BUILDING LEGALLY DEFENSIBLE GROWTH MANAGEMENT IN A COASTAL COMMUNITY: THE SANIBEL EXPERIENCE

by

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CHAPTER 1

INTRODUCTION

After two hundred years of progrowth attitudes by local governments, many American communities stopped encouraging growth for growth's sake in the 1960's and started trying to manage private development to achieve public goals.[1] The traditional approach to growth was that growth was desirable and indicated prosperity, or the growth ethic of bigger is better. The suburban growth rates of the fifties and sixties began affecting communities unaccustomed to rapid growth. These communities became concerned about their quality of life and in many cases wanted to preserve the "small town character" of their communities when confronted with growth pressures. Combined with this was a new environmental awareness with many communities afraid that more growth would have negative effects on their air and water quality.

New attitudes toward managing growth have not come about solely because of a change in the mood of the American people. Underlying these new attitudes have been large-scale shifts in national population distribution and unprecedented growth pressures on suburban and exurban areas. In 1970, for the first time in U.S. history, more people lived in the suburban rings of metropolitan areas than in the central cities or in rural

areas. The new areas of growth are on metropolitan peripheries, in rural areas, and along the coasts with the dominant trend toward concentration in coastal areas and the sunbelt. The growth management movement has been a response to these large-scale national demographic and settlement pattern shifts.[2]

Growth management can be defined as a conscious government program intended to influence the rate, amount, type, location, and/or quality of future development within a local political jurisdiction. Growth management programs may include a statement of growth policy, a development plan, and various traditional and innovative implementation tools--regulations, administrative devices, taxation schemes, public investment programs, and acquisition techniques.[3] These are popular in coastal areas.

The coastal areas of the United States are narrow in extent but broad in human significance. Most Americans depend directly or indirectly on coastal lands and waters for recreation, industrial and commercial activities, waste disposal, food production and natural preserves so there are many different types of land uses competing for limited coastal space. In addition, more than one-half of the nation's population live within fifty miles of the oceans or Great Lakes and the percentage is increasing. With these large population increases in coastal areas have come even more competition for coastal lands.[4]

The accomodation of incompatible land use activities within limited coastal space is difficult. Cutting across all proposed human use of shorelines is the prospect of natural catas-

trophe. The land-water boundary in the coastal zone is peculiarly susceptible to a variety of natural hazards: hurricanes, floods, erosion, landslides, mudslides, tsunamis, volcanoes, earthquakes, and fire. The physical characteristics which attract human occupancy (such as being near the water) are also responsible for the disaster potential. Inhabitants of Atlantic and Gulf Coast barrier islands face a triple threat from hurricanes, flooding, and erosion.[5] With more growth in the coastal zone and the existence of these hazards, hazard mitigation is becoming an important element in growth management of coastal areas particularly on barrier islands.

The accelerated rate of coastal zone development during the past twenty years has led to a large increase in research on and understanding of barrier islands. The origin of barrier islands is not certain, but it has been proposed that they were formed as the dune front of a mainland beach during a period of low ocean level. When the sea level rose due to glacial melting, the lower elevations behind the dunes were flooded, forming shallows between the islands and the mainland. In response to ocean winds, waves, storms, and tides, the islands are in a perpetual state of shifting and migration. It is the transitory nature of these sandy islands that enables them to survive. By absorbing the forces of wind and waves, they effectively protect the estuary and mainland from the ocean's fury.[6]

A barrier island has six highly integrated parts: the beach, dunes, washovers, inlets, aquifers, and maritime forests. The sound side of the island is fringed with estuarine salt marshes. The action of wind, waves, storms, and tides

affects each of these sectors. Man's activities in any one area has consequences that are felt throughout the island system.[7] Because of the role of the barrier island in protecting the mainland from storms and the fragile nature of the islands' ecosystems it is important that human activity on them be in such a way as to avoid damage to any of the islands' natural systems.

These fragile barrier beaches (islands) are being subjected to intense growth pressures along the East and Gulf Coasts. The trend toward island development has been countered by conservationists concerned with the sensitivity of barrier islands and other coastal areas. The preservation of these areas has occurred through the creation of coastal parks. Controversy regarding the development potential and management strategies for barrier islands has been important in setting the stage for this research. It is important that the processes that formed and continue to shape barrier islands (through their erosion and the migration of sand dunes) be understood so that their potential uses can be fully assessed.[8] Growth and development should be controlled in such a way that only compatible land uses are allowed on these barrier islands.

The concerns of managing the increased growth and development in coastal areas led to the enactment of the Coastal Zone Management Act in 1972. The impetus for the Coastal Zone Management Act came from population growth in coastal areas, the need to protect the ecologically sensitive land and water resources in the coastal zone, and, the more recent amendments, the search for oil in the continental shelf. Most of the au-

thority for implementing the Act is delegated to state governments although local governments in coastal areas are increasingly becoming involved in growth management. Many of these local governments have implemented growth management programs because of environmental and ecological considerations. The thrust of the Act was to help coordinate growth management efforts between local, state, and federal agencies.

Growth management is not a new phenomenon. Current techniques are now being integrated with traditional, fragmented tools into a development package. Zoning, subdivision, and open space programs are being combined with capital improvements programming in an effort to manage development.[9] These tools are being used in coastal areas to implement growth management plans based on community goals such as protecting natural areas and beach access.

Growth management programs have had some difficulty with equity issues in balancing community goals with those of special groups. The most frequent limitation on local growth management is opposition from interest groups who may raise legal challenges. Growth management techniques sometimes tread on constitutionally protected grounds. A survey of past legal challenges to various growth management techniques in other localities is useful when considering which techniques to use. Significant past legal challenges in other localities and their results must be considered before implementing growth management. It is particularly important to consider results in federal court cases and the appropriate state courts.

Some generalizations can be drawn from past court deci-

sions. Some growth management techniques, such as fiscal zoning (zoning the majority of vacant land for land use activities that will pay high taxes and require few city services), have not faired well in the courts. On the other hand, zoning designed to protect ecologically sensitive areas has had some success in the courts. In addition, growth management techniques tend to be upheld in federal court while several states' courts have taken a dim view of the same techniques. These are important considerations for cities in the coastal zone devising growth management programs.

To better understand the issues involved with the articulation and implementation of a growth management program in the coastal zone, a case study approach was employed. Sanibel Island is a barrier island off the coast of Lee County, Florida. Sanibel was used as a case study because it has a unique history in growth management, it has not been widely documented, and it could become a guide for growth management for other islands. Sanibel incorporated as a city in order to have control over its growth and development.

Sanibel had been zoned by Lee County as if it were ripe for development. The county zoning would have allowed up to 30,000 dwelling units on the island's 6,500 acres of privately owned land with no regard for existing urban services infrastructure or the ecologically sensitive resources of the island. Realizing the fragile nature of the island and the progrowth attitudes of the County Commission, the islanders turned to self-determination with growth management the impetus for the city's incorporation.

The new city then sought a way to manage its growth within its natural systems capabilities and in a way that was legally defensible. The city engaged consultants to develop a comprehensive land use plan based on natural systems. They divided the island into nine ecological zones for the purpose of regulating development. In addition, legal consultants who specialized in land use law were engaged to help write the implementation tools to be included in the plan and tailored to each individual ecological zone.

Sanibel is well known for its fine white beaches, wildlife refuge, and seashells. However, it is not well known as a city involved in growth management. Its program is not as well documented as Ramapo, New York; Petaluma, California; Boca Raton, Florida; or Boulder, Colorado. Two other factors in Sanibel's growth management program make it unusual. Sanibel lies completely within the coastal zone as defined by the Coastal Zone Management Act and the state of Florida has mandated local planning in its Local Comprehensive Planning Act of 1975 (which requires local governments to prepare and adopt comprehensive plans and that after adoption all development and zoning must be consistent with the plan).[10]

Sanibel's approach to growth management may be used as a guide as other barrier islands in the coastal zone begin devising their own management programs to regulate growth and development. Sanibel's identification of ecological zones and tailoring of ordinances to each individual zone has been unique and could easily be applied to other islands. Documentation of Sanibel's approach to growth management is important as such an

effort can serve as a guide for other coastal-area communities, particularly those on islands. They could better understand the process in order to emulate the more successful facets of the Sanibel experience while avoiding the less satisfactory outcomes.

