

REGIONAL LAND USE CONTROLS
IN
MARTHA'S VINEYARD, MASSACHUSETTS

by

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ABSTRACT

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Land use controls in the United States have been changing significantly in the last decade to more readily address problems of rapid growth for which existing controls have been inadequate. The major trend has been the transfer of land use controls from municipal to state and regional levels of government. This shift of regulatory and planning powers away from municipalities has resulted in the examination of present police power regulatory techniques and the exploration of new techniques both within the police powers and in the area of compensable regulations.

This study examines two land use measures for Martha's Vineyard, Massachusetts. One, the Nantucket Sound Islands Trust bill, is Federal legislation for the establishment of an island trust. The other measure, now a state law, is the Dukes County Regional Planning Law, which provides for regional administration of land use controls. Separately or in combination, these measures provide opportunities for advancing the state of land use management.

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PART I

INTRODUCTION

Since the Supreme Court decision in Village of Euclid vs. Ambler Realty Co. in favor of local zoning, land use regulation has remained predominantly in local hands. The use of zoning and subdivision control have had significant effects on the character of land use ever since. In the light of development pressures of the seventies, traditional local zoning probably has the least effect on developed and redeveloping areas. Zoning is more significant in developing areas but falls short of the need for control in these areas. It has become apparent that the expanded goals of state governments to promote the "general welfare" will require new mechanisms for land use management above the local level where too often the goals of maximizing tax revenue and maintaining the status quo are the only ones considered to the detriment of regional and statewide interests for sufficient job opportunities, affordable housing, available recreation, and the preservation of land having or contributing to our natural resources and the overall quality of our environment. It should be emphasized at this point that a land use management program should stimulate necessary development as well as limiting undesirable development.

Land use management currently falls into three categories of control; the police power, the power of eminent

domain, and the power to levy taxes. The clause of the Constitution which gives the states the so-called police powers, the power to protect the "health, safety, morals, and general welfare" of the public allowed state governments to adopt enabling legislation for zoning. The 1923 Standard State Zoning Act published by the U. S. Dept. of Commerce was widely adopted and upheld by the 1926 case Village of Euclid vs. Ambler Realty Co. By today's standards of land use regulatory powers, the early enabling acts were based on a strict interpretation of the public safety clause of the police power. The most important purpose of zoning then and probably today was to insure the stability of the single family residence district.¹ The police power clause is and will be the major basis for our land use regulatory powers. What we are experiencing in the emerging techniques is a shift from local to regional or state administration of existing forms of non-compensable regulations. Although the lay observer may watch with alarm the removal of some local autonomy in land use matters, the legal basis for land use rests with the state government and only by its choice were almost all of these powers given to the localities. Another significant occurrence in land use regulation has been the broadening of scope of states' enabling legislation in its interpretation of "general welfare".

¹Babcock, Richard F., The Zoning Game, p. 6.

The power of eminent domain can figure prominently into a land use management scheme. It is by this method alone that complete control over the use of land can be achieved. It must be remembered that even with a broader interpretation of the enabling statutes, private land still cannot be rendered economically unusable by any non-compensable regulation. Admittedly, we may be witnessing a shift in the balance between owners' rights and the welfare of the public. In the British system, the government is required to buy a piece of property for which it refused a development permit, rendering it unusable. However, the definition of unusable is quite strict. The feeling about affecting land values by land use regulation is that land values should reflect the availability of a development permit of a certain type.² The burden falls on the developer to accurately determine what is possible for the land. On the other hand, with our system of fixed regulation, a developer often depends on the windfall increase in land value which occurs when his land is rezoned to commercial or industrial use. Enabling legislation has traditionally thwarted efforts to guide development in undeveloped areas by insisting that land having similar characteristics be zoned for similar uses.³ It is conceivable

²Bosselman, Fred; Callies, David; and Banta, John; The Taking Issue, Ch. 14.

³Commonwealth of Massachusetts, Dept. of Community Affairs, Enabling Legislation for Planning and Zoning, Study Report No. 1, Zoning, May, 1971, p. 5.

that a region's undeveloped land may have similar topographic and soil conditions but that development of different uses is imperative to local and regional goals. There are many flaws of this nature in our tools of land regulation which can be amended while still remaining within the police power justification. It is necessary to consider these weaknesses in our existing zoning and subdivision mechanisms in order that the legal basis for statewide control is as clear as possible when we attempt to implement these new structures. It is conceivable that a more ambitious program of state land use management could have serious setbacks in the courts if we depended on outdated expressions of the police power in our state enabling legislation.

PART II

MARTHA'S VINEYARD-CONTEXT FOR REGIONAL LAND USE CONTROLS

Martha's Vineyard is located in Nantucket Sound and consists of approximately 67,000 acres of land.⁴ Access to the island is by boat or air. A regular ferry service runs between the mainland and the Vineyard. The island is made up of six towns of which the three eastern or "down-island" towns, Tisbury, Oak Bluffs, and Edgartown, are by far the most populated. Each has its own commercial center, whereas the "up-island" towns of West Tisbury, Chilmark, and Gay Head are sparsely populated and have little commercial development of significance. The isolation of the island from the mainland has insured its desirability as a summer resort for some time and has until recently kept growth far below the amounts experienced on nearby Cape Cod. However, rapidly changing conditions have provoked a sudden awareness of land use problems among the island's summer and year round residents. Needless to say, the reactions to recent proposals have not always stemmed from a full understanding of the problems or the proposals. With the recent passage of the State's Dukes County Regional Planning Law, and the third major revision of Senator Kennedy's Nantucket Sound Islands

⁴U. S. Dept. of the Interior, Bureau of Outdoor Recreations; Islands of America, p. 75.

Trust Bill under scrutiny, the political storm has calmed somewhat. The focus of this analysis will be on the current land use problems and the likely effectiveness of existing and proposed solutions. It will address the practical administrative limitations on any proposals as well as the theoretical possibilities or legal restrictions.

