard area local law if a city (other than New York City) or any town or village fails to adopt the regulations in time or its submission is disapproved.[425] For that purpose, the counties are granted the same regulatory powers the succeeded city, town or village possesses.[426] In the event the commissioner revokes his approval of the program of a city (other than New York City), town or village, he may require the county to administer and enforce such lower unit's erosion hazard ordinance, or the commissioner may himself assume that responsibility.[427]

If New York City, or a county designated to take over from a lower unit that failed to have a program approved, does not itself make a timely submission of an erosion hazard area local law, the Commissioner of Environmental Conservation is required to issue and enforce his own regulations in the affected area.[428] In the event he revokes his designation of a county to administer and enforce the erosion hazard area legislation of a city, town or village whose own approval has been revoked, or he has chosen to administer and enforce the legislation of

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423. Id § 34-0105(5).

424. Id § 34-0105(1) (McKinney Supp 1983).

425. Id § 34-0106(1) (McKinney Supp 1983). The procedures for county action are similar to those prescribed for the cities, towns and villages, including the six months deadline. The displaced city, town or village may nevertheless enforce other laws within the erosion hazard area, if consistent with the county's erosion hazard area local law. Id subd 5.

426. Id.

427. Id subd 7(a), and § 34-0107(3) (McKinney Supp 1983). The commissioner shall reinstate the approval if and when he is satisfied that the lower unit can perform adequately. § 34-0106(7)(b) (McKinney Supp 1983).

428. Id § 34-0107(1) (McKinney Supp 1983).

the lower unit whose approval has been revoked, the commissioner must assume the responsibility for such administration and enforcement.[429] Though the statute appears to be silent on the consequences of a revocation of the commissioner's approval of the New York City program, the commissioner's regulations assume that upon such revocation "he will exercise jurisdiction over the issuance of erosion area permits" there.[430]

The regulations of the commissioner must meet minimum standards set out in the Act. These mandate the inclusion of standards and criteria providing for minimum setback requirements "taking into consideration recession rates, the useful life of the proposed structure, and the protection afforded by natural protective features and existing erosion protection structures"; regulation of development to prevent any measurable increase in erosion at the site, "and minimize adverse effects on natural protective features, existing erosion protection structures or natural resources, such as significant fish and wildlife habitat"; and standards for the construction of erosion protection structures, or for restoration and stabilization activities.[431] The commissioner's rules and regulations must also prescribe procedures for appealing from the designation of erosion hazard areas, subject to limits set out in the Act,[432] and procedures for granting variances from the standards under circumstances spelled out in the Act.[433]

Where the Commissioner of Environmental Conservation has issued regulations to be administered by him in any erosion hazard area, "any person proposing to undertake activities or development subject to such

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429. Id subd 3.

430. 6 NYCRR § 505.4 (1983).

431. Id § 34-0108(3) (McKinney Supp 1983).

432. Id subd 2.

433. Id subd 4. The applicant for a variance must demonstrate "practical difficulty or unnecessary hardship," terms given extensive judicial interpretation in cases applying similar provisions of zoning laws. The applicant must satisfy statutory criteria, including a showing that where public funds are to be used in the proposed development "the public benefits clearly outweigh the long-range adverse effects"; "no reasonable prudent alternative site is available"; the project incorporates measures "to mitigate adverse impacts on natural systems"; "the development will be reasonably safe from flood and erosion damage"; and the variance "will be the minimum necessary to overcome the practical difficulty or unnecessary hardship."

regulations shall obtain a permit" from him.[434] The Act's definition of the term "person" includes both private and public entities.[435] The Act does not include a similar requirement for the administration of municipal erosion hazard area ordinances or local laws, but they would probably establish a permit system in any case.[436]

The Act does not define the types of developers subject to municipal erosion hazard area ordinances or local laws. It does not use the term "person" in the provisions relating to local legislation. The Act does deal with the question of applicability of such local legislation to government land development in a limited way. Section 34-0108(5) says that notwithstanding the Act's delegation of regulatory power to local governments, "in the case of any department, bureau, commission, board or other agency of the state, or any public benefit corporation, any member of which is appointed by the governor, a permit shall be obtained from the [Department of Environmental Conservation] . . . provided, however, in cases where there is a local law or ordinance in effect the commissioner shall make a finding prior to the issuance of the permit that the conditions of such local law or ordinance have been met, insofar as such conditions relate to the standards and criteria adopted" under the Act.[437]

The question remains whether the local laws and ordinances certified under the Act can reach municipalities or local public benefit corporations (whose governing body does not include an appointee of the Governor). We have noted that the local governments are expected to exercise their existing zoning and other police powers in implementing

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434. Id § 34-0109(1). The section prescribes procedures governing applications for permits, and their review and disposition by the commissioner (subds 2-3). In addition, the Uniform Procedures Act, found in article 70 of the Environmental Conservation Law (McKinney Supp 1983), is applied here.

435. Id §34-0103(9): "'Person' shall mean any individual, public or private corporation, political subdivision, government agency, partnership, association, firm, trust, estate or any other legal entity whatsoever."

436. The Commissioner of Environmental Conservation assumes this. In prescribing requirements for the submission of a local program for his certification, his regulations state that the form of application must contain a "description of the local government's administrative capacity to administer its local program including a step-by-step discussion of how a local permit application will be processed." 6 NYCRR § 505.16(b)(4) (1983).

437. McKinney Supp 1983. This tracks the definition of "State agency" found in section 34-0103(10). If in a given case it is decided that a municipal developer is subject to a local erosion hazard area ordinance or local law, it is not clear whether section 34-0108 exempts a state agency from obtaining an additional permit from the local unit, so long as the agency demonstrates to the state commissioner that it has complied with the local standards.

the Act.[438] We conclude that the issues regarding the possible immunity of government agencies from zoning, discussed above, are pertinent here to that extent.

D. Flood Plain Control Areas

As a prerequisite to receiving various types of federal financial assistance, local governments designated as being threatened with special flood hazards are required to participate in the national flood insurance program.[439] Qualification for participation in the national program requires the adoption of adequate local land use controls, through the exercise of existing municipal powers.[440] The State Department of Environmental Conservation must develop flood hazard regulations, meeting federal standards, for municipalities that are required, but fail, to adopt them.[441] If a local government fails to qualify for participation in the national program, or if its qualification has been revoked, the Commissioner of Environmental Conservation may himself promulgate and administer the necessary flood hazard regulations.[442] The commissioner has adopted rules and regulations governing the discharge of his responsibilities under these provisions.[443]

State agencies are expressly required to "take affirmative action to minimize flood hazards and losses in connection with state-owned and state-financed buildings, roads and other facilities, the disposition of state lands and properties, the administration of state and state-assisted planning programs, and the preparation and administration of state building, sanitary and other pertinent codes."[444] The state agencies are required to take such affirmative action in connection with the "siting, planning, construction and maintenance of such facilities and the administration of such programs."[445] The statute implies that the Commissioner of Environmental Conservation is to review "potential flood hazards at proposed construction sites of state, and state-

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438. See text accompanying note 423 supra.

439. 42 USC §§ 4001 et seq (1983).

440. Environmental Conservation Law §§ 36-0101, 36-0103(1) (McKinney Supp 1983).

441. Id § 36-0107(3) (McKinney Supp 1983).

442. Id § 36-0109 (McKinney Supp 1983).

443. See 6 NYCRR Pts 500-501 (1982).

444. Environmental Conservation Law § 36-0111(1) (McKinney Supp 1982).

445. Id.

financed facilities."[446]

The statute says that it shall not affect the validity of local flood hazard regulations, "provided, however, that where a flood hazard regulation has been promulgated by the commissioner" in the case of non-qualification by a local government, "such regulation shall also apply."[447] This provision does not declare whether either the state or local regulation prevails in the event of inconsistency in their respective provisions. A court would probably hold that the state regulations would prevail; otherwise the grant of authority to the Commissioner of Environmental Conservation to act in lieu of the non-qualifying municipality might be rendered ineffective.

E. Waterfront Revitalization Areas

In 1981 the New York legislature added article 42 to the Executive Law, entitled "Waterfront Revitalization and Coastal Resources,"[448] to promote the development of the state's coastal areas and, to that end, enable the state to participate in the national coastal zone management program.[449] The Waterfront Revitalization and Coastal Resources Act is not itself a regulatory measure. Its purpose is to support positive programs for development of the state's coastal areas, to "achieve a balance between economic development and preservation that will permit the beneficial use of coastal resources while preventing the loss of living marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems"; encourage port and harbor development; "conserve, protect and where appropriate promote commercial and recreational use of fish and wildlife resources";

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446. Id subd 2. And see the commissioner's regulations governing such review, in 6 NYCRR Pt 502 (1982).

447. Id § 36-0115(2) (McKinney Supp 1983).

448. 1981 NY Laws ch 840, Executive Law §§ 910 et seq (McKinney 1982). The article is known as the "Waterfront Revitalization and Coastal Resources Act."

449. Pursuant to the Coastal Zone Management Act of 1972, 16 USC §§ 1451 et seq (1976), the principal object of which is to provide federal funding in aid of approved state coastal management programs, New York's participation was endorsed by federal approval of the New York Coastal Management Program in 1982. See United States Department of Commerce, Final Environmental Impact Statement and the New York Coastal Management Program, prepared by the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, Department of Commerce, and the New York Department of State (August 1982) (cited hereafter as the New York Coastal Management Program). The enactment of the Waterfront Revitalization and Coastal Resources Act and Shoreowner's Protection Act was influenced by New York's desire to qualify for participation in the federal program.