FOOTNOTES

[1]David R. Godschalk et al., Constitutional Issues of Growth Management, rev. ed., (Chicago: Planners Press, 1979), p. 6.

[2]Ibid., pp. 6-8. [3]Ibid.

[4]G. D. Robinson and Andrew M. Spieker, eds., Nature to be Commanded, Geological Survey Professional Paper 950, (Washington, D.C.: U.S. Government Printing Office, 1978), p. 14.

[5]Rutherford H. Platt, "Coastal Hazards and National Policy: A Jury-Rig Approach," American Institute of Planners Journal 44 (April 1978):170-71.

[6]David J. Brower, Growth Management in Rural Coastal Communities, (Chapel Hill, North Carolina: Center for Urban and Regional Studies, The University of North Carolina at Chapel Hill, 1980), p. 6.

[7]Ibid.

[8]Stephen P. Leatherman, ed., Barrier Islands, (New York: Academic Press, 1979), p. ix.

[9]Lawrence B. Burrows, Growth Management, (New Brunswick, New Jersey: The Center for Urban Policy Research, 1978), p. 13.

[10]Gilbert L. Finnell, Jr., "Florida's State Land Use Laws and the ALI Model Land Development Code," in Land Use Planning, Politics, and Policy, (Berkeley, California: University Extension Publications, 1976), p. 35.

CHAPTER 2

COASTAL ZONE MANAGEMENT AND RELATED LEGISLATION

People have concentrated their activities in the attractive, productive, and convenient coastal zone. Recreation is a booming industry there and manufacturing plants and commercial activities flourish in the coastal zone. Large deposits of mineral and petroleum resources are located offshore in the continental shelf. Approximately one-half of the total biological productivity of the world's oceans takes place near the coasts. Wetlands and estuaries located there are the most productive natural areas of the world nurturing the aquatic organisms that form the basis of the food chain. Public recognition of the ecological fragility and resource limitations of coastal areas has been very late in coming. It has been preceded by substantial overcrowding, overdevelopment, and the destruction of valuable resources in the coastal zone.[1]

The concentration of large urban centers along the coast has generated huge amounts of industrial and domestic wastes which have been dumped thoughtlessly into oceans and contiguous water bodies. Offshore mining of minerals, oil, and gas has resulted in the pollution of marine environments while seawater used to cool power plants is damaging to aquatic life when discharged back into oceans and estuaries at very high

temperatures. Many highly productive wetlands and estuaries have been dredged for ports and marinas or filled to provide land for development then polluted by runoff from upland soils, solid and liquid wastes. One-fourth of all U.S. salt marshes have already been destroyed. Public access to coastal beaches has diminished rapidly as open spaces have been converted into recreational subdivisions, coastal highways, water related industries, and sites for power plants. The energy crisis has intensified the pressures on the coastal zone since a federal program for increased exploitation of offshore oil reserves has developed.[2]

Coastal Zone Management Act of 1972

The severity of the problems existing in the coastal zone and the absence of adequate state and local initiatives to combat these problems led in 1972 to the enactment of the federal Coastal Zone Management Act (CZMA), (Pub L No 92-583, 86 Stat 1280), as amended through 1976, by the United States Congress. The Act sought to initiate a plan for the rational use of the nation's coastal zone resources. It is an outgrowth of several major legislative measures for national land use planning.[3] The CZMA is based on the same principles as the unsuccessful National Land Use Policy Act which include: (1) declaration of a national policy favoring better management of (coastal) land and water resources, (2) creation of a process for federal-state collaboration in planning for these resources, and (3) authorization of federal funds to assist states in developing and administering their own plans.[4] The Act has two main pur-

poses:

> (1) to preserve, protect, develop, restore, or enhance the resources of the nation's coastal areas; and
>
> (2) to encourage and assist state and local governments in developing and maintaining management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values, as well as to the needs for economic development.[5]

By adopting this federal regulatory plan, Congress recognized the diverse and conflicting demands of urbanization upon the country's natural resources and the necessity for management and control of the environmentally sensitive coastal zone. Congress also noted that state and local institutional methods for planning and regulating land and water uses in coastal areas were inadequate to meet the demands for increasing energy needs or the national interest.[6] This commitment to a rational use of the coastal zone provides an excellent opportunity for testing new approaches to resource management. It allows attention to be directed to specific concerns identified by Congress including loss of wetlands and public open space, damage to ecological systems and shoreline erosion.[7]

The Coastal Zone Management Act attempts to coordinate the fragmented coastal management programs of various states with federal agencies.

> States and local governments have traditionally exercised considerable authority over the development and regulation of the coastal zone. . . It has become increasingly apparent, however, that this local fragmented approach is ineffective in dealing with large-scale environmental problems of planning and control. The coastal zone is a politically complex area, involving local, state, regional, national, and international interests, and any legislation in this area must be able to deal with and harmonize these competing interests.[8]

However, it should be pointed out that there is no attempt to diminish state authority. The intent of the legislation is to enhance state authority through planning and regulatory power.[9] The CZMA requires adoption and implementation of coastal zone management plans by coastal states choosing to participate in the program (it is one of the few federal programs that allows a choice in participation). It is administered at the federal level by an Office of Coastal Zone Management (OCZM), an arm of the National Oceanic and Atmospheric Administration (NOAA), a marine and environmental agency.[10]

Because of the dynamic, constantly changing nature of the shoreline, any federal-state program must consider the capacity of the land to withstand erosional forces so that recreational, residential, commercial, and industrial facilities may be developed. Since the states have traditionally delegated land use planning to local governments through enabling legislation, the federal government had previously been hesitant to interfere with this practice. In recognition of the historic role of state and local units, the legislation consequently authorizes the use of federal monies as an incentive to the states to establish coastal management programs in conjunction with local and federal governmental agencies. In addition, the CZMA instructs participating federal authorities to collaborate and share in the state's coastal land use planning.[11]

Federal grants covering up to two-thirds of the costs of developing state coastal zone plans were available to coastal states for the program development stage (Section 305 grants) and the implementation (or administrative) stage (Section 306

grants). An incentive to the states for prompt development of coastal zone management plans was in the provision of only three annual program development grants and no awards of that type were to be made after June 30, 1977. Once a state's management program receives federal approval, all federal actions which directly affect the coastal zone must "to the maximum extent practicable" be consistent with the state's approved plan. The "Coastal Zone" is defined in the Act but the exact inland limits of the zone are left to the discretion of the states. However, the zone must extend inland "to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."[12]

The Congressional initiative encourages state participation on a voluntary basis without direct intervention, by means of the federal grant-in-aid incentive. The Act sets forth many definitions pertinent to the purposes and objectives of the legislation. "Coastal Zone" is defined to include certain coastal waters (including the lands therein and thereunder). This definition includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. "Coastal Waters" are defined in the Great Lakes area as the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, and estuary-type areas, such as bays, shallows, and marshes. More specifically, they are defined as those waters, adjacent to shorelines, which contain a measureable quantity or percentage of sea water, including, but not limited to, sounds, lagoons, bayous, ponds, and estuaries. "Coastal State" is defined by

the Act to include a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes (this definition includes thirty states). The definition also includes U.S. territories.[13]

The State Role

Requirements which each state must meet in the development of a coastal zone management plan to receive federal funds are set out in the statute. Each plan must include:

> (1) an identification of the boundaries of the coastal zone subject to the management program;
>
> (2) a definition of what shall constitute permissible land and water uses within the coastal zone which have a direct and significant impact on the coastal waters;
>
> (3) an inventory and designation of areas of particular concern within the coastal zone;
>
> (4) an identification of the means by which the state proposes to exert control over the land and water uses referred to in part (2), including a listing of relevant constitutional provisions, legislative enactments, regulations, and judicial decisions;
>
> (5) broad guidelines on priority of uses in particular areas, including specifically those uses of lowest priority;
>
> (6) a description of the organizational structure proposed to implement the management program, including the responsibility and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.[14]

The CZMA provides that the state must have a regulatory procedure. This requirement applies to development generally though it is not very clear how the standard is to be implemented. The significance of this Act at the state level will also depend on the depth of the coastal zone.[15] The Office of

Coastal Zone Management (OCZM) accepts separate policies and management regulations to be adopted for distinct subareas of the coastal zone. Some land and water uses may be prohibited in the coastal zone but states must give reasons for prohibiting any use.[16]

The designation of the coastal zone boundaries is the crucial first step in the development of a management plan. It determines the location and extent of territory subject to planning and controls and which areas are not subject to controls under the program. The Act recognizes that land and water uses in areas a considerable distance inland from the land/sea interface may have significant effects on the coastal environment and that protection of this environment requires control of all areas whose uses will have "direct and significant impact on the coastal waters." In individual states the precise land water boundary of the coastal zone depends on actual geographic, ecological, and other conditions, but the boundary should include all areas "the uses of which will have a direct and significant impact on the coastal environment."[17]

States must inventory and designate coastal sites having special importance for ecological, economic, cultural, locational, or other reasons. The OCZM suggests the inclusion of: (1) areas of significant hazard if developed, because of storms, slides, floods, erosion, settlement, and (2) areas needed to protect, maintain, or replenish coastal lands or resources including coastal floodplains.[18] The inventory and designation of areas of particular concern may include areas that are environmentally unique or fragile, historically significant,

scenically important, or naturally highly productive; or they may have substantial recreational value or be subject to significant natural hazards.[19]

A state must adopt one or more of the following techniques for controlling land and water uses: (1) direct regulation by the state; (2) local regulation in accordance with state standards, subject to administrative review; (3) local regulation, subject to state review for consistency with the management plan. In addition, the state must develop a method for assuring that local regulations within the coastal zone "do not unreasonably restrict or exclude land and water uses of regional benefit."[20]

The Act requires the Secretary of Commerce to consult and cooperate, as well as coordinate his activities, with other federal agencies. Also, once a state management plan is approved, every applicant for a federal license or permit to conduct an activity affecting the coastal zone must certify that his proposed activity will not violate any state's plan. In this manner, a state can object to certification, and may call upon the Secretary to resolve the conflict. Such extension of state authority over the granting of federal licenses and permits has led to greater state participation.[21]

State Examples

States must delineate their coastal zones in accordance with the statutory definition given above. The seaward limit in every state is the outer boundary of the U.S. territorial sea (which is three miles seaward of the mean high water line).

The landward limit is discretionary, however, with each state establishing a different and sometimes arbitrary method of determining it. Connecticut's landward limit is 500 feet inland while Alabama uses the ten foot contour line.[22] Delaware's Coastal Zone Act defines a zone approximately two miles wide. Within the zone certain heavy industry with major environmental impact is prohibited.[23] No precise limits are specified by the federal government but the coastal zone should go far enough inland to protect the coast adequately. No two states seem to be able to agree how far inland the coastal zone should go.

The coastal zone also includes urban areas. It is doubtful that Congress gave coastal controls in urban areas much thought, and they present serious problems in some states in state and local coordination of enforcement.[24] One approach to this problem is in Illinois where Lake Michigan is under state control, hazard or erosion zones are under joint state-local control, and regulatory zones are under local control subject to state review.[25] This arrangement seems to be effective in Illinois's urban areas.

California has adopted a comprehensive plan for resource use in its coastal zone. Mandated by a statewide referendum in 1972, the plan was ratified by the state legislature in 1976. The principal policies of the plan are to guarantee public access to the shore, to insure that coastal developments serve the public as a whole, to protect and restore coastal marshes, to preserve coastal farmlands, and to provide stringent environmental safeguards for coastal developments, particularly energy facilities. These policies are to be implemented

at the local level by governments who are required to adopt them as part of their own general plans.[26] Local governments have been given primary responsibility for development and implementation of specific coastal plans. Local governments within the defined coastal zone (in most cases this is within 1,000 yards of the Pacific Ocean) are required to develop a local coastal program and to submit the program for approval to temporary regional commissions and in some circumstances to the statewide commission.[27]

In Massachusetts, Martha's Vineyard and Nantucket are islands where explosive growth has led to clashes between those who wish to restrict access to protect the existing environment and those who favor development.[28] Martha's Vineyard Commission was established with the mandated purpose to "preserve and conserve the unique natural, historical, ecological scientific and cultural values of Martha's Vineyard" through the commission's review of large developments, and designation by the commission of important or ecologically fragile areas of the island (where development is regulated). Local boards, taxpayer groups, or the commission can nominate areas for such designation. After a public hearing, the commission votes as to whether an area should be designated as important or ecologically fragile. With this mechanism the commission can establish a building moratorium on the district until new regulations (which can protect its character) can be adopted.[29]

Florida has not adopted a state coastal zone management plan. However, the state did realize that the destruction of its wetlands and coastal resources had reached a serious stage

in 1971 and enacted a package of laws that make up a state growth policy. Florida chose a selective approach to coastal zone management focusing on decisions of regional or statewide significance because of the size or type of development or the site's special environmental values. Four pieces of legislation that deal specifically with these concerns are:

(1) The Environmental Land and Water Management Act of 1972,

(2) The Land Conservation Act of 1972,

(3) The Water Resources Act of 1972, and

(4) The Florida Comprehensive Planning Act of 1975.[30]

Florida also approaches coastal zone planning and regulation through the Florida Pollutant Spill Prevention and Control Act. This Act makes funds available for clean-up operations, and provides recoveries from persons or entities responsible for shoreland damage resulting from oil spills.[31]

Because of the different approaches states take in delegating coastal zone management authority, the CZMA specifies procedures for interactions between states and local government or regional agencies. State coastal management agencies, which can allocate their grant funds to local governments, must be provided extensive authority to insure that local regulations and decisions on coastal land and water uses "do not unreasonably or arbitrarily restrict or exclude those uses of regional benefit." The law calls for extensive consultation and cooperation between the state and local agencies, as a condition of state program approval. If a state agency proposes to implement any decision that would conflict with a local zoning ordinance or decision, it must notify the local govern-

ment and allow it a one-month comment period.[32]

Coastal Zone Management Act Amendments of 1976

The CZMA was amended in 1976 to encourage states to establish coastal zone planning on a regional and interstate level by authorizing additional grants of up to ninety percent of the entire cost of such programs. Coastal states can now enter into interstate agreements and create the necessary agencies to implement regional coastal zone policies without further Congressional endorsement. In addition, Congress has accelerated its technical assistance to both private and public research bureaus and organizations studying coastal zone management and regulation.[33]

Part of the reason for the 1976 amendments to the CZMA was the energy crisis that developed between 1972 and 1975. The Arab oil embargo created an even greater need for energy resources, specifically those located in the offshore and coastal zone areas of the states. Many states were concerned that the development of fossil fuel resources would create a quick deterioration of their coastal zone regions. This is of particular concern since they had been deprived of the right of regulation over offshore oil and gas leases by the United States Supreme Court (in the United States v. Maine, 1975 it was decided that the U.S. and not the individual states had the sovereign rights over the seabed and subsoil under the oceans, from beyond the three-mile limit to the outer continental shelf). Congress therefore considered the need for additional legislation to protect the coastal states from the

possibility of adverse effects resulting from offshore drilling. With the aid of the President and with increased funding, this concern led to the 1976 amendments (to the CZMA) and the creation of the Coastal Energy Facility Impact Fund.[34]