The quality and interest of Martha's Vineyard as a varied topographical environment is a result of its formation at the end of the last glacial period. In geological terms, the island is a terminal moraine, in fact, the junction of two terminal moraines. These were formed when glacial movement stopped and deposited the debris which it had been pushing in front of it. The result is hilly terrain of mixed types of soils. To the south of the hilly ridges lies the sandy outwash plain.⁵ It remains as one of the few well-preserved examples of a terminal moraine in the world.⁶ These geological origins make the Vineyard's hills, plains, ponds, and beaches especially vulnerable to land misuse. Misuse of land capable of supporting development further threatens the visual quality of the whole island.

In the past, freedom from significant growth allowed the island's towns to ignore the development controls available to them. Oak Bluffs adopted a rudimentary zoning

⁵Vineyard Open Land Foundation, Looking at the Vineyard, p. 3.

⁶Simon, Anne W., No Island is an Island, p. 10.

ordinance in 1948. Other towns waited until at least the late sixties before overcoming fear of restrictions on their property rights. All the towns have zoning ordinances. The years of enactment are as follows: Oak Bluffs, 1948; Edgartown, 1969; West Tisbury and Chilmark, 1971; Tisbury and Gay Head, 1972.⁷ The Vineyard's major development pressure is in the form of residential subdivisions. To give an idea of the rate of growth, it is useful to examine some pertinent quantitative data on new developments proposed or under way. First, the number of dwelling units on the island in 1973 was 8600. It is calculated that the saturation point under existing controls would be 36,000.⁸ The following table shows in the first two columns the number of units and acreage for developments started since 1973. The third column shows the acreage of additional subdivisions which have been filed since 1970 but have not yet been undertaken.

⁷ Ibid. pp. 137-140.

⁸ United States Senate, Committee on Interior and Insular Affairs, Subcommittee on Parks and Recreation, "Hearing on S. 1929 Nantucket Sound Islands Trust Bill", 93rd Congress, 1st Session, July 16, 1973, p. 181. Report of the Dukes County Planning and Economic Development Commission.

RESIDENTIAL DEVELOPMENT

	Developments in Progress:		Proposed Subdivisions:
	(lots)	(acres)	(acres)
Edgartown	353	517	1170
Oak Bluffs	859	502	254
Tisbury	168	248	423
W. Tisbury	84	165	1592
Chilmark	168	699	341
Gay Head	-	-	-
	<hr/>	<hr/>	<hr/>
Total	1632	2131	3780

This information shows that there could be up to 1600 units in the near future and almost 4000 units in proposed subdivisions for which plans have been filed. Of course, not all subdivided lots will be sold immediately nor would they all be built upon soon after they are sold. The purpose of this data is to show that these figures represent rather substantial increases over the 8600 total dwelling units existing in 1973. Commercial development is less of a problem. There is development pressure along the Edgartown-Vineyard Haven Road and the State Road in Tisbury and West Tisbury. A large scale commercial development has been proposed for 300 acres in West Tisbury. The developer is working with the town on the site plan and design controls.¹⁰ In summary,

⁹ Dukes County Planning and Economic Development Commission "Recent Residential and Commercial Developments on Martha's Vineyard", June, 1974.

¹⁰ Ibid. p. 5.

residential development pressure is greatest in Edgartown, Oak Bluffs and Tisbury. In Chilmark and Gay Head, relatively restrictive zoning and high land costs have resulted in slow growth.¹¹

¹¹ Ibid. p. 9.

PART III

THE LEGAL BASIS FOR LAND USE MANAGEMENT

A. AMERICAN LAW INSTITUTE MODEL LAND DEVELOPMENT CODE

In examining the new Dukes County Regional Planning Law and the proposed Nantucket Islands Trust Legislation, it will first be necessary to look at the overall picture of land management proposals for the Commonwealth of Massachusetts and the sources of those proposals, primarily the American Law Institute Model Land Development Code. An important consideration of any state program is to address only those land use issues of regional or statewide importance. Most land use decisions are purely local in scope. Therefore, to simplify the state's role, local control should be superceded only where necessary. There is certainly room for improvement in local planning and regulatory efforts, and states should provide incentives or require the existence of local mechanisms but should leave the administration to local governments.

An examination of all published articles of the A L I Code is beyond the scope of this work. In general, the Code advocates a reorganization of the local structure with more emphasis on discretionary decisions and a legally significant planning effort. These objectives are also advocated for state level mechanisms. It calls for the creation of a State Land Planning Agency within the Governor's office.

Also, Regional Planning Divisions may be created and any powers of the State Planning Agency may be given to the regional divisions. State or regional advisory commissions could be appointed by the Governor to make recommendations on plans. ¹²

The Model Code calls for the preparation of a state plan and/or regional plans by the respective agencies. The plans would include the following:

- (1) statements of objectives, policies, and standards regarding proposed changes in public and private development
- (2) identification of present conditions and major development problems
- (3) a short-term program of public actions to be undertaken in order to achieve objectives, policies, and standards of the plan
- (4) the issuance of a State Land Development Report to present a new Short Term Program, analysis of the success of the past short term program, and any suggested changes in the plan--at least once every five years ¹³

The Model Code calls for approval of the plan by the Governor and then the state legislature. Upon approval by the legislature, the plan becomes legally significant in any regulatory action taken by the state or regional agency.

In the area of regulation, the state and regional agencies can establish guidelines for determining those areas where state or regional interests take precedence over local concerns. The Model Code defines three such areas; 1) Districts of Critical State Concern, 2) Developments of

¹²American Law Institute A Model Land Development Code Tentative Draft No. 3, p. 61.

¹³Ibid., Section 8 pp. 404-405.

State or Regional Benefit, and 3) Large Scale Development.