"encourage and facilitate public access for recreational purposes"; "minimize damage to natural resources and property from flooding and erosion"; "encourage the restoration and revitalization of natural and manmade resources"; "encourage the location of land development in areas where infrastructure and public services are adequate"; "conserve and protect agricultural lands"; "assure consistency of state actions and, where appropriate, federal actions, with policies within the coastal area, and with accepted waterfront revitalization programs"; "cooperate and coordinate with other states, the federal government and Canada to attain a consistent policy towards coastal management"; and "encourage and assist local governments in the coastal area to use all their powers that can be applied to achieve these objectives."[450]

The "coastal area" covered by the Act includes "(a) the state's coastal waters, and (b) the adjacent shorelands, including landlocked waters and subterranean waters, to the extent such coastal waters and adjacent lands are strongly influenced by each other . . . ."[451] The definition of "coastal waters" includes the same water bodies listed in the definition of "coastline" in the Shoreowner's Protection Act.[452] The inland boundaries, intended "only to encompass those shorelands, the uses of which have a direct and significant impact on the coastal waters," are established and mapped by the office of the Secretary of State.[453]

The objectives of the Act are to be achieved mainly by local governments through their preparation and implementation of waterfront revitalization programs for the coastal areas within their jurisdictions. Incentives for the preparation, and obtaining the Secretary of State's approval, of local programs are provided in the form of financial assistance and other benefits. Although the Act does not itself grant local governments land use control powers, it is bound to stimulate the use of their existing powers, including zoning, to

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450. Executive Law § 912 (McKinney 1982).

451. Id § 911(1) (McKinney 1982).

452. Id subd 3; and see text accompanying note 418 supra.

453. Id, subd 1, and § 914 (McKinney 1982).

regulate waterfront development within their program areas.[454] In exercising its regulatory powers in an attempt to win approval of its program a local government must satisfy the Secretary of State (and he must find) "that the program incorporates each" of a list of objectives "to an extent commensurate with the particular circumstances of that local government."[455] In describing a full range of activities normally competing for onshore and offshore space, the statute lists, among other items, the "facilitation of appropriate industrial and commercial uses which require or can benefit substantially from a waterfront location, such as but not limited to waterborne transportation facilities and services, and support facilities for commercial fishing and aquaculture."[456]

The requirement that an approved local government waterfront revitalization program incorporate each of a number of specified types of activities, including aquaculture, "to an extent commensurate with the particular circumstances of the local government," highlights, rather than resolves, the problem of competing uses. If a local government were to find, and the Secretary of State were to agree, that aquaculture is just one of a number of competing uses appropriate for a given location, as well for the community as a whole, that might satisfy the statutory requirement of being "commensurate with the particular circumstances," whether or not aquaculture were selected as a permitted use for the location.

However, the statute would appear to strengthen the position of a developer seeking to obtain a zoning classification for his land as a site for aquaculture facilities; and would make it difficult under most circumstances for a municipality with extensive coastal areas along waters congenial to aquaculture to ban aquaculture entirely from its jurisdiction. The landowner or leaseholder applying for zoning approval could point to the statement, in the specific Waterfront Revitalization Guidelines relating to commercial fishing, that Department of State

> regulations have been developed which require that, to be approved, a local waterfront revitalization program must

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454. To obtain state approval and thereby qualify for benefits provided by the Act, a local government must follow guidelines to be prepared by the Secretary of the State, guidelines requiring that the local government identify "the uses, public and private, to be accommodated in the waterfront area." Executive Law § 915(4)b (McKinney 1982). The secretary's guidelines state that in identifying techniques for implementing its proposed program a local government should indicate the means of implementation, including "review procedures, . . . land use controls and other ordinances." Guidelines for Local Waterfront Revitalization Programs, Pt 1, General Guidelines 4(a), found in Appendix B of the New York Coastal Management Program at B-9 (cited hereafter as Waterfront Revitalization Guidelines).

455. Id subd 5.

456. Id (emphasis added).

be commensurate with the following policy:

> Further develop commercial finfish, shellfish and crustacean resources in the coastal area by:
>
> 1. encouraging the construction of new or improvement of existing on-shore commercial fishing facilities;
>
> 2. increasing marketing of the State's seafood products; and
>
> 3. maintaining adequate stocks and expanding aquaculture facilities. Such efforts shall be made in a manner which ensures the protection of such renewable fish resources and considers other activities dependent on them.[457]

The Waterfront Revitalization Guidelines for commercial fishing also state, in part:

> A . . . major opportunity for involvement by local governments in commercial fishery resource development is in the area of aquaculture. Today the market demand for aquaculture products (e.g., clams, oysters, striped bass) far outstrips current production of these high value seafood products.
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> . . . .
>
> Municipal zoning regulations can be used to provide increased utilization of commercial fin and shellfish. Marine commercial zones can be established in areas where such facilities as marinas, commercial docks, and fish processing plants would be appropriate. Such zoning would reduce competition for dock space between sport and commercial fishermen, and hence reduce the access problem for commercial fishing activities.
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> . . . .
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> A municipality's treatment of this policy would be considered adequate if: (1) the community has realistically assessed the potential for commercial

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457. Waterfront Revitalization Guidelines, Pt 2, Specific Guidelines, New York Waterfront Revitalization Program, Appendix B at B-43. The quoted matter is taken from provisions of the regulations setting out policies with which state agency decisions must be consistent. 19 NYCRR § 600.3, 600.5(b)(3) (1982). See text accompanying notes 459-61 infra.

> fisheries development in its area of jurisdiction, (2) identified a practical and meaningful role it could play in promoting commercial fishery development, (3) identified a means of funding this development effort, (4) made adjustment as needed in its zoning code to provide for such activities along its waterfront and (5) prevented incompatible development adjacent to existing on-shore support facilities which might ultimately force the future dislocation of that facility.[458]

One of the benefits of approved waterfront revitalization programs is the requirement of state consistency with local program decisions. The Act instructs the Secretary of State to "examine programs operated by state agencies which may have the potential to affect the policies and purposes of an approved waterfront revitalization program,"[459] including "programs which involve issuance of permits, licenses, certifications and other forms of approval of land use or development, the provision of grants, loans and other funding assistance which leads to or influences land use or development, directly undertaken land use or development and planning activities." Within 60 days after he approves a local program the secretary is required to notify state agencies of their respective identified actions.[460] The "state agency program action so identified shall be undertaken in a manner which is consistent to the maximum extent practicable with the approved waterfront revitalization program."[461]

The granting of an aquaculture lease by the state Commissioner of General Services or Department of Environmental Conservation would not fit squarely into any of the statutory categories of "permits, licenses, certifications and other forms of approval of land use or development," or "directly undertaken land use or development." However, consistency of such leasing with local programs may be compelled indirectly through the requirement that "[a]ctions directly undertaken by state agencies within the coastal area, including grants, loans or other funding assistance, land use and development, or planning, and land transactions shall be consistent with the applicable coastal policies of this

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458. Waterfront Revitalization Guidelines Pt 2, New York Waterfront Revitalization Program, Appendix B at B-44.

459. Executive Law § 916(1)a (McKinney 1982).

460. Id.

461. Id subd 1b. Similarly, section 915(8) of the Act (McKinney 1982), which authorizes the local programs, says, in part: "Subsequent to approval of the local program by the secretary, state agency actions shall be consistent to the maximum extent practicable with the local plan."

article."[462] And section 600.3 of the secretary's regulations requires that the same state activities -- including land transactions -- "be consistent with the applicable coastal policies set forth" in the regulations.[463] In addition, for the purpose of the regulations governing state actions generally, the secretary defines "permit" to include a "permit, lease, license, certificate or other entitlement for use or permission to act that may be granted or issued by a state agency."[464] The granting of a lease is a land transaction. A local program, which must also be consistent with the Act's coastal policies,[465] might favor one or more coastal policies incompatible with aquaculture.

It should be noted, however, that the state consistency provisions of the regulations are not as firm as they would appear from a reading of the provisions quoted above, in view of the "maximum extent practicable" modifier in the governing statute. Section 600.4(3) of the regulations, describing the manner of initial review of state agency actions, states that once it has been determined that a proposed action has satisfied environmental impact assessment requirements,

> where the action is in the coastal area within the boundaries of an approved local waterfront revitalization program area, and the action is one identified by the secretary pursuant to section 916(1)(a) of the Executive Law, a state agency shall . . . file with the secretary a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved local waterfront revitalization program and whenever practicable will advance one or more of such policies. If the action will substantially hinder the achievement of any policy or purpose of the applicable approved local Waterfront Revitalization Program, the state agency shall instead certify that the following three requirements are satisfied: (i) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy or purpose; (ii) the action taken will minimize all adverse effects on the local policy and purpose to the extent practicable; and (iii) the action will result in overriding regional or statewide public benefit. Such certification shall constitute a

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462. Executive Law § 919(1) (McKinney 1982) (emphasis added).

463. 19 NYCRR § 600.3(2) (1982). Section 600.5 of the regulations reiterates the coastal policies enunciated in the statute.

464. Id § 600.2(g) (1982).

465. Executive Law § 915(5) (McKinney 1982).

> determination that the action is consistent to the maximum extent practicable with the approved local Waterfront Revitalization Program as required by Executive Law, Article 42.[466]

The state agency consistency requirement raises some questions. One is answered by the statute itself, in declaring that notwithstanding the consistency mandate "nothing in this article shall be construed to authorize or require the issuance of any permit, license, certification, or other approval or the approval of any grant, loan or other funding assistance which is denied by the state agency having jurisdiction, pursuant to other provisions of law or which is conditioned by such agency pursuant to other provisions of law until such conditions are met."[467] Note that here the words "or other approval," if not construed as being limited by the specifics of the companion consistency provisions of section 916(1)(a), could be interpreted as including the approval of an application for an aquaculture lease. This means that if a local plan were to create a zoning district in which aquaculture facilities are permitted, the consistency requirement would not compel the state agency to grant a lease to every applicant.

Another question takes us back to the discussion of the unsettled common law on the subject of possible zoning immunity of an aquaculture use on underwater land leased from the state. If a court were otherwise inclined to grant immunity on the ground that the lessee is serving a state purpose, would the state consistency mandate in the Waterfront Revitalization and Coastal Resources Act change the result? The immunity would undoubtedly be deemed to have been lifted by the Act; that was the very purpose of the consistency provision.