The creation of this new fund in 1976 was to provide assistance in the development and production of natural resources from the outer continental shelf and provides up to 50 million dollars per fiscal year in the form of grants or loans. Congress decided to provide full federal funding rather than the partial funding available under other provisions of the Act in recognition of the new program's importance to the nations total energy policy. In addition, the 1976 amendments authorized a federal guarantee for bonds issued by coastal states and units of general purpose government to raise monies for improved facilities required as a result of coastal energy activity.[35] In order to qualify for CZMA planning or program development grants, a state was to have submitted a coastal zone management plan, acceptable to the NOAA, by June 30, 1975.[36]

Hazard Mitigation

As mentioned earlier, hazards constitute a threat in coastal areas. Natural hazards such as hurricane-induced flooding and high winds and erosion combine with man-induced hazards such as oil spills and pollution in ways that threaten human life, property damage, and deleterious impacts on natural resources. Hazard mitigation is an important aspect of managing development in the coastal zone.

The past decade has seen the emergence of diverse legislative and executive action relating in one way or another to coastal hazard mitigation. These include the National Flood Insurance Program (NFIP), the Coastal Zone Management Act, and executive orders 11988 and 11990 (signed by Carter in May 1977). CZMA establishes a planning process in each coastal state that recognizes and integrates these initiatives. NFIP provides technical data on coastal hazards and sets minimum national criteria for management of hazard areas. The executive orders require federal agencies to implement wise use of floodplains and wetlands through their actions.[37]

The mitigation of coastal zone hazards will receive more attention in coming years especially if population migration trends toward the coastal zone continue. Most coastal residents have little experience in preparing for or fleeing from hurricanes. Mobile homes in low-lying coastal areas are particularly susceptible to destruction by wind and water. Erosion of the coastline causes a great deal of property damage. The combination of population growth and natural hazard has caused public authorities and property owners to devise three different types of coping mechanisms or adjustments: (1) modification of the hazard through technology; (2) modification of the vulnerability to damage through warning systems, land use controls, relocation, and related measures; and (3) modification of the impact of the hazard through disaster relief, insurance, and reconstruction loans. Flood hazards can be divided between structural measures (dams, dikes, seawalls, jetties, and groins) and nonstructural measures (public land ac-

quisition, land use controls, and warning systems). The current trend is toward greater reliance on nonstructural measures.[38]

Public support for restrictive land use policies designed to reduce damage from hurricanes is extremely high immediately after disasters. Such policies include coastal setback laws, flood oriented and wind oriented building codes, and mobile home tie-down regulations. Most persons questioned about such laws preferred that they be enacted at the state rather than the local level of government.[39] Implementation would probably have to be worked out at the local level however.

Related Federal Legislation

A great deal of coastal zone related legislation has been passed by Congress in the past few years both prior to and following the Coastal Zone Management Act of 1972. Related legislation enacted prior to the CZMA includes: Submerged Lands Act of 1953, the National Flood Insurance Act of 1968, and the National Environmental Policy Act of 1970. Related legislation subsequent to the CZMA includes: the Shoreline Erosion Control Demonstration Act of 1974, the Deep Water Ports Act of 1974, National Flood Insurance Act amendments of 1973, and the Federal Water Pollution Control Act amendments of 1972.

A bill introduced before the 92nd Congress would have established a "national trust" to administer the unincorporated areas of the islands of Nantucket and Martha's Vineyard and establish strict land use controls. Advocates of such controls are aware of the taking issue. The 1972 version of the Island

Trust Bill would have provided for a 25 million dollar, three-year appropriation for the acquisition of land. This was understood to include partial compensation for highly restrictive federal zoning.[40]

The small amount of litigation involving the nation's coastal zone or shoreline generally deals with three problems: (1) the concept of navigability and the regulation thereof; (2) the rights and title to lands on, adjacent to, or under navigable waters; and (3) federal permit systems controlling development activities in these waters. The majority of state shoreline litigation relate to the implementation of state shoreline management and regulatory programs, such as permit systems and "takings" without just compensation.[41]

One intention of the CZMA and amendments was to help coordinate the existing and future related coastal legislation at the state and local level. One problem with the existing legislation is that it is administered through so many different department Secretaries. The National Flood Insurance Program is administered by the Secretary of Housing and Urban Development, the Shoreline Erosion Control Demonstration Act and the Rivers and Harbors Act are under the authority of the Army Corps of Engineers, the Outer Continental Shelf Land Act is administered by the Secretary of the Interior, while the CZMA is administered by the Secretary of Commerce. The coordination of these Acts is particularly important at the regional and interstate levels. With this basis of federal legislation, local ordinances can be related to them for managing growth in the coastal zone.

FOOTNOTES

[1]Elaine Moss, ed., Land Use Controls in the United States: A Handbook on the Legal Rights of Citizens, (New York: The Dial Press/James Wade, 1977), p. 99.

[2]Ibid., pp. 99-100.

[3]Patrick J. Rohan, Zoning and Land Use Controls, Vol. 4, (New York: Mathew Bender, 1978), pp. 26-2, 26-5, 26-6.

[4]Rutherford H. Platt, "Coastal Hazards and National Policy: A Jury-Rig Approach," American Institute of Planners Journal 44 (April 1978):172.

[5]Pamela C. Mack, "Federal Environmental Laws: Piecemeal Land Use," in Management and Control of Growth, Vol. III, ed. Randall W. Scott (Washington, D.C.: The Urban Land Institute, 1975), p. 425.

[6]Rohan, pp. 26-6, 26-7, 26-8, 26-9. [7]Platt, p. 173.

[8]Rohan, p. 26-9. [9]Platt, p. 173.

[10]Daniel R. Mandelker and Deborah B. Wafer, "The Role of the Federal Government in Land Use Planning and Development Controls," in Land Use Planning, Politics, and Policy, ed. Richard Cowart (Berkeley, California: University Extension Publications, 1976), p. 56.

[11]Rohan, pp. 26-10, 26-11, 26-12. [12]Moss, pp. 100-101.

[13]Rohan, pp. 26-12, 26-13, 26-14. [14]Moss, p. 102.

[15]Mandelker, p. 58. [16]Platt, p. 173. [17]Moss, p. 112.

[18]Platt, p. 174. [19]Moss, p. 113. [20]Ibid., p. 103.

[21]Rohan, pp. 26-21, 26-23, 26-24. [22]Platt, p. 173.

[23]Fred Bosselman, David Callies, and John Banta, The Taking Issue, (Washington, D.C.: U.S. Government Printing Office, 1973), pp. 10-11.

[24]Mandelker, p. 58. [25]Platt, p. 173.

[26]G. D. Robinson and Andrew M. Spieker, eds., Nature to be Commanded, Geological Survey Professional Paper 950, (Washington, D.C.: U.S. Government Printing Office, 1978), p. 14.

[27]Fred Bosselman, Duane A. Feurer, and Charles L. Sieman, The Permit Explosion, (Washington, D.C.: The Urban Land Institute, 1976), p. 40.

[28]Bosselman, Callies, and Banta, pp. 13-14.

[29]Commonwealth of Massachusetts, "Martha's Vineyard Commission," in Management and Control of Growth, Vol. IV, ed. Frank Schnidman, Jane A. Silverman, and Rufus C. Young, Jr. (Washington, D.C.: The Urban Land Institute, 1978), p. 97.

[30]David R. Godschalk, "State Growth Management: A Carrying Capacity Policy," in Management and Control of Growth, Vol. III, ed. Randall W. Scott (Washington, D.C.: The Urban Land Institute, 1975), p. 334.