Districts of Critical Concern--The agencies can designate Districts of Critical State concern and must provide the reasons for the designation as well as recommended guidelines for the regulation of the district. The localities are then required to submit development regulations for state approval. If these regulations do not comply with the guidelines, or are not submitted at all, the state draws up regulations which are consistent with the guidelines. These are administered by the localities.¹⁴ The designations are only allowed for the following areas:

- (a) an area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment;
- (b) an area containing or having a significant impact upon historical, natural or environmental resources of regional or statewide importance; or (c) a proposed site of a new community designated in a State Land Development Plan, together with a reasonable amount of surrounding land.¹⁵

Developments of State or Regional Benefit--This section requires localities to consider the regional value of a development and grant a development permit on that basis even if the permit would not be allowed under the local ordinance. It allows the developer to appeal to the State Land Adjudicatory Board after an unfavorable local decision. The following types of development are eligible: (1) development

¹⁴ Commonwealth of Massachusetts, Dept. of Community Affairs, A Review and Analysis of Selected Key Land Use Regulatory Mechanisms, April, 1974, Part III, pp. 13-14.

¹⁵ American Law Institute, op. cit., Section 7-201.

by a governmental agency, (2) development which will be used for charitable purposes and which serves "or is intended to serve a substantial number of persons who do not reside" within the locality, (3) development by a public utility which will provide services beyond the territorial jurisdiction of the local government, or (4) development by any person receiving state or federal aid "designed to facilitate a type of development specified by the State Land Planning Agency by rule."¹⁶ Also, the likely benefit from the project must exceed the likely detriment by standards included in Article 7, Section 5.

Large Scale Development--This category of development is intended to cover those developments of significant magnitude which will affect regional environmental characteristics, transportation, and other services, as well as answering needs for housing, commercial and industrial space and educational and recreational facilities. Almost all large developments not covered under the previous section would be included here. Again, the likely benefit must exceed the likely detriment for a permit to be granted. The development must be consistent with state and local plans and the local development ordinance. If it is not consistent with the local ordinance it must sufficiently serve the above mentioned regional needs for the inconsistency to be allowed to stand. Developments producing more than 100 jobs must

¹⁶ Commonwealth of Mass., Dept. of Community Affairs, Key Land Use Mechanisms, op. cit., Part III, pp. 14-15.

plan for additional housing if sufficient amounts are not currently available.

Both categories of regional developments require a Special Development Permit issued by the locality under special hearing procedures outlined in Article 2 of the Code which pertains to the local structures of development control. In all cases of state or regional land use interests, the localities retain the administrative function. The state's power lies in two areas. First, in establishing the guidelines under the above categories and the statewide development plan, the state is effectively promulgating its goals and standards by forcing the localities to consider them in their day to day administration of the local ordinance. The major check on the localities in their administrative discretion lies in the ability of the applicant to appeal to the State Land Adjudicatory Board.

The most important aspect of any land management program is its ability to control unwanted development as well as encouraging necessary development. Most development decisions are local in nature. According to the drafters of the Model Code, more than 90 percent of current land use decisions have no regional significance.¹⁷ Consequently, the drafters sought to strengthen the existing local structure in such a way that it could more effectively deal with local issues as well as administer the state and regional guide-

¹⁷American Law Institute, op. cit., p. 5.

lines. It is logical that the drafters outlined the three types of regional spheres of influence. These were conceived with specific development problems in mind. The first, based on land or district considerations, allows state influence over those types of development which sometimes escape local control, in particular, incremental residential and commercial growth. This type of growth may be infringing upon fragile or scenic environments or just have a blighting effect on otherwise developable land. The endless "strip-commercial" development, stretching out along secondary roads and blighting the rapidly developing urban fringes, is a vivid example of how small scale incremental investments in commercial facilities can end up having a large impact on major regional facilities, causing congestion, air, water and noise pollution and visual chaos. Incremental residential development can cause wasteful scattering of population which results in additional costs for municipal and regional services. The nature of land values encouraged earlier development of cheaper rural land before inner suburbs achieve maximum acceptable densities. This trend is further encouraged by the lag in adoption of local development controls by those communities confronted with rapid and unexpected growth. Localities do not usually consider regional growth patterns in their own development objectives. It is these types of problems that are addressed in the establishment of Districts of Critical Concern. This provision would cover those areas significantly impacted by major developments. These

developments often stimulate secondary growth patterns which are sometimes perceived but not planned for in advance.

The inclusion of a category based on types of development covers those developments which could occur anywhere outside Districts of Critical State Concern but would, nevertheless, have significant consequences for the state or region. The most important new power contained in these sections allows local considerations to be overruled in favor of regional interests. This gives the state power to eliminate some of the local "buck passing" in areas of low income housing, and industrial development which consistently occurs in established middle class suburbs. It will be interesting to see whether political realities will allow the removal of a locality's veto power over major developments. This distinction between the positive and negative aspects of state control will be examined in the discussion of Massachusetts proposals and the Dukes County Regional Planning Law.

B. EXISTING STATE LEVEL MECHANISMS IN MASSACHUSETTS

1. The Wetlands Protection Law

In examining the state of land use controls in Massachusetts it seems useful to outline some of the existing mechanisms which have been in effect for some time. The decade of the sixties saw the creation of several specialized types of controls administered at the state and local levels. The Jones Act, for the protection of coastal wet-

lands, was enacted in 1963. It required developers intending to dredge or fill coastal wetlands to apply to the Department of Natural Resources for a permit. It did not allow the Department to prohibit all development. The major purpose of this Act was to insure that sufficient coastal wetland areas be maintained in order that "wildlife and marine fisheries" be protected. Coastal wetlands play a major role in the breeding activity of fish, thereby affecting in turn the productivity of the fishing industry. In addition, the wetlands serve as a resource for recreation, and storm and flood protection.¹⁸ The effectiveness of the Jones Act, however, was limited by the permit process which required the Dept. of Natural Resources to act quickly to prevent alterations. In 1965 the Coastal Wetlands Act was enacted, which allowed the Dept. of Natural Resources to issue protective orders, or conservation restrictions. These restrictions included specific regulations for allowed uses and were issued for lands designated by the Dept. by a public hearing procedure. Action was taken at the state level with informal consultation with localities. This Act placed the burden on the land owner to comply with the pre-stated regulations. At least 44,000 acres of coastal wetlands are currently protected, with a projected goal of 60,000 acres.