Conversely, if the statute governing the state leasing for aquaculture expressly subjects the leased property to municipal zoning regulations, would it be qualified by the maximum practical extent modifier of the consistency provision of the Waterfront Revitalization and Coastal Resources Act? Resorting to that Act, could the state agency ignore the zoning restrictions on the basis of a showing it was not feasible to abide by them as a practical matter? We do not find in the Act any evidence of a legislative intent to so alter the provisions of the existing laws subjecting state activities to local land use controls.

However the consistency clause be construed with respect to state grants of leases, it is doubtful that it could be extended to require that grants by Suffolk county of shellish leases in Gardiner's and the Peconic bays be similarly subject to land use controls of a town with an

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466. 19 NYCRR § 600.4(c)(1-3) (1982).

467. Executive Law § 915(8) (1982).

approved waterfront revitalization program.[468] The state ceded all of its rights in these bays to the county, to be used by the county for leasing for shellfish culture.[469] Although it could be argued that the cession was to serve a state purpose, and that conditions for exercise of the county's authority over the bays left some kind of reversionary interest in the state, we doubt that this would qualify Suffolk county as a "state agency" for the purposes of applying the consistency provisions of the Waterfront Revitalization and Coastal Resources Act.[470] When referring to counties or other municipal units that Act uses the term "local government." Had the legislature intended to embrace neighboring, overlapped, or overlapping local governments in the consistency provisions it is reasonable to assume it would have done so explicitly, by ordaining consistency in the actions of "state agencies" and "local governments."

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468. E.g., if the Town of Southold, whose jurisdiction embraces parts of these bays, were to attempt to regulate uses of the underwater lands of the bays.

469. See text accompanying notes 302-04 supra.

470. The Act defines "State agency" as meaning "any department, bureau, commission, board, public authority or other agency of the state, including any public benefit corporation any member of which is appointed by the governor." Executive Law § 911(5) (McKinney 1982).

VI. Pervasive Environmental Impact Assessment Requirements

Federal and state legislation establish mechanisms for the assessment of the environmental impacts of governmental activities, including government approvals of activities of private parties, that apply to the siting of aquaculture operations. It would serve no useful purpose here to summarize and analyze the pertinent statutes, implementing regulations, and procedures. They are lengthy and complicated. We do no more here than spot particular features of New York's environmental impact assessment law with special implications for aquaculture development.

The State Environmental Quality Review Act[471] (SEQRA) requires all agencies, defined as including state and local goverment agencies and public benefit corporations, public authorities or commissions, and other political subdivisions,[472] to prepare or have prepared "an environmental impact statement on any action they propose or approve which may have a significant impact on the environment."[473] Rules and regulations adopted by the Commissioner of Environmental Conservation under SEQRA establish the criteria for determining whether various types of proposed actions may have a significant impact on the environment, hence require the preparation of the statements.[474]

The SEQRA regulations classify "listed" actions that may or may not have a significant effect on the environment, hence may or may not require the preparation of an environmental impact statement. There are two types of listed actions. Type I actions are those "that are more likely to require the preparation of [environmental impact statements] than those not so listed (i.e., unlisted actions)," though the "Type I list is not exhaustive of those actions that an agency may determine have a significant effect on the environment."[475] Type II actions are those "which have been determined not to have a significant effect on the environment," so "do not require environmental impact statements or any other determination or procedure under" these regulations.[476] "Each agency may adopt its own Type II list, provided it finds that each of the actions contained on it: (1) is no less protective of the

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471. Environmental Conservation Law art 8 (McKinney Supp 1983), enacted by 1975 NY Laws ch 612.

472. Id § 8-0105(1-3) (McKinney Supp 1983).

473. Id § 8-0109(2) (McKinney Supp 1983).

474. Id § 8-0113(2) (McKinney Supp 1983). The rules and regulations are found in 6 NYCRR §§ 617.1 et seq.

475. Id § 617.12 (1978).

476. 6 NYCRR § 617.13 (1982).

environment than the" items in the Type II list; and "(2) will in no case have a significant effect on the environment based on the criteria" established in or under regulations.[477]

It is impossible to predict whether the granting of an aquaculture lease by the state or a municipality or the building of a structure housing a hatchery or used for processing or other aquaculture activities would be classified as a Type I action, so as to require an environmental impact statement, without knowing all the circumstances, particularly the facts relating to the scale of the project. It would be a Type I action if a rezoning of 25 or more acres were required and the use were characterized as "industrial or commercial" and were located in an existing "residential or agricultural" zoning district;[478] or if some other kind of zoning change were required for a nonresidential use meeting or exceeding one more "thresholds" specified in the list.[479] Potentially pertinent thresholds include "the physical alteration of 10 acres"; the "use of ground or surface water in excess of 2,000,000 gallons per day"; "a facility with more than 100,000 square feet of gross floor area," in a city, town or village with a population of 150,000 or less, or with more than 240,000 square feet in such municipalities with larger populations; a facility within specified historic buildings or districts; and an action exceeding 25% of any other specified thresholds "occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space."[480] If no thresholds are applicable the action is classified Type I if it "takes place wholly or partially within, or substantially contiguous, to any Critical Environmental Area designated by a local agency pursuant to section

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477. Id; and see 6 NYCRR § 617.13(b)(1,2) (1982).

478. Id § 617.12(b)(2)(i) (1978). See Newton, Aquaculture: Emerging Issues of Law and Policy, 2 NY Sea Grant L and Policy J 46, 51-60 (1978), for a discussion of case law determining whether or not "agriculture" includes "aquaculture" in various contexts; in particular, his summary of an unreported case, Glennon v Mayhill (Sup Ct, Suffolk Co, October 17, 1977), holding that a finfish hatchery was not a permitted use within the meaning of the term "commercial agricultural operation" in the Town of East Hampton zoning ordinance. Whether or not the term "agriculture" as used in the SEQRA regulations would be construed as embracing particular aquaculture activities is open to question. We have noted that in other legislation and regulations relating to coastal land uses specific reference is made to "aquaculture." See text accompanying note 381 supra (Tidal Wetlands Act), and notes 444 and 446 supra (Waterfront Revitalization and Coastal Resources Act). The regulations under the Freshwater Wetlands Act contain separate definitions of "agriculture" and "aquiculture" (sic). 6 NYCRR § 663.2(c)(e) (1980) (see text accompanying note 405 supra).

479. Id subd (b)(3).

480. Id subds (b)(6,9-10).

617.4" of the regulations.[481]

The initial step of obtaining a site for aquaculture would come within the Type I category, requiring an impact statement, if it involved the "acquisition, sale, lease or other transfer of 100 or more contiguous acres of land by a State or local agency."[482] This could conceivably apply to large scale leases of underwater lands for shellfish or seaweed cultivation.

Type II actions, those determined not to have a significant environmental impact, include some that might be pertinent to the siting of an aquaculture project under appropriate circumstances, such as: the "construction, maintenance and repair of [agricultural] farm buildings and structures, and land use changes consistent with generally accepted principles of farming" -- but only if the term "agricultural" were construed to include aquaculture; the "construction or placement of minor structures accessory or appurtenant to existing facilities . . . not changing land use or density"; "inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession"; and "license and permit renewals, where there will be no material change in permit conditions or the scope of permitted activities."[483]

The criteria or "indicators" set out in the regulations for determining "whether a proposed Type I or unlisted action may have a significant effect on the environment" appear to weigh the balance on the side of significant impact when applied to aquaculture projects. They include, among others, (a) "a substantial adverse change in existing air quality, water quality or noise levels"; (b) "a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding or drainage problems"; (c) "the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; or substantial

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481. Id subd 11. Section 617.4(j) authorizes a local agency, upon complying with prescribed procedures, to "designate specific geographic areas within its boundaries as critical areas of environmental concern," if they have "an exceptional or unique character covering one or more of the following: (1) a benefit or threat to the public health or public safety; (2) a natural setting (e.g., fish and wildlife habitat, forest and vegetation, open space and aesthetics); (3) social, cultural, historic, archaeological, recreational or educational purposes; or (4) an inherent ecological, geological or hydrological sensitivity to change which could be adversely affected by any change." (1983)

482. Id § 617.12(b)(4) (1978).

483. Id § 617.13 (1982). See text accompanying note 478 supra, on the question whether "agriculture" might be deemed to embrace "aquaculture."

adverse effects on a threatened or endangered species of animal or plant, or the habitat of such a species"; (d) "the creation of a material conflict with a community's existing plans or goals as officially approved or adopted"; (e) "the impairment of the character or quality of important historical, archeological, architectural or aesthetic resources or of existing community or neighborhood character"; and (f) "a substantial change in the use, or intensity of use, of land or other natural resources or in their capacity to support existing uses."[484]

484. Id § 617.11 (1982).

VII. Statutory Treatment of Siting in Special Situations: Some Analogs

Should law revision be contemplated for clarifying the relationships between the New York state and municipalities in the regulation of siting, the draftsmen can examine a number of different approaches already taken by the New York legislature in other similar contexts.

A. Express Waiver or Grant of Immunity from Municipal Regulations

We have seen statutory provisions expressly subjecting to local land use regulations state lands leased to private parties under particular statutes.[485] Some statutes waive zoning immunity of state agencies so as to defer to municipal land use control, but establish special procedures for applying local restrictions.[486] Others may add locational conditions to those imposed by municipalities.[487]

Very few statutes categorically declare that governmental uses are immune from municipal land use controls. This is understandable. Were the legislature to so provide in a few situations it would be vulnerable

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485. See text accompanying note 284-85 supra (shorter term leases under Public Lands Law § 3[2]), and note 286 supra (longer term leases under Public Lands Law § 3[4-a]). And see similar provisions in the Highway Law § 10(38) (McKinney 1979), companion to Public Lands Law § 3(4-a); Multiple Dwelling Law §§ 172(7), 275, 277, 281(2), 310(2)(c) (McKinney 1974 and 1983 Supp); Public Authorities Law § 553(9)(f) (McKinney 1982); Private Housing Finance Law § 83(5,6) (1976); and Public Housing Law § 123 (1955).