[31]Rohan, pp. 26-50, 26-51.

[32]Rice Odell, "The Coast Is Not Clear for Energy Planning," in Management and Control of Growth, Vol. IV, ed. Frank Schnidman, Jane A. Silverman, and Rufus C. Young, Jr. (Washington, D.C.: The Urban Land Institute, 1978), pp. 164-65.

[33]Rohan, pp. 26-24, 26-25. [34]Ibid., pp. 26-26, 26-27.

[35]Ibid., pp. 26-28, 26-29. [36]Moss, p. 113.

[37]Platt, p. 172. [38]Ibid., pp. 171-72.

[39]Earl J. Baker, "Public Attitudes towards Hazard Zone Controls," American Institute of Planners Journal 43 (October 1977):401.

[40]Bosselman, Callies, and Banta, p. 14.

[41]Rohan, p. 26-108.

CHAPTER 3

LEGAL CHALLENGES TO GROWTH MANAGEMENT

In devising a growth management program, a critical concern is whether the program reaches a fair compromise among the conflicting needs and demands of divergent groups: developers, current and potential residents, environmentalists, people in lower-income or minority groups, local business people, surrounding communities, and the local government. Federal and particularly state constitutions are important in assessing the fairness of the compromise since they define the scope of power for each level of government and specify the rights guaranteed to individuals. A growth management program that follows the guidelines established in the Federal Constitution and the applicable state constitution should resolve conflicts fairly while escaping, or at least withstanding, constitutional challenges. However, the requirements of a constitutional provision are not always clear and the proper resolution of demands made by competing constitutional provisions is rarely apparent. A knowledge of constitutionally mandated duties and protections and associated challenges for noncompliance with these standards is important in evaluating growth management programs.[1]

One of the favorite tools of local government for imple-

menting growth management programs is the zoning ordinance. Consequently, most legal challenges to growth management involve zoning. Since the Supreme Court decision in Village of Euclid v. Ambler Realty Co., in 1926, the use of zoning ordinances has been the most popular method of land use regulation. Zoning is part of the police power delegated to local governments by the states. Legal limitations on land use regulations have evolved over the years in response to the exercise of zoning controls by local governments.[2] The increasing use of zoning and associated conflicts have provoked the Supreme Court to begin hearing zoning cases in 1974 after 46 years of letting lower courts decide the issues.

Due to the diversity of groups affected, the untried nature of some program tools, and the broad potential impact, many growth management programs are likely to be challenged in court. Some important questions have already been raised, and in some cases resolved, about the constitutionality of certain challenged programs. However, many important questions remain since the growth management movement is still in a formative stage and there is a lack of legal precedents on which to base decisions. Because of this lack of established legal precedents, planners and public officials have the opportunity to be innovative in their programs. Many legal issues raised present questions of first impression so state and federal courts are playing important roles in determining the future scope and nature of local growth management.[3]

Every court reviewing a growth management scheme hopes that the objectives of all the disputants can be achieved at

once, by gradual and well-planned growth, which protects the natural and cultural environment, does not overburden the local tax base, and provides a regional fair share of modestly priced housing. A plan presented so that it appears to fulfill these criteria will probably be legally successful. A strong attack on any of these elements may spell legal defeat for the program.[4]

The courts are particularly important in constitutionally based challenges to growth management since they are the final interpreters of the federal and individual state constitutions. The judicial role is also enhanced by the fact that most constitutions consist of general principles written in broad terms which the court must interpret and then apply to the facts of a case. The courts have considerable room for discretion in going from the general principle to the specific application.[5]

In constitutional growth management litigation, each individual state and federal court potentially has a role in determining what growth management programs will be judged constitutional. One of the reasons for this is that there have been very few national guidelines on the federal constitutional aspects to base decisions on because the U.S. Supreme Court has chosen to hear only a few cases applicable in this arena. The field is fairly open for the lower courts to reach their own interpretation of federal constitutional provisions when applied to growth management questions. Where litigation is based on state constitutional grounds, even where the state provision parallels a federal constitutional provision, the state supreme court is the final authority. State judiciaries

may arrive at different interpretations of similar or identical provisions in their own state constitutions.[6]

In the search for defensible growth management, it is important to recognize that within the overall judicial system interpretations of constitutional growth management issues vary considerably. State courts range from a traditional focus on private property rights and a presumption of validity for local legislative actions to a "broadened-impact"[7] focus on civil rights, environmental quality, and strict scrutiny of governmental actions. Variations also exist in the general differences in interpretation between state and federal courts on issues of due process and equal protection. Complicating matters further, some courts are evolving from traditional to broader-impact views on certain issues but not on others. The best approach for local governments is to research the legal situation in its state and to build a growth management program that provides as much protection as possible while achieving program goals.[8] There are many possible legal challenges to a growth mangement program. Federal and state constitutional challenges generally can be broken down into categories dealing with a specific issue. Basic categories include due process, reasonableness, exclusion, taking, right to travel, and challenges dealing with state environmental legislation.

Due Process

Due process of the law is a right assured to all by the Constitution. The Fifth Amendment requires that due process be followed in all actions of the federal government while the

Fourteenth Amendment requires states to also recognize this constitutional right. In the growth management context, the state guarantee is most applicable: "nor shall any state deprive any person of life, liberty, or property without due process of law." Generally, there are two types of due process of law one of which is substantive. Substantive due process is concerned with the rights and duties of people and governments in their ordinary relations with each other. It includes concern for what the government can do, the limits of its regulatory power, and the essential fairness of governmental actions. A law may violate the substantive due process guarantee if it seeks to control something that is beyond its power to control, or controls it in a way that is unfair. It may also be a substantive rights violation under the due process clause if a statute or ordinance regulates something beyond the delegated powers, is arbitrary or capricious, or is lacking in ascertainable standards or a statement of reasons.[9]

A substantive due process challenge may be made on the grounds that a governmental action is generally unfair because of the unreasonableness of the ends sought or the unreasonableness of the means used to achieve the ends. This is referred to as a general due process or a reasonableness challenge. A due process challenge may also accompany any of the other specific constitutional challenges, such as taking, equal protection, or right to travel, on the grounds that the governmental action violated this specific constitutional guarantee. If the government confiscates an individual's land without paying him for it, this is a violation of the Fifth Amendment on tak-

ing grounds as well as a violation of substantive due process.[10]

The general due process challenge is really a broad allegation that the government has not been reasonable. Usually, upon more rigorous analysis, a substantive due process challenge could be categorized as one or more of the specific challenges. The range of judicial interpretation in a general due process challenge is usually small. It becomes apparent in the method of application of the widely accepted requirements of legitimate objectives, reasonably necessary means, and means which are not unduly oppressive. The major differences between traditional broadened-impact courts are seen in the extent to which a presumption of validity[11] is accorded local governmental actions and the level of scrutiny given to the appropriateness of the means.[12] Reasonableness is one of the most important aspects of the due process challenge.

Reasonableness

A basic rule of all legislation is that it must be reasonable when taking into consideration the factors of local situations, new conditions, public requirements, the general welfare, and the interests of property owners. The benefits of zoning ordinances, for example, are obtainable by strict adherence to the rule of reasonableness as it applies to each situation in question. Unreasonableness, as interpreted by most court decisions, means that unreasonableness has reached a degree as to constitute unconstitutionality. The burden of proving that the challenged zoning ordinance is arbitrary and unreasonable is an important question when considering the

question of constitutionality.