¹⁸ Bosselman, Fred; and Callies, David; The Quiet Revolution in Land Use Control, p. 206.

Inland wetlands were first protected by the Hatch Act (1965). This provided a permit procedure similar to the Jones Act. The scope of this Act did not include agricultural lands, a fact which produced some controversial cases. The Inland Wetlands Act (1963) is a parallel to the Coastal Wetlands Act. It faced opposition from realtors, residential developers, and the Farm Bureau Federation. Apparently, the merits of protecting inland wetlands were not as persuasive as those for coastal wetlands.¹⁹ Protection of inland wetlands has proceeded slowly. Protective orders have been issued for only 1000 acres of wetlands in three towns, with action pending in several more towns. The outlook for protection of inland wetlands remains doubtful. These four laws were rewritten and combined in 1972 to form the Wetlands Protection Act, Chapter 130, Section 105 and Chapter 131, Sections 40 and 40A of the Massachusetts General Laws. The provisions of the Wetlands Protection Act are substantially the same as those created by the earlier laws.

2. The Zoning Appeals Law

The availability of low income housing has been a concern of the state for some time. As was mentioned earlier in the discussion of the A L I Code, the ability of established suburbs to prohibit multi-unit housing has prevented opportunities to develop low income housing on less

¹⁹Ibid. pp. 207-208.

expensive suburban land. The intent of the A L I Code to overturn local exclusionary decisions has been incorporated in the Zoning Appeals Law,²⁰ the so-called anti-snob zoning law. This law was passed in 1969, to the surprise of its supporters, who expected more vigorous opposition. Two aspects of the A L I Model Code have been included. The first concept is that of the state's imposing guidelines for localities' decisions on low income housing. Administration remains at the local level as in all phases of the A L I Code. Secondly, the Zoning Appeals Law introduces the concept of a comprehensive development permit outlined in the Code under the provisions for local administrative reform. Under the Zoning Appeals Law, any public housing authority or non-profit or limited dividend developer can apply for a comprehensive permit to build low income housing. The proposal need not conform to the local ordinances if it is "consistent with local needs". The law establishes a certain quota for low-income housing for a municipality which conforms to its share of the regional demand for this type of housing. If the comprehensive permit is denied, the developer may appeal to the Housing Appeals Committee, a quasi-judicial appointed board under the Department of Community Affairs. The Housing Appeals Committee can overturn the local decision. Only a handful of projects have been approved under this law. The major problem with the law is its failure to

²⁰ Massachusetts, General Laws, 1969, Chapter 774.

establish adequate criteria for decision making at both the local and state levels. The comprehensive permit, although part of the A L I Code as the usual device in discretionary decisions, must be superimposed on the existing local structure in Massachusetts where it does not necessarily fit in with current procedures. The Zoning Appeals Law is a specialized form of the land management structure. The comprehensive permit and Housing Appeals Committee have their analogies in the Model Code's special development permit and State Land Adjudicatory Board.

C. PROPOSALS FOR LAND USE MANAGEMENT IN MASSACHUSETTS

1. The Regional Planning Law Revision

Chapter 40B of the Massachusetts General Laws has allowed the creation of regional planning agencies. There are currently twelve districts which include almost all municipalities in the state. These planning commissions are made up of representatives from the municipalities and usually employ a planning staff. Private consultants have been retained at times to assist in the planning efforts. The function of these commissions has been to advise localities about regional goals and objectives which could be affected by local decisions. The commissions have been in a relatively powerless position to actively pursue their goals in a land use management program. Recent attempts to modify the existing structure have sought to give these commissions statutory powers to implement their planning efforts.

The traditional approach to a land management program would start with a comprehensive state plan formulated by a state planning agency followed by regional goal determination and plan making. This, of course, would be coupled with the necessary regulatory powers. What has actually happened, though, has been the formulation of regional goals and some comprehensive planning by these regional commissions in the absence of a state plan and any regulatory powers. The result is that some of the regional commissions are in a position to assume regulatory powers even though the state level efforts are probably somewhat behind these regions. This will be the situation with the recently enacted Dukes County Regional Planning Law. Legislation has been submitted which will revise Chapter 40B of the general laws and give more powers to the regional commissions. Firstly, the plan making function of the commissions will be strengthened. After formulating regional goals and preparing a suitable plan, a commission will submit its plan to the Governor for approval. Upon approval, the plan will be legally binding in the commission's regulatory decisions. The following criteria are set forth in the revision for the creation of plans:

- a) The plan must not be inconsistent with written state-wide plans or policies which have been promulgated by the Governor.
- b) Provisions must be presented which will interrelate various functional programs of the district (or the subsection of the district to which the plan applies) such as sewers, transportation, or water.

- c) Goals, objectives, and priorities for the regions must be clearly stated.
- d) The plan must take into consideration the physical, social, and economic needs of the district, as determined by a survey.
- e) A statement of policy must be included which will be sufficient for the evaluation of programs and projects of regional significance.
- f) One or more of the following items may be included in the plan: land use, water use, natural resource conservation, transportation, economic development, housing (with particular attention given to the needs of disadvantaged persons), manpower, and health needs.
- g) The plan must be developed and adopted according to participatory process requirements listed in Section 6 of the law.²¹

The second aspect of the new powers include reviewing projects or programs of regional significance. Unfortunately the scope of this category is not as broad as one might hope. This category includes developments undertaken by public agencies of the state excepting those undertaken by municipalities. The following criteria are established for these types of development.

1. impacts more than one municipality in a regional planning district or contiguous municipalities in two, contiguous regional planning districts;
2. is significantly affected by or has a significant effect upon any existing or proposed major public facility or other area of major public investment;
3. is proposed by a multi-jurisdictional, special purpose district which is located in one regional planning district or in contiguous municipalities in two contiguous regional planning districts;

²¹Massachusetts House Bill No. 5101, "An Act to Amend the Regional Planning Law", 1974, Section 3-I.