486. See Private Housing Finance Law § 26(5)(a) (McKinney 1976), providing for the submission of a proposed limited-profit housing company project for initial approval by the local planning commission (if any), together with any needed, proposed zoning changes; prescribing voting and hearing requirements for approvals of the planning commission and local legislative body; and stating that the approval itself effects the zoning changes. And for similar procedures see id § 114 (McKinney 1976 and 1983 Supp) (redevelopment company projects), and § 203 (McKinney 1976) (urban redevelopment corporation projects); and Public Housing Law § 155 (McKinney Supp 1983) (public housing authority projects). Cf Highway Law § 10(39) (McKinney Supp 1983), requiring the approval of municipal governing bodies for the placement of parking facilities to be used in conjunction with public transportation systems planned by the Commissioner of Transportation; leaving open the question whether such approval may be given despite the municipality's zoning restrictions.

487. See Environmental Conservation Law §§ 27-1103, 27-1105(f) (McKinney Supp 1983), requiring the obtaining of a certificate of environmental safety and public necessity from the Commissioner of Environmental Conservation for the emplacement of an industrial waste treatment, storage and disposal facility, and setting out the criteria for passing on applications for the certificates, in addition to the requirement that the facility not "be contrary to local zoning or land use regulations."

to the assertion that similar confirmation would be required to grant such immunity in every other situation, calling for extensive revision of state laws. However, express exemption of a state agency from local controls in given situations may be found where the local controls are otherwise explicitly applied to state agency actions. See, for example, section 1266(11) of the Public Authorities Law, providing that no project of the Metropolitan Transportation Authority "to be constructed upon real property theretofore used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior transportation use, nor any acts or activities in connection with such project, shall be subject to the provisions of" the Environmental Conservation Law containing SEQRA, the Air Pollution Control Act, the Freshwater Wetlands Act, or the Tidal Wetlands Act.[488] Explicit provisions denying local regulatory power have also been necessary to cover development activities normally subject to local jurisdiction, as in the case of a temporary suspension of local laws, ordinances or regulations that may hinder state emergency disaster preparedness actions.[489]

Express or implied confirmation of partial immunity from local controls may also be found in statutes granting municipalities partial control over state agency projects. Examples will appear in the ensuing discussion. The denial of local jurisdiction may also be articulated where the activity, though operated under a state permit, would otherwise be considered subject to local regulation, as in the placement of certain oil or gas drilling or storage facilities.[490]

B. Authority To Override Local Regulations

1. State Agency Disregard of Unreasonable Municipal Restrictions

One technique permits a state agency to override a local regulation based on a standard presumably less restrictive than that normally

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488. McKinney 1982.

489. Executive Law §§24(1) (McKinney 1982). But see id §§ 23(7)(c) and 28-a(3) (McKinney 1982), providing that local recovery and redevelopment plans, prepared for areas in which a state disaster emergency has been declared, shall include proposed new or amended zoning and other types of local ordinances.

490. Section 23-0303(2) of the Environmental Conservation Law, in the article relating to state regulated mineral resource extraction, says that the provisions of the article "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local governments under the real property tax law." McKinney Supp 1983. The supersession has been interpreted as including local zoning regulations. Matter of Envirogas, Inc. v Town of Kiantone, 112 Misc2d 432, 447 NYS2d 221 (Sup Ct, Erie Co, 1982).

applied to private activities. For example, the statute governing the projects of the New York State Urban Development Corporation provides that, after "consultation with local officials," the corporation shall comply with local building codes, "provided, however, that when, in the discretion of the corporation, such compliance is not feasible or practicable, the corporation and any subsidiary thereof shall comply with the requirements of the state building construction code."[491] The statute requiring the issuance by the Public Service Commission of a certificate of environmental compatibility and public need for siting the construction of a major utility transmission facility is more precise in stating the basis for the override. The decision to approve a site must contain a finding and determination "that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding on the commission, except that the commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality."[492] Similar provisions are found in the statute requiring the obtaining of a similar certificate for the construction of a major steam electric generating facility.[493]

Though framed in converse fashion in provisions confirming local regulatory power, the result is the same under the section of the Champlain Basin Compact stating that nothing in the compact or in regulations issued under it "shall be interpreted to supersede actions of a park district created under the laws" of the concerned state unless the designated compact agency "specifically states such effect is necessary for the adequate protection of the amenities and values of the

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491. Unconsolidated Laws § 6266(3) (McKinney 1979). Similar provisions are found in Private Housing Finance Law § 83(6) (McKinney 1976), relating to limited dividend housing company projects.

492. Public Service Law § 126(1)(f) (McKinney Supp 1983).

493. Id § 146(2)(d) (McKinney Supp 1983). The certificates are granted by the New York State Board on Electric Generation Siting and the Environment, in the Department of Public Service. It should be noted that under both statutes any municipality in which part of the facility is to be located, and individual residents of such municipality, may become parties to the certification proceeding. Public Service Law §§ 124, 144 (McKinney Supp 1983). The Power Authority of the State of New York is subject to these siting provisions, despite the fact that the provisions of its enabling legislation are to be construed as superseding the provisions of any other conflicting law. Public Authorities Law § 1014 (McKinney 1982).

Lake Champlain Park."[494]

2. State Agency Override of Local Objections by an Extraordinary Majority Vote

Express reaffirmation of state immunity from local ordinances is found in the statute defining the powers of the New York State Urban Development Corporation, possibly because the statute also contains a limited recognition of local prerogatives in the siting of the corporation's projects.[495] Although the corporation is required to give consideration "to local and regional goals and policies as expressed in urban renewal, community renewal and local comprehensive land use plans and regional plans," and to seek municipal approval of its project plans, the corporation may override municipal disapproval by a 2/3 vote of the corporation's directors.[496] Also, except for conceding the power of local inspection for compliance with local requirements for operation and maintenance to protect the welfare of occupants of its projects, the statute declares that no municipality may require the corporation, any of its subsidiaries or lessees or successors in interest to obtain any "authority, approval, permit, certificate or certificate of occupancy from such municipality as a condition of owning, using, maintaining, operating or occupying any project" of the corporation or of any of its subsidiaries.[497]

3. Requirement of State Agency Approval of Specified Types of Development Projects

A number of statutes impliedly allow a state agency to override municipal decisions by requiring state agency approval of particular types of land development projects, or of actions directly or indirectly relating to land use. Thus, with certain stated exceptions, no projects affecting water resources of the Susquehanna River Basin "shall be undertaken by any person, governmental authority or other entity prior to submission to and approval by the [Susquehanna River Basin Commission] or appropriate agencies," and whether or not a local approval agency exists, the commission's prior approval is required for particular types of actions (such as projects involving water

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494. Environmental Conservation Law § 21-1101 art 8, § 8.5 (McKinney 1973).

495. Unconsolidated Laws § 6266 (McKinney 1979).

496. Id subds 1 and 2. See Floyd v New York State Urban Development Corporation, 33 NY2d 1, 347 NYS2d 161, 300 NE2d 704 (1973), upholding the statute upon a challenge based on home rule arguments; and People v Miceli, 73 Misc2d 133, 138, 341 NYS2d 262, 267 (City Ct, New Rochelle, 1973), stating that the corporation, "as a State agency derives its 'override' power from its constitutional power to ignore the restraints of local regulation and not from the Urban development Corporation Act or any other statute."

497. Id subd 3.

diversion).[498] This provision does not directly bar a local government from regulating the state agency's own projects. However, the device is noted here because, conceivably, it could be used to give the state agency a veto power over other municipally approved activities that might be detrimental to the state agency's projects.

4. State Administrative Resolution of Siting Conflicts

The reactions of municipalities to New York court decisions removing state licensed residential care facilities from the reach of local zoning ordinances,[499] and possibly the dissatisfaction of some of the judges with the inflexible doctrines underlying those decisions,[500] led the state legislature in 1978 to provide a special procedure, in section 41.34 of the Mental Hygiene Law, for selecting the sites of certain types of "community residential facilities."[501] Although the legislation was enacted to "encourage a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community, rather than legal antagonism,"[502] we include it as an example of a state override mechanism because a state official makes the final administrative determination in the event of a breakdown of negotiations over the siting.

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498. Environmental Conservation Law § 21-1301 art 3, § 3.10 (McKinney 1973). And see id § 21-0701 art 10, § 10.3 (McKinney 1973) (Delaware River Basin Compact).

499. See text accompanying notes 345-46 supra.

500. See the excerpt from Judge Jones' opinion in People v Renaissance Project, Inc. in the text accompanying note 350 supra. In his dissent in Group House of Port Washington, Inc. v Board of Zoning Appeals of the Town of North Hempstead, 45 NY2d 266, 277, 408 NYS2d 377, 383, 380 NE2d 207, 212 (1978), mentioned in the text accompanying notes 345-46 supra, Chief Judge Breitel of the Court of Appeals acknowledged the value to the people of the state of the proposed group home, but said that the "remedy, if there should be one, would be State legislation mandating acceptance of the facilities but including, undoubtedly, controls and restrictions to prevent the subversion of equally valuable single-family communities."

501. 1978 NY Laws ch 468. The new section applies to a "community residential facility for the disabled," defined as a "supportive living facility with four to fourteen residents or a supervised living facility subject to licensure by the office of mental health or the office of mental retardation and developmental disabilities which provides a residence for up to fourteen mentally disabled persons, including residential treatment facilities for children and youth." Mental Hygiene Law § 41.34(a)(1) (McKinney Supp 1982).

502. Approval Message of the Governor, McKinney's 1978 Session Laws at 1821.

An agency planning to sponsor a community residential facility is required to give notice to the municipality, containing prescribed types of information.[503] The municipality has 40 days to approve the proposed site or suggest alternative sites.[504] If the agency and municipality are unable to agree on a site, either party may request a hearing by the commissioner of the concerned state licensing department.[505] In reviewing objections to the proposed site the commissioner considers "the need for such facilities in the municipality or in the area in proximity to the site selected," as well as "the existing concentration of such facilities and other similar facilities licensed by other state agencies in the municipality or in the area in proximity to the site selected."[506] The commissioner may sustain the objection to a proposed site "if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility."[507] The decision of the commissioner is subject to judicial review in an Article 78 proceeding.[508] A court may overrule a commissioner's decision only if it finds that the "decision had no rational basis and as a result was arbitrary."[509]

C. State Imposition of Land Use Controls

1. Exclusive State Regulation

The Tidal Wetlands Act, noted above, impliedly vests exclusive jurisdiction in the Commissioner of Environmental Conservation to adopt and enforce land use regulations governing the use of mapped tidal wetlands.[510] The statute expressly declares that "[n]o permits may be granted by any local body, nor shall any construction or activity take

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503. Mental Hygiene Law § 41.34(c) (McKinney Supp 1983).