The test of reasonableness is very hard to define with any preciseness. It is flexible, tends to change over time, and varies from one locale to another. Generally, however, the courts consider four aspects of reasonableness in determining the validity of a growth control or land use regulation:

> (1) The regulation must promote an objective which is a proper governmental concern, and there must be a demonstrable relationship between the regulation and the objective;
>
> (2) the objective must not be one that the entire community should pay for through eminent domain proceedings;
>
> (3) landowners who are similarly situated must receive equal treatment;
>
> (4) the regulation must not reduce the value of property too severely.[13]

A growth management policy or regulation could be challenged as having an improper objective, as utilizing means unrelated to an otherwise proper end, or as employing means which, although related to a proper end, are unreasonable to accomplish that end. The means may be challenged as related, but unreasonable to accomplish that end. In Board of Supervisors v. Williams, Fairfax County, Virginia, had adopted the objective of delaying development until adequate public facilities were available. The county had refused to rezone a certain parcel to a higher-intensity use on the grounds that public facilities were still inadequate for intense urban development. The Virginia Supreme Court found the refusal to rezone to be unreasonable, arbitrary, and capricious, not because the keying of development to adequate facilities was an improper

end, but because the court found the facilities were adequate and the use of low-density zoning was unreasonable to accomplish the stated end.[14]

While it would be an exaggeration to say that all landowners similarly situated must be treated equally, the courts generally require a regulation to be based on some policy which can rationally justify any differences in treatment. Regulations that are applied arbitrarily or capriciously have been ruled unconstitutional, and courts are most suspicious when legislative bodies treat small parcels of land differently from surrounding property. The Stanford Environmental Law Society made the following observation about reasonableness:

> Sometimes, however, the court will require a greater showing of reasonableness if certain factors exist. Thus, were a regulation to infringe on what the courts consider to be "fundamental rights" or to involve a classification which the court views as "suspect," the courts would scrutinize such a regulation very strictly, requiring that the law be both necessary and in the furtherance of a "compelling governmental interest."[15]

The Taking Issue

Another Fifth Amendment provision relating to due process is the "taking clause." The Fifth Amendment provides that "No person shall. . . be deprived of. . . property without due process of law; nor shall private property be taken for public use without just compensation." The United States Supreme Court has held that the Fourteenth Amendment due process clause extends this restriction on the federal government to the states. Since local governments derive their power from the states, this restriction on taking private property extends

to them as well.[16]

Private property rights have been regulated since the enactment of nuisance laws at the turn of the century and by zoning in many localities for the past 55 years. This does not constitute a taking in the traditional sense even though many land use cases can point to the fact that a property devaluation occurred as a result of the said regulation. The legality of these regulations derives from the police power, which gives local governments the vested right to protect the public health, safety, morals, and welfare. When perceived that the maintenance of public welfare requires property to be publicly regulated to the extent that a person's property is no longer useful to him, payment for such taking is deemed necessary. It has been noted by Bosselman, Callies, and Banta that:

> The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In a valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great that the landowner ought not to bear such burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transformed to the government so as to be a taking in that sense.[17]

The case law revolving around what actually constitutes a lawful taking is still somewhat unclear. In the past, courts have insisted the taking clause be strictly observed. Whenever the government has needed land for some public use, it has either purchased the land in the open market or exercised the power of condemnation (eminent domain). However, when communities are attempting to regulate large tracts of land for open space preservation, green belts, and buffer zones, the costs

via purchases will generally outstrip available funds. Boulder, Colorado has successfully purchased thousands of acres worth millions of dollars in its greenbelt program; however, not all communities possess such resources (Boulder residents approved a one cent sales tax to accomplish this).

The first half of this century found the case law supporting the taking clause strictly. In 1922, in the case of Pennsylvania Coal Co. v. Mahon, Chief Justice Holmes announced his famous rule that property may be regulated to a certain extent, but if the regulation goes too far it will be recognized as a taking. Thus, Holmes declared Pennsylvania's Kohler Act, passed to prevent coal mines from operating under towns, an unconstitutional regulation of the property of the coal company. This rigid interpretation laid down by Holmes set the precedent for many rulings which have upheld private property rights at the expense of the public. It is interesting to note the dissenting opinion in the case by Justice Brandeis, who argued that the scope of the police power was, in fact, sufficient to regulate Pennsylvania Coal.[18]

William Reilly makes the following observation on the taking issue:

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation. But restrictions imposed to protect the public health, safety or morals from dangers threatened is not a taking. . . The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public.[19]

Judicial approaches to determining whether a governmental action or regulation is a taking have led to the development of tests. Four tests have been used to determine if restrictions resulting from a floodplains regulation constitute a taking. They serve to illustrate the broad degree of discretion that the court may consider in evaluating the validity of a regulation. They are:

> (1) a balancing test--if the advantages to the community are outweighed by disadvantages to the owner;
>
> (2) confiscation restrictions leave no reasonable use of the property;
>
> (3) public use test--a benefit is conferred on the public as opposed to prevention of a harm; and
>
> (4) correlative benefit test--if the owner does not participate in a benefit conferred by the regulations.[20]

Many courts have treated the idea of regulatory taking more as a hypothetical possibility rather than a real one. The United States Supreme Court has left some doubt as to whether any regulation could constitute a taking as long as the court was convinced the public purpose served by the regulation was important. This serves to show the changing emphasis reflected by the new mood in America regarding the purpose and intent of land use regulations. A well defined thrust to judicial interpretation is still in balance when it comes to resolve conflicts between public and private property rights.

Right to Travel

Efforts to slow growth may on occasion be found to tread upon constitutionally protected rights, including the right to travel.[21] This was the decision of a Federal District Court in

Construction Industry of Sonoma County v. City of Petaluma (this decision was later overturned). At the same time, however, it is clear that local governmental units have reasonably broad discretion to regulate growth and population density through zoning. Such broad discretion was recognized in the April 1974, Supreme Court decision, Village of Belle Terre v. Borass, involving a city ordinance which restricted land use to one-family dwellings and rather specifically defined what it meant by a family (not more than three persons unrelated by blood, marriage, or adoption). The Supreme Court in that case upheld the constitutionality of the ordinance, rejecting the assertion by a landlord who rented to a group of students that the ordinance infringed upon the rights of association, privacy, and freedom of travel. More specifically, the court pointed out that "the police power is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area sanctuary for people."[22]

In an effort to effect a form of growth management Petaluma, California placed annual limits on the number of residential building permits as part of a total plan to slow and redirect growth. The federal trial court decision striking down the plan on the grounds that it violated the federal constitutional right to travel was reversed by a federal appeals court, which found the plan within the confines of the reasonable exercise of the police power. In February 1976, the U.S. Supreme Court declined to hear the case. Thus, the appeals court decision and the Petaluma plan stand as legally valid.[23] It

should be noted, however, that had the legal challenge been brought by a potential resident of Petaluma, as in Dailey v. Lawton,[24] rather than the construction industry, the right to travel argument would have been stronger. The federal appeals court ruled that the Construction Industry of Sonoma County lacked the standing to bring a right to travel challenge against the city because their right to travel obviously had not been violated.