4. requires a major commitment of land and /or water resources from more than one municipality in one regional planning district or in contiguous municipalities in two contiguous regional planning districts;
5. provides a major service facility or function for more than one municipality within the planning district or for contiguous municipalities in two contiguous, regional planning districts;
6. has a major impact upon the physical or social environment of more than one municipality within a planning district or contiguous municipalities in two contiguous, regional planning districts;
7. is subject to hearing under chapter one hundred thirty-one, section forty or chapter one hundred thirty, section one hundred five or is located in areas which have been classified as critical land, air, water, environmental or other state resources areas, as such may be designated from time to time by state law or further articulated under administrative regulation; these matters shall be submitted to the appropriate regional planning agency after such hearings have been held at the municipal level and findings of those hearings have been published.
8. is located on land within one thousand feet of a municipality boundary, land within two hundred fifty feet of the taking line of a state highway or within one thousand feet of the taking line of an interstate highway or other major public facility, one thousand feet from the taking line of any airport shown on a state master plan, or on land designated by a regional planning agency to be subject to seasonal or periodic flooding. A project of regional significance is also any project sponsored, initiated or developed in whole or in part by any agency of a municipality or any private development which falls under the criteria of paragraphs seven or eight of this subsection or requires an environmental impact report, pursuant to section sixty-two of chapter thirty.²²

These criteria combine the concepts of developments of regional impact and districts of critical regional concern contained in the A L I Model Code. In general, they exclude

²²Ibid., Section 3-g.

private development except that which falls under sections 7 and 8 above. In the context of these criteria, the power of the critical area concept is greatly diminished. The land related criteria include areas near highways and public facilities. However, they would only include private development if it were regionally significant. It can be seen that all types of smaller scale incremental development are left out. In effect, this regulatory scheme does not embrace the concept that lands under intense development pressure are critical areas and should fall under regional control if local controls are insufficient. It should not be necessary that areas be topographically or ecologically unsuitable for development in order that regional interests prevail. It should be clear that these powers involve the review of proposed project. They do not transfer to the regional commission the powers given to localities under the zoning and subdivision enabling acts.

The third function of the regional commissions provides for review of programs involving state or federal funding. Federal law requires that any regional planning organization review a project's consistency with its plan for federal funding to be granted.

2. The Land Resource Management Bill

The Massachusetts Land Resource Management bill, also known as the Hatch-Ames bill, after its sponsors, emphasizes private development to a greater extent than

the Chapter 40B revision, which primarily addresses public projects. It presumably lets Chapter 40B stand as is or could coexist with the revision although some provisions would overlap. This proposal would be Chapter 40E of the general laws. One failure of this proposal is that it does not mention the creation of regional plans nor their use as a legal instrument in regulatory decisions. However, it does take a more comprehensive approach to regional regulatory powers as well as establishing two state boards. A State Land Planning Agency would be established, consisting of the Secretaries of Communities and Development, Environmental Affairs, Transportation and Construction, Manpower Affairs, and Human Services or their designees. Also, a Massachusetts Land and Water Adjudicatory Board would be formed consisting of the Attorney General or his designee and four other members; a hydrology and soils engineer, real estate developer, conservation expert, and a land use planner. This board would hear appeals from regional decisions.

At the regional level twelve Regional Resource Boards would be formed corresponding to the twelve existing commissions. These boards would have six members chosen by and from the commission, and five members, who would be residents of the region, appointed by the Governor. These gubernatorial appointments would include a real estate developer, an attorney, a conservation expert, a

hydrology and soils engineer, and a land use planner.

The Regional Committee would be given regulatory powers of two distinct types similar to those specified in the A L I Model Code. First, the Committee would designate areas of critical planning concern by means of criteria established by the State Land Planning Agency. Private citizens could petition for areas to be designated and could recommend development regulations. The following guidelines could be considered for areas of critical planning concern. These criteria could be rescinded or amended by the Committee:

- a) An area where uncontrolled development could result in irreversible damage to important historical, environmental, natural, or archaeological resources, or
- b) Areas determined to possess inland or coastal wetlands, marshes, or tidal lands, or
- c) Beaches and dunes, or
- d) Significant estuaries, shorelands, and flood plains of rivers, lakes, and streams, or
- e) Significant agricultural, grazing, and watershed lands, or
- f) Forests and related lands which require long stability for continuing renewal, or
- g) Areas with unstable soils and high seismicity, or
- h) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment. ²³

²³ Massachusetts House Bill No. 2327, "Land Resource Management Act", 1973, p. 7.

The broad scope of these criteria gives the Regional Resource Committee powers in two respects. First, they allow the Committees to tailor the requirements to the existing local controls. In rural areas where local control may be ineffective or non-existent, the Committee can exert its influence in the types and amounts of critical districts it identifies and controls. It should be clear that the Committees have the power to impose any controls currently available to the municipalities under our state enabling acts. Although it would be desirable for all localities to assume as much land use jurisdiction as is consistent with local interests, the reality is that many if not most municipalities fall short of this ideal. Therefore, the ability of the Regional Resource Committees to, in effect, take over where the localities leave off, is significant if a rapid change in the quality of land use management is to be achieved.

In addition to the above mentioned benefits, the critical area concept allows the Regional Resource Committees to impose controls in those areas where regional interests are at stake. In rapidly developing areas, no large projects may be at fault in the misuse of land resources. Typically these urbanizing areas are faced with haphazard residential subdivision and blighting commercial development along major arterials. This section of the Hatch-Ames proposal would give some hope of guidance to these kinds of land uses.