504. Id.

505. Id.

506. Id.

507. Id.

508. Id subd d.

509. Browe v Champagne, 97 Misc2d 1058, 1062, 413 NYS2d 103, 106 (Sup Ct, Rensselaer Co, 1979).

510. Environmental Conservation Law § 25-0302(1) (McKinney Supp 1983). See text accompanying notes 391-94 supra.

place at variance with these regulations."[511] It could be argued that this provision bars inconsistent local decisions allowing any activity within wetlands subject to the commissioner's jurisdiction, but does not prevent a local government from prohibiting an activity permitted by the commissioner under the Act. The argument would probably fail on the basis of standard state preemption doctrine prohibiting inconsistent regulation by local governments.[512]

2. State Regulation upon Default by Local Governments

Examples of this approach were seen in the discussion of the Coastal Erosion Hazard Areas Act, Freshwater Wetlands Act, and flood hazard area law. Local governments are given the option of adopting and enforcing their own controls, but in the event they fail to do so, or default in implementing their controls, the Commissioner of Environmental Conservation may or must assume the responsibility.

3. Limited Local Concurrent Jurisdiction

Using this technique, the state lays down minimum land use standards to be followed in the siting of particular facilities, but permits local governments to adopt and apply more restrictive supplemental standards. One example is the grant of power to the Department of Environmental Conservation to promulgate regulations governing the operation of solid waste management facilities, and the prohibition against site preparation and construction or operation of a new solid waste management facility without a permit granted by the department.[513] The statute states that the recipient of a permit is not relieved of the responsibility of constructing or operating the facility "in full compliance with any applicable laws, rules or regulations."[514] The statute further provides that local laws, ordinances or regulations of a county, city, town or village shall not be superseded by the state law and state regulations; however, it stipulates that the local measures must be "consistent" with the state law and regulations, and explains that any such local laws, ordinances or regulations "which comply with at least the minimum applicable requirement set forth in any rule or regulation promulgated pursuant to this title shall be deemed consistent with this title or with any such rule or regulation."[515]

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511. Id.

512. See text accompanying notes 203 et seq supra.

513. Environmental Conservation Law §§ 27-0701, 27-0707 (McKinney Supp 1983).

514. Id §27-0707(3) (McKinney Supp 1983).

515. Id § 27-0711 (McKinney Supp 1983). And see Monroe-Livingston Sanitary Landfill, Inc. v Town of Caledonia, 51 NY2d 679, 435 NYS2d 966, 417 NE2d 78 (1980).

Other examples of statutory grants of authority to state agencies to promulgate and administer state land use regulations or standards superseding inconsistent (but not more restrictive) local regulations are found in statutes relating to various interstate water pollution control or water resource development compacts.[516] The result is about the same where standards are established in the state law or in regulations adopted under a state law and the law contains a provision declaring that it shall prevail over any other inconsistent laws.[517] Invoking common law inconsistency doctrine the courts would probably hold that more restrictive local provisions are not inconsistent with the state regulations.

A slight variation of the technique is found in the provisions of the Multiple Dwelling Law establishing standards for motor vehicle storage in or upon the premises of multiple dwellings. Section 3(4)(a) of that law states that "[a]ny city, town or village may make local laws, ordinances, resolutions or regulations not less restrictive than those provided in this chapter and may provide for their enforcement by legal or equitable actions or proceedings, and prescribe the penalties, sanctions and remedies for violations thereof."[518]

The Adirondack Park Agency Act contains an elaborate formula establishing state primacy in planning for and regulating land use in the Adirondack Park and defining the limited regulatory role of affected local governments.[519] The Adirondack Park Agency, comprised mostly of

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516. E.g., Environmental Conservation Law § 21-0701 art 6, § 6.2 (McKinney 1973), authorizing the Delaware Basin River Commission to adopt standards for land use in flood prone areas, which "standards shall not be deemed to impair or restrict the power of the signatory parties or their political subdivisions to adopt zoning and other land use regulations not inconsistent therewith."

517. See, e.g., Environmental Conservation Law § 21-0723 (McKinney 1973) (Delaware River Basin Compact); and id § 21-0913 (McKinney 1973) (Great Lakes Basin Compact). Typically, section 2045-x of the Public Authorities Law (McKinney Supp 1983) states: "In so far as the provisions of this title [creating the Onondaga County Resource Recovery Agency] are inconsistent with the provisions of any other act, general or special, or of the county charter or any local law, ordinance or resolution of the county or any other municipality, the provisions of this title shall be controlling."

518. McKinney Supp 1983. However, the statute permits the application of inconsistent local laws of the City of New York (the sole member of a class described as "a city of four hundred thousand or more persons") providing for penalties, sanctions and remedies. Id. And see section 60(3) of the same law, regulating motor vehicle storage in or upon the premises of multiple dwellings, authorizing certain city agencies to make supplementary rules more restrictive than the requirements of the section. McKinney 1974.

519. Executive Law art 27, §§ 800 et seq (McKinney 1982). The Act withstood a constitutional home rule attack in Wambat Realty Corp. v State of New York, 41 NY2d 490, 393 NYS2d 949, 362 NE2d 581 (1977).

state officials serving ex officio and other members appointed by the Governor, administers the Adirondack Park Land Use and Development Plan adopted by the state legislature.[520] The agency may itself amend the plan in some respects, and recommend other changes for legislative approval in other cases; review and approve specified types of development projects; and adopt and enforce interim development controls.[521] Local governments in the area may submit local land use programs, including regulatory provisions, to the Adirondack Park Agency for its review and approval; and, if approved may themselves administer the programs.[522] The statute prescribes criteria for the agency's determinations, including the requirement that the local programs be "in furtherance and supportive of the [state's] land use and development plan."[523] The Adirondack Park Agency is authorized to participate in the local review of specified types of proposed regional projects permitted under approved local programs;[524] and to undertake independent review of other specified types of regional projects.[525]

The statute is not to "be construed to prohibit any local government from adopting and enforcing land use and development controls for lands, other than those owned by the state."[526]

Special provisions authorize the Adirondack Park Agency to review any new land use or development of state agencies (with some exceptions), whether or not subject to an approved local program.[527]

D. Limited Veto by a Higher Level Agency

In order to bring "pertinent inter-community and county-wide considerations" into land use control decisions of cities, towns and

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520. Id §§ 803-05, 809-10, and 815 (McKinney 1982).

521. Id §§ 805, 809, 815 (McKinney 1982).

522. Id §§ 807(1), 808 (McKinney 1982).

523. Id § 807(2) (McKinney 1982).

524. Id § 808 (McKinney 1982).

525. Id § 809 (McKinney 1982).

526. Id § 819(1) (McKinney 1982).

527. Id § 814 (McKinney 1982). The exceptions are uses or developments of the Department of Environmental Conservation pursuant to its master plan for management of state lands.

villages, "as an aid in coordinating" them, the General Municipal Law provides a system of referral for their review by a county, regional or metropolitan planning body.[528] The referral is to be made prior to the local government taking final action approving or granting a zoning change, special permit or variance, or a subdivision approval, with respect to real property located within 500 feet from the "boundary of any city, village, or town, or from the boundary of any existing or proposed county or state park or other recreation area, or from the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway, or from the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines, or from the existing or proposed boundary of any county or state owned land on which a public building or institution is situated."[529]

Within 30 days from the receipt of a full statement of the referred matter the county planning agency (or if there is none, a regional or metropolitan planning agency) "shall report its recommendations thereon to the referring municipal agency, accompanied by a full statement of the reasons for the recommendation."[530] If the "planning agency disapproves the proposal, or recommends modification thereof, the municipal agency having jurisdiction shall not act contrary to such disapproval or recommendation except by a vote of a majority plus one of all the members thereof and after the adoption of a resolution fully setting forth the reasons for such contrary action."[531]

In passing on the referred decision the planning agency is told to consider the

> compatibility of varous land uses with one another; traffic generating characteristics of various land uses in relation to the effect of such traffic on the other land uses and to the adequacy of existing and proposed thoroughfare facilities; impact of proposed land uses on existing and proposed county or state institutional or other uses; protection of community character as regards predominant land uses, population density, and relation between residential and nonresidential areas; community appearance; drainage; community facilities; official development policies, municipal and county, as may be expressed through comprehensive plans, capital programs,

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528. 239-l (McKinney 1974).

529. Id §§239-m, 239-n (McKinney 1974).

530. Id.

531. Id.

> or regulatory measures; and such other matters as may relate to the public convenience, to governmental efficiency, and to the achieving and maintaining of a satisfactory community environment.[532]

By following prescribed referendum requirements a county may convert the referral device to an absolute veto, one not subject to override by an extraordinary majority vote of the referring body.[533]

E. Cooperative and Coordinative Techniques

1. Consideration of Local Regulations

A number of statutes assuming or expressly confirming state immunity from local land use controls defer to local prerogatives only to the point of requiring the state agencies to consider local regulations in siting their projects. Thus, in selecting a site for the construction of one of its projects, the New York Environmental Facilities Corporation is told to "take into consideration the character of the area of any proposed location and the zoning regulations, if any, applicable to such area."[534] The court in City of Rochester, New York v Town of Rush held that "[t]his requirement is not equivalent to a direction that the [New York Environmental Facilities Corporation] either comply with such regulations or be subject thereto."[535]

Similar provisions are found in laws governing projects of the Long Island Job Development Authority;[536] the Onondaga County and Dutchess County Resource Recovery Agencies;[537] counties, in general, in providing solid waste disposal facilities;[538] and various industrial

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532. Id § 239-l.