Turning to another aspect of due process, exclusion has become a critical issue, usually raised in challenges to growth control ordinances. It is an important determination criterion applied when deciding whether a regulation is a reasonable exercise of governmental power. Some growth control regulations attempt to exclude particular types of residential uses such as mobile homes, multi-family dwellings, or apartments with more than one bedroom. Courts generally do not look on such regulations as reasonable. They see such ordinances as disquised means for keeping out certain classes of people--usually the poor and urban Black, and, in the case of bedroom ordinances, families with school age children. All growth control ordinances, in effect are exclusionary in that they do not allow all people who wish to settle in a particular place to do so. While this broad sense of exclusion is of great concern to some courts, most courts refer to a regulation as "exclusionary" only when the purpose or effect is to exclude particular classes of individuals from the community, such as racial minorities, the poor, or families with school age children.[25]

Large lot zoning (usually three-to-four acres or larger

lots) has been used by many communities for many reasons. It has been used to protect ecologically-fragile lands from intense development, to slow growth in areas lacking utilities, and to exclude the poor. Large lot zoning has been successful in the courts in areas lacking utilities, such as in Wilson v. Town of Sherborn, but has become increasingly suspect as exclusionary.[26]

In the case of National Land and Investment Co. v. Kohn, the Pennsylvania Supreme Court struck down four-acre zoning in the path of suburban development noting that zoning was a means to plan for the future not to deny it. Ten years later, the Supreme Court of New Jersey in Southern Burlington County NAACP v. Township of Mt. Laurel, went even further declaring that all municipalities in the path of urban expansion must zone or rezone to small lots to provide for their fair share of least-cost housing. The Virginia Supreme Court also proved hostile to large lot "holding zones"[27] in Board of County Supervisors of Fairfax County v. Carper where it perceived an intent to exclude the less wealthy from that section of the county. In Simon v. Town of Needham the Massachusetts Supreme Court held that although a town may not zone so as to exclude "thrifty and respectable citizens," municipal service costs "might be considered as an element, more or less incidentally involved" in rezoning.[28]

It has been demonstrated that when local governments take affirmative action to help resolve potentially negative side effects of growth limits (such as higher land and housing costs), the courts might be less likely to hold those growth-

limiting actions invalid. This was the case in Golden v. Planning Board of the Town of Ramapo where the New York Court of Appeals was able to discount arguments that the Ramapo regulations were exclusionary. It did so in part because the township had established a public housing agency and had actually constructed some subsidized housing units, despite court suits by its own citizens who were trying to prevent it. However, this was not the case in Virginia where the State Supreme Court in DeGroff v. Board of Supervisors invalidated a mandatory 15 percent lower-income housing provision in planned developments on the grounds that it was "socioeconomic zoning," and beyond the scope of the police power.[29]

Several recent decisions of the federal courts, such as Ybarra v. Town of Los Altos Hills and Warth v. Seldin, indicate a growing reluctance on the part of the federal judiciary to decide exclusionary land use controls cases, particularly where economic (and not racial) discrimination appears to be involved. However, at least one state court (New Jersey, in the Mount Laurel case) has said that the general welfare, for which land use controls are exercised, includes the opportunity for decent, affordable housing.[30]

State Environmental Challenges

A multitude of environmental legislation has been enacted at all levels of government. Many of these laws (particularly those at the state and local level) have had dramatic effects on land development. Environmental performance standards can severely limit development. Many times these laws relegate

land to open space purposes. Local governments would never have been able to accomplish the same results with conventional zoning powers because the police power can not be used to accomplish purely aesthetic objectives or to obtain private property for essentially public use which would be in violation of the Fifth Amendment's prohibition against uncompensated confiscation.[31]

In Just v. Marinette County a state-authorized local wetland protection ordinance was upheld against the argument that its prohibition of fill into the lake invalidly removed all development value from the plaintiff's property. The court said that land ownership does not necessarily include an inherent right to alter the natural state of the land when to do so would threaten the health, safety, and welfare of the other citizens of the state. Regulation of development in flood-prone areas did not fare well in the courts until the National Flood Insurance Program prompted most states to adopt flood plain zoning enabling legislation. In Turnpike Realty Company v. Town of Dedham, for example, a flood plain ordinance was upheld despite the argument that it amounted to an unconstitutional taking of property, may be a harbinger of future judicial attitudes toward such laws.[32]

Downzoning (rezoning land to a lower-intensity use) to prevent large second-home developments in environmentally sensitive areas is permissible, at least in the short run, according to the federal court decision in Steel Hill v. Town of Sanbornton. In a downzoning that dramatically reduced property values, the California Supreme Court held in the Cerritos case

that a property owner was not entitled to bring an action in inverse condemnation to recover the lost development value--his remedy was a convential action to determine the constitutionality of the downzoning itself. When downzoning and conventional zoning techniques are used to accomplish purely fiscal or exclusionary ends without reference to environmental dangers, then the federal courts and some state courts such as New Jersey and Pennsylvania will be more likely to strike down such regulations.[33]

The Future

Two complicated growth management plans have been approved in higher court rulings. Both Ramapo, New York and Petaluma, California have been able to defend their programs in legal challenges. However, the planner or lawyer should explain to their clients that there can be no advance assurance that a local growth management plan will stand up in court. A brief scan of the existing court decisions should convince anyone that there is no use in trying to form a coherent legal doctrine out of the decisions rendered so far. The starting points and rationales for the decisions are so varied as to preclude pat assessments. For example, the Petaluma court did not even cite Ramapo.[34] It may be observed, however, that in many states growth management techniques fare better in the federal courts than in state courts. This probably would be the case in New Jersey, Pennsylvania, and possibly Florida.

FOOTNOTES

[1]David R. Godschalk et al., Constitutional Issues of Growth Management, rev. ed., (Chicago: Planners Press, 1979), p. 21.

[2]Carl J. Seneker, II, Land Use Regulation for Urban Growth Control, (University of California Davis: Institute of Governmental Affairs, 1974), pp. 1-4.

[3]Godschalk, p. 15.

[4]Alexandra D. Dawson, J.D., "Management of Residential Growth," Zoning and Planning Law Report 2 (July-August 1979): 155.

[5]Godschalk, p. 15. [6]Ibid.

[7]Broadened impact refers to courts considering nontraditional issues in deciding challenges to land use regulations such as the regional general welfare or a community's fair share of a regional housing market.

[8]Godschalk, pp. 15-16. [9]Ibid., p. 43. [10]Ibid., p. 44.

[11]A presumption of validity means that due to the nature of legislative actions they are presumed by the courts to be legitimate.

[12]Godschalk, p. 52.

[13]Mary Cranston et al., A Handbook for Controlling Growth, (Stanford Environmental Law Society, 1973), pp. 17-18.

[14]Godschalk, pp. 44-45. [15]Cranston, p. 21.

[16]Godschalk, p. 53.

[17]Fred Bosselman, David Callies, and John Banta, The Taking Issue, (Washington, D.C.: U.S. Government Printing Office, 1973), p. 20.

[18]William K. Reilly, The Use of Land: A Citizen's Policy Guide to Urban Growth, (New York: Thomas Cromwell Company, 1973), p. 166.

[19]Ibid.

[20]Robert H. Freilich, "Development Timing, Moratoria, and Controlling Growth," in Management and Control of Growth, Vol. II, ed. Randall W. Scott (Washington, D.C.: The Urban Land Institute, 1975), p. 378.

[21]The right to travel is a relatively new concept based on rather unclear references to this right in the First, Eleventh, and Fourteenth Amendments as interpreted.

[22]Alan G. Kirk, II, "Federal Environmental Regulation: Impact on Land Use," in Management and Control of Growth, Vol. III, ed. Randall W. Scott (Washington, D.C.: The Urban Land Institute, 1975), p. 415.

[23]Earl Finkler, William J. Toner, and Frank J. Popper, Urban Nongrowth, (New York: Praeger Publishers, 1976), p. 38.

[24]In Dailey v. Lawton, a potential resident (Dailey) of a proposed low-income housing project joined in a suit against the City of Lawton when it refused to rezone a lot for the project. The court found in favor of the plaintiff and directed the city to rezone the lot.

[25]Cranston, pp. 14-15. [26]Dawson, p. 154.

[27]Holding zones are generally districts zoned in large lots for agricultural, residential, or other low-intensity land use. The purpose of holding zones is purported to be to limit construction in undeveloped areas until necessary capital improvements are installed.

[28]Dawson, p. 154. [29]Finkler, pp. 39-40.

[30]Ibid., pp. 40-41. [31]Ibid., p. 37. [32]Ibid., pp. 37-38.

[33]Ibid., p. 38. [34]Dawson, p. 154.