The Hatch-Ames bill also includes provisions for the Regional Committees to review "developments of regional impact." The Committees will set the standards by which a development of regional impact will be identified. These standards must be approved by the State Land Planning Agency. Because municipalities must identify developments of regional impact for referral to the appropriate Regional Committee, the standards must be specific enough to facilitate this process. To be approved, a development must be compatible with soil and other topographical conditions and have an assured water supply without overly burdening the existing system. It also must not cause undue air and water pollution, traffic congestion, or create an unreasonable burden on municipal services, as well as not adversely affecting scenic, historic, or irreplaceable natural areas.²⁴

In general, the Hatch-Ames bill attempts to set in place a regulatory structure based on that recommended in the A L I Model Code at least at the state and regional level. The planning function is not dealt with specifically in this legislation. One major difference arises in combining the two types of regional development delineated in the A L I Code. The Hatch-Ames legislation does not take the significant step toward encouraging developments of regional benefit. In reviewing developments of regional impact,

²⁴Ibid., p.p. 11-12.

the Regional Committees may refuse the issuance of a development permit but may not override a local veto. Therefore, the type of regulation necessary to counter local opposition to needed regional facilities is not available in this proposal. If it were it would extend the concept already established in Chapter 774, the anti-snob zoning law. It is conceivable that a Regional Resource Committee could impose less restrictive controls on a designated critical area in order to encourage certain types of development, but it seems that the intention of the critical area concept is to impose controls which are more rather than less restrictive than the local ordinances.

PART IV

SOLUTIONS FOR MARTHA'S VINEYARD

A. THE NANTUCKET SOUND ISLANDS TRUST BILL

In an answer to Martha's Vineyard growth problems, Senator Edward M. Kennedy of Massachusetts introduced his Nantucket Sound Islands Trust Bill (S.3485) on April 11, 1972. An amendment was introduced in the Senate on May 31, 1973 (S.1929). The most recent version was published in the Vineyard Gazette on April 19, 1974 (Vol. 128, No. 51). The various revisions of the bill attempted to incorporate suggestions of local citizens and also to make the legislation more compatible with the state legislation proposed by Governor Sargent in 1973. This state bill was passed on July 18, 1974. The concept of an islands trust was first suggested in a publication of the Department of the Interior, Islands of America.

This concept was developed for islands where traditional techniques for the protection and enhancement of their unique qualities are not practicable. An Island Trust is made up of an island or group of islands with outstanding scenic, historic or recreational values. The Congress would authorize the Secretary of the Interior to establish these Trusts through appropriate agreements with the States involved. Such agreements would provide for the establishment of Island Trust Commissions....The commissions would encourage State and local governments to adopt and enforce adequate master plans and zoning ordinances to promote the use and development of privately owned lands within the Islands Trusts in a manner consistent with the comprehensive plans. They may recommend acquisition by

such governments of privately owned property.²⁵ It is significant that state control over private land is emphasized. The report further states: "The States are the seat of legal powers enabling land-use control through zoning. These powers usually are delegated to local governments, but statewide zoning is desirable to promote wise use of certain resources involving many local governments".²⁶

The scope of the Trust bill includes Nantucket, Martha's Vineyard, and the Elizabeth Islands, providing for a separate commission for each. For the purposes of this analysis, only sections pertaining to Martha's Vineyard will be considered. The Martha's Vineyard Trust Commission is made up of a member appointed by 1) the Secretary of the Interior, 2) the Governor of Massachusetts, 3) the Board of Selectmen of each town, these appointments being officials of the town government, 4) the Dukes County Commissioners. Also included are nine members elected at-large in an Island-wide election and four members appointed by the Governor and Secretary whose principal residence is not on the island but who pay taxes on property owned on the island, these four having a voice but no vote (Section 3c). The membership of the Commission has been arranged to correspond with the Martha's Vineyard Commission established in the state legislation (except for the addition of the Secretary of the Interior). It can be seen that the Commission is heavily weighted toward local residents.

²⁵Islands of America, op. cit., p. 42.

²⁶Ibid., p. 49.

The Trust bill provides for the classification of all lands on the island into three categories: Class A, Open Lands; Class B, Resource Management Lands; and Class C, Town Lands. When the bill was submitted in its earlier forms it included a mapping of these districts. The current strategy is to map the lands with local consultation and public hearings. The Class A, Open Lands are intended to be free from new improvements. Current land owners will be allowed to hold their property in their family for as long as they desire. The Commission will have the first option to purchase the property at fair market value. The assumed intent of this section is the eventual acquisition of all the Open Lands by purchase of full title. The Resource Management lands are not to be developed beyond their present intensity except under regulations formulated by the following guidelines;

- (i) The overall intensity must take into account the capability of the land for such development, which shall include consideration of existing land use, intensity of uses in the immediate vicinity, area-wide water quality and quantity, soil conditions, roadway utilization, and visual and topographic conditions.
- (ii) The overall intensity guideline shall not be translated into uniform lot sizes and applied to the land so classified, but shall be applied with flexibility to encourage sound land use planning respecting the varying natural values of the land; and
- (iii) The area upon which intensity is calculated shall not include bodies of water or wetlands classified

as such under Massachusetts Wetlands Protection Act (131 M.G.L.40).²⁷

The regulations shall be issued by the Commission subject to a public hearing and approval by the Governor and Secretary of the Interior. Owners of any lands designated Class A or B may request that the Commission acquire the property should continued ownership under the regulations constitute an unreasonable hardship. (Section 7 (a) (3)). The Town Lands remain under the jurisdiction of the towns except that the Commission shall review the ordinances and any variances for their consistency with the purposes of the Trust. The map, once adopted, can be changed by a vote of the Commission after an affirmative vote of the town meeting of the town affected provided that the Governor and Secretary agree. If not, a two-thirds vote of the Commission is required. The Commission has flexible powers to acquire land by purchase, donation, or transfer from private owners or governmental agencies. In order not to lower the tax revenues of any town, the bill provides for the state or any political subdivision to tax the lands held by the Commission. This provision is necessary because states are not allowed to tax lands held by the Federal government except under a special exemption voted by Congress.²⁸

²⁷U.S. Senate "Nantucket Sound Islands Trust Bill", Section 5 (b) (2) (i-iii).

²⁸Gifford, K. Dun, "Leading Edges in Land Use Laws" Harvard Journal on Legislation, Vol. 11, No.3, April, 1974, p. 944.