533. See Matter of Smithtown v Howell, 31 NY2d 365, 339 NYS2d 949, 292 NE2d 10 (1972), holding valid the provisions of the Suffolk County Charter effecting the change. (See text accompanying note 197 supra.)

534. Public Authorities Law § 1285(6) (McKinney 1982).

535. 67 Misc2d 328, 330, 324 NYS2d 201, 204 (Sup Ct, Monroe Co, 1971).

536. Public Authorities Law § 1840-d(7) (McKinney 1981).

537. Id § 2045-e(3) (Onondaga), and § 2047-e(3) (Dutchess) (McKinney Supp 1983).

538. County Law §226-b(1) (McKinney Supp 1983).

development agencies.[539]

2. Consultation

The mandate to one government agency to consult with others in planning its development projects or otherwise producing spillover effects on other jurisdictions is used frequently in both federal and New York state legislation. An example of such federal legislation is found in the Fish and Wildlife Coordination Act of 1934, which is intended to encourage cooperation between the Secretary of Interior and other federal, state and public or private agencies and organizations in reconciling the goal of wildlife resource conservation with that of expansion of the national economy.[540] The Act requires that

> whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any agency under Federal permit or license, such department or agency shall first consult with the United States Fish and Wildlife Service, Department of Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.[541]

The requirement goes beyond the mere act of consultation. The statute provides that "[i]n furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State," based on pertinent surveys of the two officials, "shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction

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539. See, e.g., General Municipal Law § 925-b (McKinney Supp 1983) (Town of Carmel Industrial Development Agency; § 890-a (McKinney 1974) (City of Dunkirk Industrial Development Agency); and § 890-b (McKinney Supp 1983) (County of Cattaraugus Industrial Development Agency). The standard provision in these statutes requires the agency to "take into consideration the local zoning and planning regulations as well as the regional and local comprehensive land use plans."

540. 16 USC § 661 (1977). Similar provisions are found in the Migratory Bird Act, 16 USC § 701 et seq (1982).

541. Id § 662(a) (1977).

of such projects when such reports are presented to the Congress or to" any agency empowered to authorize the construction of water-resource development projects.[542] The regulations of the United States Army Corps of Engineers, the federal agency normally responsible for reviewing, and granting permits allowing, projects in navigable waters, reiterate these requirements, and in addition provide that the Corps "will give great weight to [the] views [of the wildlife conservation officials] in evaluating the application."[543] The Corps regulations give the recommendations of the consulted officials further weight in stating that the "applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this result."[544]

In a case rejecting a challenge to a Corps permit for the construction of a steel plant on the shores of Lake Erie, a federal court ruled that "[t]here is no requirement that the Corps follow the advice of the State or Federal agencies or adopt their positions."[545] The court was satisfied that "[r]epresentatives of federal and state fish and wildlife organizations were consulted early in the review process and contacts were maintained throughout the permitting process;" the fact one of the consulted agencies, the Pennsylvania Fish and Game Commission, opposed the granting of the permit did "not mean that the Corps did not give 'full consideration' or 'great weight' to the views of that agency. It only shows that they gave greater weight to the views of the majority of the agencies and experts which studied the effects the plant would have on wildlife."[546] We surmise that even if the majority of the conservation agencies had opposed the permit, the Corps might nevertheless have been upheld in granting it unless it were shown that the Corps had arbitrarily ignored the majority's position.

A court might infer from a consultation requirement a right of the consulted agencies to make their own recommendations regarding the proposed project, and an obligation on the part of the project sponsor to give consideration to the recommendations. These incidental obligations are expressed in provisions of some New York statutes effectuating interstate compacts. For example, article 14, section 14.1, of the Susquehanna River Basin Compact provides that prior to adopting or amending its comprehensive plan for the development and use of water resources in the basin, the Susquehanna River Basin Commission

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542. Id § 662(b) (1982).

543. 33 CFR § 320.4(c) (1982).

544. Id.

545. Lake Erie Alliance for the Protection of the Coastal Corridor v US Army Corps of Engineers, 526 F Supp 1063, 1081 (WD Pa 1981), aff'd, 707 F2d 1392 (3d Cir 1983).

546. Id.

"shall consult with water users and interested public bodies and public utilities and shall consider and give due regard to the findings and recommendations of the various agencies of the signatory parties, their political subdivisions, and interested groups."[547]

A reverse consultation provision, requiring development agencies to consult with the overarching interstate unit, is found in the Delaware River Basin Compact.[548]

3. The Mandate To Cooperate or Coordinate

The legislature frequently directs the state agency, the lower level agencies, or both to cooperate with each other or coordinate their efforts to reconcile their differing positions regarding the siting of proposed state agency projects. Typically, the Delaware River Basin Compact provides that the Delaware River Basin Commission "shall cooperate with the appropriate agencies of the signatory parties and with other public and private agencies in the planning and effectuation of a coordinated program of [watershed management] facilities and projects authorized by" the compact.[549] Some statutes prescribe one or more methods for achieving coordination; e.g., pursuant to the statute governing the activities under or of the Tri-State Compact and Interstate Sanitation Commission, by requiring all "state and municipal departments, commissions, boards and bodies having to do with the waters of the state [to] cooperate with the commission and [to] furnish to the commission such information as the commission shall request, touching

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547. Environmental Conservation Law § 21-1301 art 14, § 14.1 (McKinney 1973). For similar provisions, see also id § 21-1011 art 6, § 6.3 (McKinney 1973) (Champlain Basin Compact); and id § 21-0701 art 13, § 13.1 (McKinney 1973) (Delaware River Basin Compact). Cf provisions in similar compacts for "consultation with water users and interested public bodies" prior to adopting plans for water development, omitting recommending and consideration provisions, in id § 21-0701 art 3, § 3.2 (McKinney 1973) (Delaware River Basin Compact); and id § 21-1301 art 3, §3.3 (Susquehanna River Basin Compact) (McKinney 1973); and in a similar provision substituting "advise with" for "consult" in id § 21-0515 (McKinney 1973), in connection with the adoption of a general plan by the Tri-State Compact and Interstate Sanitation Commission.

548. Environmental Conservation Law § 21-0701 art 11, § 11.2 (McKinney 1973): "The planning of all projects related to powers delegated to the [Delaware River Basin Commission] by this compact shall be undertaken in consultation with the commission."

549. Environmental Conservation Law § 21-0701 art 7, § 7.4 (McKinney 1973).

the pollution or the elimination thereof, of the waters of the district."[550]

The statutory command to coordinate may be specific in directing the state agency to take a lead role in the process and in requiring it to undertake specified activities in carrying out that role. Thus the Champlain Basin Compact states that the Interstate Commission on the Lake Champlain Basin "shall act as a general forum for the problems of the region . . . , and to that end shall encourage and implement channels of communication and coordination among those departments and agencies of the signatory parties and their subdivisions as have significant interest in the subject matters of the Commission's activities and make such recommendations to those parties, and those departments, agencies, and subdivisions as may be desirable for the welfare and orderly development of the region."[551] In addition, and to the same end, the commission shall sponsor or encourage the holding of conferences of concerned local governments, and "promote mutual aid and multilateral arrangements between the signatory parties and their agencies and local governments and their agencies and encourage interlocal legislation and agreements," and sponsor or encourage the publication of information bulletins;[552] and may engage in other specified types of activities, such as the establishing of advisory committees, and assisting in cooperative planning with federal agencies.[553]

The provision for making recommendations to the lower level agencies, such as the one quoted above, is a familiar one. For example, the Interstate Commission on the Lake Champlain Basin, "acting through its Valley Council may recommend standards as guides for planning, zoning, and other action which will promote balanced development."[554]

The increasing use of statutory provisions encouraging cooperative efforts reflects the recognition that many functions and powers are

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550. Environmental Conservation Law § 21-0701 art 7, § 7.4 (McKinney 1973).
550. Id § 21-0505 (McKinney 1973). Compare the provisions governing the administration of the state's flood plain management program, stating that the Commissioner of Environmental Conservation "shall cooperate with other public and private agencies having flood plain management programs" and "shall coordinate the development, dissemination and use of any information on floods and flood hazards that may be available." Id § 36-0113 (McKinney Supp 1983). And see the specification of activities the Delaware River Basin Commission may engage in to aid in intergovernmental coordination, in id § 21-0701 art 3, § 3.9 (McKinney 1973).

551. Id § 21-1101 art 5, § 5.1 (McKinney 1973).

552. Id subd 5.3.

553. Id subd 5.4.

554. Id § 21-1101, art 7, § 7.2 (McKinney 1973).

shared by, rather than divided among, different government units. The "either-or" formula has given way to an invitation to cooperate and negotiate intergovernmental differences. This is exemplified, in perhaps its most highly developed form to date, in a statute of particular relevance to the issues at hand, New York's Waterfront Revitalization and Coastal Resources Act. Section 915(1), directed to local governments in connection with the preparation of their programs, provides:

> A local government or two or more local governments acting jointly which intends to submit a waterfront revitalization program for the purposes of this article is strongly encouraged to consult, during its preparation, with other entities that may be affected by its program, including local governments, county and regional agencies, appropriate port authorities, community based groups and state and federal agencies. On request by the local government, the secretary [of State] shall take appropriate action to facilitate such consultation.[555]

This exhortation is aimed at conflict prevention. The statute goes on, however, to give the concerned officials specific instructions aimed at conflict resolution. Section 915(6) states that before the Secretary of State approves a local waterfront revitalization plan or an amendment to one, he "shall consult with potentially affected state and federal agencies," and may not approve the program if, upon such consultation, he finds "that there is a conflict with any state or federal policies."[556] If such a conflict develops "at the request of the local government or the state or federal agency affected, the secretary shall attempt to reconcile and resolve the differences between the submitted program and such policies and shall meet with the local government and involved state and federal agencies to this end."[557] If at the later stage of implementation of an approved local program, a local government identifies "potential conflicts" with state agencies, it is required to "so notify the secretary," who "will confer with the affected state agency and the local government to modify the proposed action to be consistent with the local plan."[558]

Ideally, the use of these mechanisms of conflict avoidance, negotiation of differences, and intervention of a high state official to help break impasses should go a long way to resolve siting problems of aquaculturists in areas subject to waterfront revitalization programs. But whether, or to what extent, the ideal is realized will depend on the

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555. Executive Law § 915(1) (McKinney 1982).

556. Id.

557. Id subd 7.

558. Id subd 9.

position given to the development of aquaculture in such areas at the plan preparation and plan approval stages; and on the Secretary of State's attitude towards aquaculture both in those formative stages and in his participation in the review of particular development proposals in the implementation stage.

F. Agricultural Districts

Individual landowners or the state Commissioner of Agriculture and Markets may initiate the creation of agricultural districts in order to encourage the continued farming of land highly suitable for agricultural production."[559] The owner or owners of at least 500 acres of land in a proposed district may initiate the process.[560] Modifications may be recommended by affected municipalities, the county planning board, a county agricultural districting advisory committee and owners of at least 10% of the area of the proposed district.[561] Following his review of the proposal, based in part on findings by the Commissioner of Environmental Conservation and Secretary of State that the proposal is consistent with certain state plans, the Commissioner of Agricultural and Markets may certify its feasibility and refer the matter back to the county legislature for its approval.[562]

The Commissioner of Agriculture and Markets may himself initiate the creation of an agriculture district covering at least 2,000 acres of "predominantly unique and irreplaceable agricultural land."[563] The procedures he must follow include consultations with and clearances by various state officials, and consultation and cooperation "with local elected officials, planning bodies, agriculture and agribusiness interests, community leaders, and other interested groups."[564] In the process the commissioner is required to "give primary consideration to local needs and desires, including local zoning and planning regulations as well as regional and local comprehensive land use plans."[565]

The creation of an agriculture district results in a reduced real property tax assessment of the affected agricultural lands, the

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559. Agriculture and Markets Law §§ 301, 303 (McKinney Supp 1983).

560. Id § 303.

561. Id.

562. Id.

563. § 304(1) (McKinney Supp 1983).

564. Id subds 1, 2, 4.

principal inducement for landowner initiative.[566] Another benefit to the farmers in these districts is a measure of relief from local land use restrictions or other local regulatory measures. Section 305(f) of the Agriculture and Markets Law provides: "No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety."[567] The net effect would be to constrain municipalities from imposing restrictions on farming to achieve purely aesthetic objectives.

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565. Id subd 2.

566. § 305 (McKinney Supp 1983).

567. Id.

VIII. Summary of Issues

The principal issues in the regulation of aquaculture siting in New York pose questions whether existing state laws governing the protection of navigation need to be altered to support an aggressive state policy of promoting aquaculture, in view of (a) uncertainties regarding the application and scope of the exemption of tidewaters of Nassau and Suffolk counties from state control under the Navigation Law; (b) the fact that various regulations of activities in state waters generally have been aimed at traditional water uses possibly inhibiting various forms of aquaculture by accident rather than by design; (c) the lack of clear legislative delineation of state and local spheres of control over shellfishing or other types of aquaculture in various waters (in addition to the problems derived from the tidewaters exception); and (d) a lack of clear judicial or legislative enunciation of the extent, if any, of municipal zoning authority over aquaculture operations in state waters or waters of the Gardiner's and Peconic bays ceded to Suffolk county.

A. The Tidewaters Exception in the Navigation Law

The tidewaters of Nassau and Suffolk counties are not included in the "navigable waters" subject to state regulation under various provisions of the Navigation Law. Although the term "tidewaters" is generally construed as meaning those waters subject to the ebb and flow of the tide of seawaters, the meaning of the term as used in the Navigation Law is not always clear. For the general purposes of separating the state from Nassau and Suffolk county regulatory jurisdiction the "tidewaters" test may be as workable as any other. However, for particular purposes, such as for the purpose of marking out authority to regulate aquaculture siting, a more precise and more easily discerned jurisdictional boundary line might be drawn.

In any case we suggest that the "tidewaters" exception in the Navigation Law be re-examined in the light of policies of the state towards the promotion of aquaculture. The history of statutory changes leading to the existing tidewaters formulation indicates that the central issue before the legislature has been whether the state or local governments should regulate boating in navigable waters. An allocation of powers for regulating boating may or may not be appropriate for the regulation (and, as a corollary) the development of aquaculture. The state might want to retain a greater or lesser degree of control over aquaculture than over the operation of small motorboats.

If the existing tidewaters exception is retained, ambiguities in its applicability in particular situations (e.g., as applied to the building of docks or placement of fill or excavation), stemming from cross-referencing to various provisions of the Environmental Conservation Law, should be cleared up.

The revision of the Navigation Law to serve the cause of aquaculture promotion might take different forms if incidental to the

establishing of a new, separate system for siting aquaculture facilities cutting across a number of statutes.

B. Restrictions on Construction, Excavation, Impoundment, Fill, or Operation of Vessels in Navigable Waters

Various provisions of the Navigation Law and Environmental Conservation Law affecting activities in waters of the state potentially detrimental to navigation or water quality need to be reconciled. They pose problems of interpretation for persons proposing traditional types of improvements, such as the construction of docks, and even more difficult problems for those contemplating aquaculture ventures.

The existing state restraints on the use of state waters have not been directed to the building or placement of aquaculture facilities, except in connection with the regulation of various shellfishing activities. This poses special problems of applying to aquaculture various statutory provisions relating to types of structures or floating objects described in general terms.

A more fundamental issue, however, is whether some of these laws, aimed at curbing abuses from traditional water located activities, should apply at all, or at least should be modified in their application, to aquaculture.

C. The Allocation of These Regulatory Powers Between the State and Local Governments

Some of the same problems are raised in the delegations of the regulatory authority to local governments. Overlaid on these problems are (1) the technical one of measuring the extent of local authority in given situations, in view of ambiguities in the applicable statutes on the subject, or uncertain application of common law state preemption doctrines; and (2) the policy issue -- to what extent should local governments be authorized to regulate various activities relating to aquaculture siting. The state legislature has formulated and from time to time revised policies for marking out state and municipal spheres of interest in the management of the shellfishing industry. Those lines are not always clearly drawn, as for example between the authority of state agencies and the authority of Suffolk county and one or more of its towns in controlling shellfishing in Gardiner's and the Peconic bays. In any case, the issues remain, whether century old formulas relating to shellfish cultivation are relevant to today's shellfish industry, and even if they are, whether the same jurisdictional lines should be drawn in respect of finfish aquaculture.

D. Aquaculture and Municipal Zoning

There is very little New York case law on the question whether underwater or shoreland owned by the state or a municipality, being used

in a private aquaculture operation under a lease, easement or license, is subject to zoning regulations. And that law has not produced definitive, easily understood rules. To some extent the courts have clouded the picture by confusing the issue of local zoning power with the Nassau and Suffolk counties tidewaters exemption or with the factor of town ownership of underwater lands based on colonial patents. Even where those complicating factors are not present, the New York courts in enunciating general principles pertinent to the aquaculture issue are apt to invoke ritualistic distinctions or concepts, such as the governmental-proprietary distinction, or superior sovereign test, subject to varying interpretations at best, and at worst having little or no relevance to the underlying policy issues.

In addition, the courts and commentators sometimes fail to relate their analyses of the issue to distinctions between direct governmental uses of land, the activities of private lessees of government land, and the performance by private parties of public benefit functions on their own lands; and on other occasions fail to recognize concepts common to the different situations.

In respect of several types of governmental or governmentally sponsored activities the state legislature has expressly declared itself on the question of susceptibility to local zoning regulations. It has done so by subjecting to local controls the use of some types of interests in state lands leased or granted to individuals under the Public Lands Law. However, particularly as they may be applied to aquaculture, these provisions leave gaps, or are ambiguous: Specific legislative treatment of the zoning immunity issue with respect to aquaculture uses would appear to be a preferred solution to the problem. If such legislation were contemplated, some ideas might be stimulated by an examination of techniques used by the New York legislature in analogous situations. Some of these techniques are mentioned in part VII of this report.

IX. Recommendations

1. We do not favor leaving zoning law in its present uncertain state, subjecting aquaculturists to potential litigation costs, the vagaries of the existing, spotty legislative treatment of the subject, or to the uncertainties of judicial rulings.

2. We do not recommend the complete relinquishment of state control over the siting of aquaculture facilities. The state has too great an interest in the promotion of aquaculture to leave the locational decisions entirely to local interests, frequently narrowed to the interests of the immediate neighbors. Yet as a political matter, it would probably be impossible for the legislature to enact a sweeping legislative prohibition against municipal interference with the siting of aquaculture facilities, if desired.

3. The siting of aquaculture facilities might be singled out for special statutory treatment, creating procedures similar to those

governing the siting of certain public utility installations. The procedures could vest the final decision in a state administrative agency or official, but only after the affected municipality has been given an opportunity to participate in the process and express its views. (The authority of the State Commissioner of Agriculture and Markets to create agricultural districts may be compared here.) Closer, however, to the public utility siting procedure, and that governing locational decisions of the Urban Development Corporation, the state agency might be required to adhere to local land use regulations unless, under particular circumstances, he finds that they unreasonably hinder achievement of the state's objectives. We would not endorse the alternative of a state agency override of local objections to a proposed aquaculture site simply by means of an extraordinary majority vote of the state agency (if it were a board or commission), as in the case of the New York Urban Development Corporation.

4. A technique inviting negotiation of aquaculture siting disputes is preferable to take it or leave it approaches. However, the technique must provide some method for breaking an impasse in the negotiations. This is done in the elaborate scheme for reconciling the placement of residential care facilities with zoning restrictions. If, after completing a sequence of actions, the parties cannot agree on the selection of one of proposed alternative sites, a state official renders a decision on the matter. The system would seem to have limited utility for aquaculture siting, if we are correct in our assumption that the shores of New York's coastal communities are not apt to yield viable alternatives for the aquaculturist. However, the statutory prescription of a formal procedure for negotiating the conditions for occupying a proposed site for aquaculture facilities may be desirable, though that kind of negotiation normally takes place on an informal basis anyway. The Waterfront Revitalization and Coastal Resources Act, to the extent it does not already govern aquaculture siting in designated areas, may be a preferred model; though it is not clear whether the role of the Secretary of State in resolving intergovernmental conflicts under the Act is as much that of a mediator as an arbitrator.