The Trust bill includes all beaches in the Open Lands classification except those classified as Town Lands. It defines beach lands as the "wet and dry sand area lying between the mean low water line and the base of the headlands or the visible line of upland vegetation, whichever is closer to the mean low water line, and shall include dunes, rock beaches, wetlands, marshes and estuarine areas adjoining tidal waters".²⁹ The bill also establishes a non-vehicular right of passage at the high water line on all Open Lands and certain sections of beaches within Town Lands. However, the right of passage would not be allowed where it interfered with the use of residential improvements on beach land. Lands may be acquired for public beaches and access to those beaches. Also, two new public beaches are to be established on the southern or southwestern shore of Martha's Vineyard, not to be extensions of existing beaches.

Other provisions of the Trust bill include studies for erosion and pollution control, economic development, transportation studies, resident homesite subsidies, hunting and fishing regulations, and a temporary freeze on building construction unless a hardship is shown. Also, there are provisions for determining and establishing the Indian Common Lands as an Indian reservation. Appropriations include \$20,000,000 for land acquisition and \$5,000,000 for development for the first three years of the trust. Of these

²⁹"Islands Trust Bill", op. cit., Section 10(b).

appropriations, \$300,000 shall be for the development of the shellfish industry, \$500,000 for a groundwater study, and \$1,000,000 for the Resident Homesite Program. This summarizes the substantive regulatory mechanisms of the Nantucket Sound Islands Bill.

B. THE DUKES COUNTY REGIONAL PLANNING LAW

In order to analyse the proposals in the proper context, it is necessary to describe the Dukes County Regional Planning Law recently passed by the Massachusetts legislature before weighing the merits of both bills. The Martha's Vineyard Commission is the same as that established in the Trust bill except that the Secretary of the Interior would only be included if the Trust bill were enacted in Congress. Among the powers granted to the Commission are those available to municipalities under the zoning and subdivision enabling acts. In cases where the Commission overrules local ordinances, sufficient reason must be shown that it is warranted to achieve the goals of the Commission. Also, the Commission can assume any function assigned to it under Federal Law. A temporary moratorium is placed on development until standards for regulation are established. Some development is allowed under certain restrictions.

This law is similar to the Hatch-Ames proposal in that no specific legal authority or approval is given to comprehensive plans. The law calls for the determination of standards by which "districts of critical planning concern" and

"developments of regional impact" are identified as in the Hatch-Ames bill. These standards must be approved at the state level. However, in the absence of a State Land Planning Agency, the power of an approval is given to the Secretary of Communities and Development and any other members of the Governor's Cabinet whom the Governor may designate.

The criteria for determination of "districts of critical planning concern" and "developments of regional impact" are substantially the same as those contained in the Hatch-Ames bill and do not warrant further discussion. It should be mentioned that under this law, it will be possible to overturn a local veto of a development of regional benefit. All appeals of decisions of the Commission would be made to the appropriate courts in the absence of any state level land adjudicatory board.

C. ANALYSIS

1. What provisions are included in the state and federal legislation to overcome local planning inertia?

Local administration of the available regulatory powers often falls short of being effective because those who administer are subject to personal and political pressures which can affect the objectivity of the decisions. Planning efforts can suffer from the lack of professional expertise available to municipalities. The following questions may be asked. What provisions of the regional controls will allow decisions to be made objectively at the regional level?

What technical assistance to the municipalities will be available to overcome their planning deficiencies?

The content of the Commission can have a significant effect on the objectivity of the decisions. It should be noted that six members will represent the boards of selectmen of the six towns. Nine members will be elected at large. It is not clear that the same local influences which hinder municipal decision making may also interfere at the regional level. The members of the Commission may have difficulty in seeing that regional interests prevail over local interests when these interests conflict.

One check on the Commission members may be the influence of a professional staff. Although both state and federal legislation do not give plans legal significance explicitly, the activities of the professional staff may force Commission members to consider the regional point of view.

With regard to local planning efforts there is no provision for direct technical assistance to municipalities. Where the Commission has assumed regulatory powers, superseding those of the municipalities, the Commission's planning efforts will guide the decisions. The municipalities will be able to take advantage of any planning information which the Commission staff has prepared and should benefit from those technical studies which the municipalities themselves could not undertake.

2. Are there any checks on local decisions in the provisions of the state and federal legislation?

The Trust bill provides for the designation of three categories of land of which two would be administered by the Commission, the Open Lands and the Resource Management Lands. The third category, Town Planned Lands, would remain under local control. An equivalent arrangement exists within the provisions of the Dukes County Regional Planning Law. Under this law, the Commission would designate areas of critical planning concern, for which it would develop standards of land use control which would supercede local regulations. It is conceivable that these areas would correspond to the Class A and Class B lands of the Trust bill, although a distinction could be made if necessary to clarify the purposes of the designation. As the same Commission will administer both state and federal measures, these various designations can be made consistent without affecting the substance of the legislation. Therefore, the first aspect of regional checks over local decisions involves the designation of actual land areas for which standards will be set by the Commission.

The second aspect of these regional checks on local decisions is incorporated in the Dukes County Regional Planning Law. The law requires that all developments of regional impact be reviewed by the Commission regardless of location. This allows the Commission to veto a development

which may be approved by a municipality but which the Commission feels is not in accordance with regional planning considerations. More importantly, the Commission will be able to approve a development which a municipality refused if the development were of regional benefit and could not be advantageously located elsewhere. This provision parallels the provisions of the Massachusetts Zoning Appeals Law for subsidized housing, with certain administrative differences. The significant advance made with this provision is the extension of the concept of regional need to all types of development.