5. More direct state intervention in local land use planning is seen where environmentally sensitive areas require special treatment, lest their resources be destroyed by municipally approved urban development. The Tidal Wetlands Act, Freshwater Wetlands Act, Coastal Erosion Hazard Areas law, and flood plain control provisions exemplify the approach. If areas for specific types of aquaculture or aquaculture operations, such as underwater lands suitable for shellfish cultivation or shorelands needed for ancillary facilities, require similar protection, alternative methods might be considered to achieve it. One would provide a state takeover of the regulatory authority. An appropriate state agency would first identify and map the areas to be protected, then require state permits for development in the areas, based on criteria designed to accord primacy to aquaculture uses. Ideally, the assumption by the state of this responsibility, or state intervention by other means mentioned below, would be based on the land use element of a previously sanctioned state or regional aquaculture development plan.

6. The concerned state agency could identify and map the areas; place the initial regulatory responsibility on towns and villages (and, less likely, cities) for protecting them with appropriate land use regulations; upon default of the lower level units, give the county the option of assuming the responsibility; and upon default by the county, directly promulgate and enforce the protective regulations.

7. Local governments might retain their land use control powers, but be required to submit zoning classifications or reclassifications and use standards affecting the mapped aquaculture areas to a state agency for review and approval. The statute would prescribe criteria for decisions of the review agency. The criteria might be general in nature, e.g., permitting an override of local restrictions that are unreasonable in view of the state's policy of promoting aquaculture. Or the statute might list specific factors to be taken into account in the review process (e.g., as in the provisions for county referral of certain city, town or village land use regulations). Or the criteria could be embodied in minimum standards the state agency might be required to formulate.

8. The analogy of the agricultural district is imperfect because the protected farmlands are already in private ownership, and embrace relatively large areas. Aquaculture is more apt to be pursued on land owned and leased out by the state or a town, and to cover smaller parcels (except, perhaps, for seaweed farming on a large scale, which would probably take place beyond the reach of local zoning ordinances). To the extent the underlying title to the lands is in the state, the state has easier and more direct means of controlling their use; and the state's interest in policing restrictive practices of the towns could probably be served without the need for elaborate districting procedures. However, the agriculture district law has at least one feature worth considering in this context. Usually the state establishes its own development standards as minimums to protect neighboring areas from the deleterious effects of nuisance generating land uses, such as hazardous waste disposal. In reverse, as is done in the agricultural district law, the state might lay down maximum restrictions that might be placed on the selection and use of sites for aquaculture, generally restrictions in the name of public health and safety. This would limit the municipal prerogative of banning aquaculture in the name of aesthetics.

9. The county could be substituted for the state as the oversight agency in adapting some of the techniques mentioned above. However, county governing bodies, made up of members whose attitudes tend to reflect the special interests of the cities, towns or villages of their constituencies in decisionmaking, may be less inclined than state officers to give due weight to state aquaculture policies in making or influencing siting decisions.

10. Should the state assume a significant role in aquaculture siting, we would expect to find the enabling legislation replete with commands, or at least authority, to cooperate with local governments.

In addition, following the style of various existing statutes, the concerned state agency could be given a lead role in efforts to coordinate aquaculture development with decisions addressing the demands of competing land consumers. Again, the Waterfront Revitalization and Coastal Resources Act points the way.

11. At the very least, the state legislature should go on record with a strong, detailed statement of the importance of aquaculture development to the economy of the state, explicitly or impliedly requiring local governments and state agencies to give weight to that state policy in making decisions affecting the siting of aquaculture facilities and operations.

APPENDIX

Categories and Subcategories of State Restraints on Aquaculture, Reviewed in the Final Report of the United States Fish and Wildlife Service, Aquaculture in the United States: Regulatory Constraints IV-3 - IV-8 (1981)

Alabama	Maryland	Oklahoma
Alaska	Massachusetts	Pennsylvania
Arkansas	Michigan	Rhode Island
California	Missouri	South Carolina
Colorado	New Jersey	Tennessee
Delaware	New Mexico	Texas
Georgia	New York	Washington
Louisiana	North Carolina	West Virginia

As a quick reference tool, preceding each state's laws affecting aquaculture as compiled in the Directory is a summary chart containing the title of the law, its legal citation, and a shorthand description of the nature of the law.

To avoid duplication of effort, and in view of the detail already provided in the State Directory, the following analysis offers only highlights of the regulatory framework generally applicable to all of the states surveyed. Reflecting the statement of work under which this study was performed, of the 32 states surveyed the original 8 remain the focus and are given the closest scrutiny.

In an effort to bring some conceptual order to the diverse body of laws and regulations that impact aquaculturists at the state level, certain descriptive categories of regulation were selected and superimposed on the research results. Each state's laws, therefore, were compiled under the following categories:

- o Species management
- o Water management
- o Land management
- o Health and Safety
- o Pollution control
- o Commerce and Labor

Species Management -- Heading up the list of statutes in this category are those authorizing fish and fisheries management agencies in the various states. The titles vary widely as do the responsible state agencies (e.g., California - Fish and Game Commission; Florida - Department of Natural Resources; Maine - Department of Marine Resources). Generally, from 3-6 major agencies, departments, or commissions play a key role in aquaculture in each state. In relatively few states are there adequate and effective aquaculture assistance programs that seek to coordinate all state agency functions and responsibilities as they relate to aquaculture.

A list of the types of activities and programs that typically come under scrutiny by the responsible fish and fisheries management agency would include:

- o Exotic species and egg importation
- o Aquaculture leases
- o Commercial fisheries research
- o Fishery harvesting
- o Species management
- o Endangered species
- o Aquatic plants
- o Licensing of hatcheries
- o Fishery conservation

Water Management -- State water management regulations facing fish farmers are extremely complex and diverse. Depending on the water resource tapped, aquaculturists confront a sizable body of law on water rights and riparian ownership. They must contend with proscriptions on the use of public waters, competition and protection from other water uses, and also may be subject to numerous federal and local water management programs. Again, the types of activities and programs that typically have restrictions placed around them by state law include:

- o Fishway construction
- o Dams and reservoirs
- o Navigational improvements
- o Dredging and filling - marine and inland waters
- o Harbor management
- o Wild and scenic rivers
- o Aquaculture facility construction

- o Boating management
- o Minerals mining
- o Estuaries management
- o Groundwater management
- o Watershed protection
- o Lake management
- o Brooks/Creek management
- o River authorities
- o Boundary waters

Land Management -- Siting aquaculture facilities on suitable land is a significant problem in many states. Conflicting state as well as federal and local land use policies converge in programs such as coastal zone management and wetlands preservation and in the use of intertidal and submerged lands.

The aquaculture entrepreneur is sometimes faced with the reality that land use planning at the state level frequently favors established public uses or private uses that generate maximum tax revenues. Strong competition for coastal lands, for example, is likely to come from private housing and industrial developments, from public, or from recreation development interests.

The types of state statutes that impinge on aquaculture development in this area typically will include:

- o Coastal zone management
- o Submerged lands management
- o Wetlands management
- o Industrial/power plant siting
- o Floodplain management
- o Zoning
- o Regional planning schemes
- o Dredging and filling
- o Wilderness preservation

- o Forest management
- o Game preserves
- o Eminent domain
- o Agricultural land use
- o Recreation development/management
- o Soil conservation
- o Public lands
- o Mineral leases

Health and Safety -- Public health restrictions on the production and sale of fish and fish products exist in every state. These laws principally protect consumers against unsafe or unwholesome food products. They also directly impact on fish farmers in several ways including where and how they do business. For example, the Virginia State Health Commission is authorized to examine all fish and shellfish within the state, to inspect their natural environment as well as any facilities engaged in their handling, to condemn polluted areas, and to regulate imports of fish and shellfish into the state.

State authorities also heavily regulate fish processing plants, from approval of water supplies to plant design to plant operations. Typical of the health and safety concerns addressed by statute are:

- o Plant design and construction
- o Import restrictions
- o Quarantine
- o Commercial feeds
- o Disease control
- o Food and drug regulation
- o Sanitation
- o Processing restrictions
- o Inspection and grading
- o Occupational health and safety

Pollution Control -- Pollution affects the fish farmer as a threat to crops and as a by-product of aquaculture operations themselves. Among state statutes controlling water pollution is, for example, Idaho's Water Pollution Abatement law which establishes water quality standards to preserve the state's water for a variety of uses including fish culture.

Aquaculture operations themselves are sources of pollution. In addition to federal laws regulating wastewater effluent, many states have established pollution control standards to regulate waste products from pond or raceway cultures. Typical of these is a Maine statute entitled "Protection and Improvement of Waters - Water Improvement Commission - Tidal or Marine Waters" which sets standards for various water uses.

Other pollution control topics typically addressed by statute include:

- Water pollution (classification of waters; bacteriological standards; chemical standards, industrial wastes, sewage disposal)
- Liquid waste management
- Solid waste management
- Hazardous waste management
- Toxic substances control
- Air pollution control

Commerce and Labor -- Numerous commercial and financial regulations affect the formation and continued viability of aquacultural enterprises just as they would any other business. On the other hand, some state laws specifically address the needs of aquaculturists, for example, Mississippi's "Cooperative Aquatic Products Marketing Law." This act authorizes the formation of nonprofit co-ops for the purpose of growing, breeding, harvesting, handling, processing, shipping, marketing, or selling aquatic products.

Some state workers' compensation statutes such as those in Florida and Wisconsin expressly include fish farming in their exemption of agricultural labor.

Topics addressed by state statute under the commercial and labor umbrella include:

- o Aquaculture/agricultural assistance and loan programs
- o Crop insurance
- o Marketing associations
- o Fish product pricing
- o Wholesale and retail licenses
- o Board laws (to acquire hatcheries, fishways)
- o Taxation
- o Blue Sky investment protection
- o Economic development
- o Pollution control financing
- o Employment regulations