3. What are the possibilities for broadening the scope of police power regulations?

Given the existence of powers at the regional level, the Martha's Vineyard Commission can embark on a vigorous program of land management. As the powers given to the Commission are developed in the state's zoning and subdivision enabling acts, a review of these existing powers and some recent proposed changes can give some idea of the options open to the Commission. First, it would seem wise to define "districts of critical planning concern" broadly enough to include not only ecologically unstable areas but also areas under considerable development pressure. This would help to insure that all new developments would be sensitive to the natural environment. Martha's Vineyard cannot afford to

waste its limited land resources on any poorly planned development. Recent proposals for changing the scope of zoning powers may have significance for the Commission in controlling its developing areas. First, an added objective of zoning, to implement the comprehensive plan of a town has been given legal significance in the proposed revision of the Massachusetts Zoning Enabling Act.³⁰ This change would allow the planning efforts of the Regional Planning Commission some weight in the regulation of critical areas and major developments. In the past, it has been assumed that undeveloped land having similar characteristics should be included in similar zones. This does not allow municipalities to arbitrarily distinguish between undeveloped areas in order to channel growth according to perceived needs for different types of development. However, another change would allow some differentiation in zoning similar lands in order to time development and guide it in accordance with a comprehensive plan.³¹

Provisions for planned unit development would be included in the revision of the Zoning Enabling Act. This concept could be strongly encouraged or enforced depending on how the Commission chooses to regulate critical areas and major residential developments. In a work prepared by the Vineyard Open Land Foundation, "Looking at the Vineyard",

³⁰Commonwealth of Massachusetts, Dept. of Community Affairs, Enabling Legislation for Planning and Zoning, Study Report No. 1, Zoning, May, 1971, p. 2.

³¹Ibid., p. 5.

topographic and vegetative characteristics of the land are classified, and development restrictions are recommended according to these classifications.³² These guidelines could form the basis for design criteria used to evaluate planned unit development proposals. With an innovative approach, the Regional Planning Commission can make the existing police power regulations work to a far greater advantage than is usually realized by the localities. Another interesting possibility for dealing with proposed and approved subdivisions lies in the subdivision enabling act. Under existing provisions, a municipality can rescind or alter an approved subdivision provided that subdivided lots have not been sold.³³ As the subdivision review powers are granted to the Commission, any subdivision within a critical area could conceivably be revoked or altered at the will of the Commission, to conform to their subdivision requirements. Hopefully, these requirements would incorporate a greater emphasis on environmental design.

In general, the greatest gain in increasing the scope of non-compensable regulations lies in the planning and administrative structure itself. The Commission can, hopefully, divorce itself from local personal and political considerations and should rely on a competent professional planning

³² Vineyard Open Land Foundation, Looking at the Vineyard.

³³ Massachusetts General Laws, Chapter 41, Section 81W.

staff for guidance on regulatory decisions. Consequently, these decisions should carry more legal weight and will be less subject to court challenges if the structure of the administrative process is rational and consistent. If the Commission has a solid defense for its regulatory standards, it is possible that more restrictive controls will be allowed without compensation than is normally allowed in municipalities, where the process of regulatory decision making is apt to be haphazard.

4. What innovations and land management techniques beyond police power regulations are possible within the scope of the state and federal legislation?

The role of the Federal government to acquire land for the purposes of preservation and recreation represents the simplest form of compensable land regulation. Although the thought of federal acquisition of lands on Martha's Vineyard was described by some residents as a "land grab", the function of the Federal government to acquire and maintain open land is well established. Even though the Constitution does not mention the power of eminent domain, nor the preservation of parklands, sufficient case law based on Supreme Court decisions exists to justify the taking of land for parks.³⁴

It is now a solid part of our legal heritage that the Federal government has ample powers to acquire and maintain parks, independent of the states; that this

³⁴Gifford, op. cit., p. 440.

power has as its necessary corollary the power of eminent domain; and that the font of the power is the general welfare clause.³⁵

Therefore, it seems that the Trust bill's powers to acquire land in the Class A, Open Land category is legally justified. In addition, the high cost of land acquisition for public use virtually guarantees this role for the Federal government.

In addition to fee simple taking of lands under the Class A, Open Lands category, the Trust bill introduces new opportunities for compensable regulations for Class B, Resource Management Lands. It is intended that density of development be controlled within this category by both police power regulations and partial compensation. Because the state holds jurisdiction in non-compensable regulation, it is likely that a combination of compensable and non-compensable regulations would best be administered by the state or political subdivisions. The dilemma presented with this approach is the lack of funds available from state governments for compensation. The provisions of both state and federal legislation create an ideal arrangement to solve this problem. Because the same Commission will administer state and federal actions, the guidelines for compensable and non-compensable regulations will be established by an agency which is, in effect, a regional agency with the only federal influence

³⁵ Ibid., p. 443.

being the Secretary of the Interior or his designee who will be a member of the Commission. The result, then, is a state or regionally administered system of compensable regulations with the funding provided by the Federal government. This arrangement preserves the traditional concept of states retaining administrative control over land use. As good as this arrangement may seem, however, it should be noted that any system of compensable regulations must be based on clearly established guidelines corresponding to the intended goals of the land use management agency. An early version of the Trust bill called for a maximum of sixty-five improvements per square mile within Class B lands. This amounts to approximately one improvement per ten acres. This density level virtually requires some compensation. This density limit seems arbitrary and has little foundation in any analysis of land capability or a pre-established land management goal. The most recent version has backed away from any specific density limits, allowing the Commission to set them. As it is unlikely that all land owners will voluntarily negotiate to preserve their lands by partial compensation, the success of compensable regulations depends on the clarity and appropriateness of the guidelines. Otherwise, in trying to enforce these land regulations, legal problems will surely rise.

CONCLUSION

This summarizes the state of regional and state land use controls in the Commonwealth of Massachusetts which have recently been advanced by the threatened growth on Martha's Vineyard. This study has not attempted to look at future possibilities such as development rights transfer, land banking for future growth (as well as preservation), and the creation of statewide or regional land development corporations. The latter remains a powerful opportunity for states to provide economic growth and access to housing where private efforts have failed. The problems of implementation remain to be solved in the recent transfer of development controls to state and regional governments. Certainly, maximum use of our existing controls has not been made as can be seen from the recent imposition of controls on Martha's Vineyard. The implementation of the Dukes County Regional Planning Law has the potential of expanding the scope and effectiveness of existing techniques of land management. The passage of the Nantucket Sound Islands Trust bill would create the possibility for compensable land regulations with federal funding. Both measures represent a combination of federal and state cooperation which could be a model for other land management programs.

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