CHAPTER 4

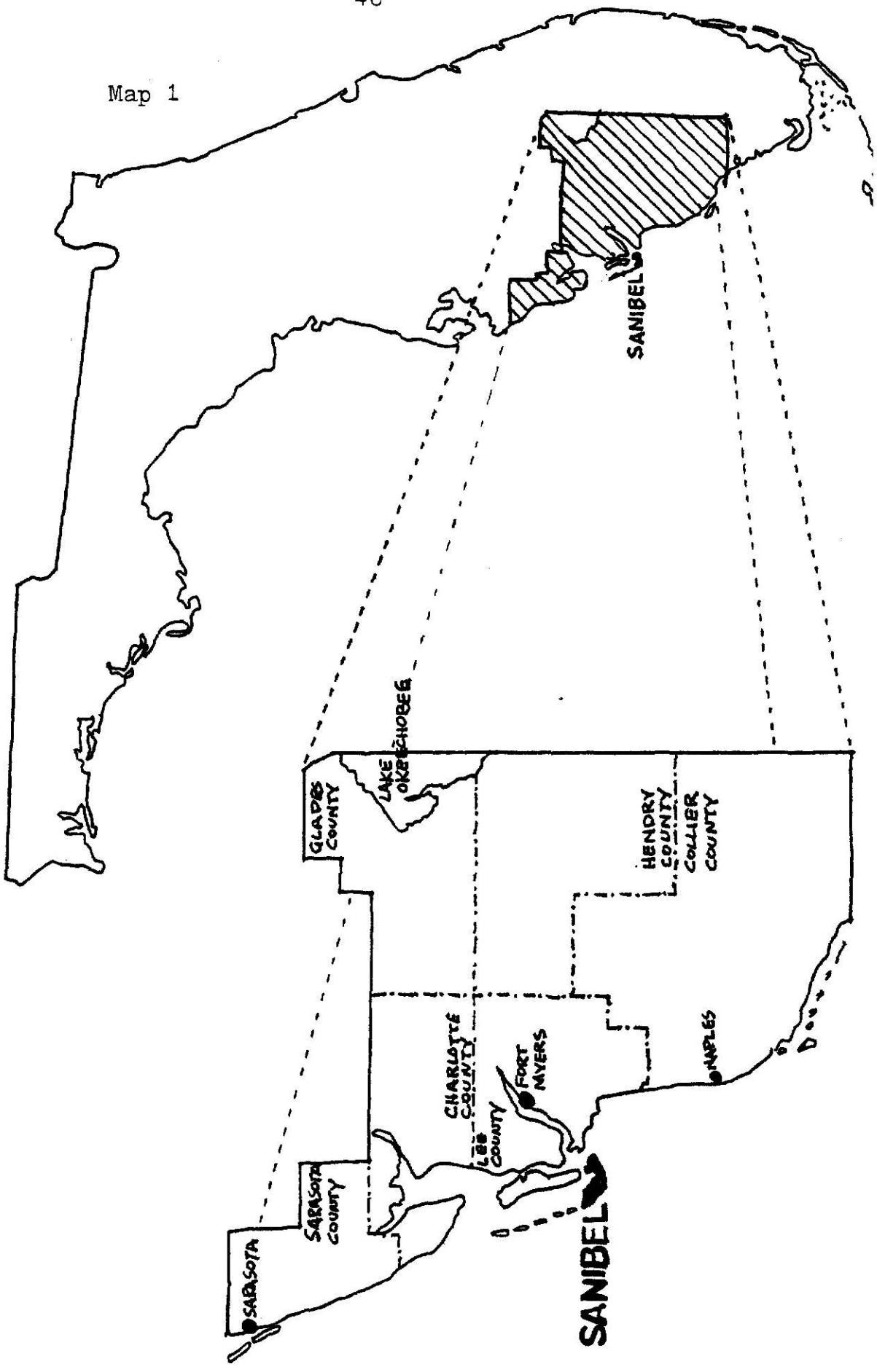
HISTORY OF SANIBEL

The City of Sanibel occupies an eleven thousand-acre barrier island off the Gulf coast of Florida near the mouth of the Caloosahatchee River in Lee County (see Map 1, page 48). The island has been formed and shaped by the wind and sea into a corduroy of sand ridges that provide its character, structure, and elevation. It has a geological age of about five thousand years.[1] Over the years, Sanibel has been connected and disconnected with nearby Captiva Island (to the north) several times by sandbars as the result of storms and erosion. Sanibel Island has an area of about eighteen square miles, has gradually assumed what is roughly a shrimp-shape, and lies almost at right angles to the Florida coast. The shoreline extends southwesterly into the Gulf of Mexico then curves northward. The island is about twelve miles long and two miles wide in its maximum dimensions.[2]

Early History

In 1513, Ponce de Leon "discovered" Sanibel Island while looking for the fountain of youth. He found instead an advanced Calusa Indian culture (who the Caloosahatchee River was named after). The Calusas believed themselves to be part of

Map 1


SANIBEL
LAKE OKEECHOBEE
GLADES COUNTY
HENDRY COUNTY
COLLIER COUNTY
CHARLOTTE COUNTY
LEE COUNTY
FORT MYERS
NAPLES
SARASOTA COUNTY
SARASOTA
SANIBEL

the earth so lived within the supportive capabilities of the natural environment. Their life-style was simple, utilizing sea shells and other natural materials for construction purposes and as weapons. The maximum number of Calusas on the island was approximately 200 living in 35 huts. The Calusas fiercely resisted European encroachment, fighting furious battles with Ponce de Leon, De Soto, Menendez, and other explorers. In 1521, Ponce de Leon died from a leg wound inflicted by the Calusas. Over the years, however, the Calusa culture slowly disintegrated as they could not forestall European domination.[3]

Sanibel's name comes from a garbled version of a Spanish name. It is the end product of a mistake repeated several times--the misinterpretation of the abbreviation S. which in Spanish can mean south or saint. On a map dated 1765, the island's name was listed as Puerto de S. Nivel, and on an official Spanish Army map of 1768 as Puerto de. S. Nibel. With b and v being interchangeable, both names meant: South Plane Harbor. In 1757 the S. was misinterpreted to mean saint by a ship's pilot who called the island St. Nivel (when there was no such saint), and reported that he had passed Punto de Sanivel meaning Sanivel Point. Map #53 of the Spanish Geographic Service had the correct name while #54 published the same year read Puerto de Sn. Nibel (Sn. being the preferred abbreviation for saint). Bernard Romans added to the confusion by calling the island Sanybel one time and San Ybell another and his map of 1774 was widely distributed. The following year, the Spaniards published map #55 which read, simply, Sanibel, and the misspelled name remained.[4]

After extensive exploration and surveying, Sanibel Island was acquired in 1831 by the Florida Peninsular Land Company as a settlement site because of its good harbor, climate, and general amenities. Following the passage by Congress of the Indian Removal Act in 1832, the remaining Calusas on the island were transferred to reservations. The first settlers arrived in 1833 and found a narrow beach, a mangrove forest along the western shore, and a grassy interior plain which was dotted with palmettos. There were ducks, turkeys, flamingos, curlews, and deer in abundance. The settlement did not prosper. Most of the settlers deserted with many leaving because of a final series of Indian attacks in 1836.[5]

In 1883, the island became a government lighthouse reservation. It was run by various family lighthouse keepers until 1949 when the responsibilities were turned over to the Coast Guard Light Attendant Station. Most of Sanibel was released for homesteading in 1888. In addition to resettlement came Sanibel's first wave of tourists. Seashells, sport fishing, and wildlife became Sanibel's principal attractions. The island soon developed into a favorite vacation spot for wildlife conservationists, naturalists, and bird watchers. Individuals and organized groups visited Sanibel to study the island's birds and ecology. Despite several severe hurricanes (in 1894, 1910, 1921, and 1926), Sanibel's tourist economy prospered.[6]

Agricultural development on Sanibel started about 1883 and continued over the next 40 years encompassing most of the island's arable land. The major agricultural products were citrus fruits and vegetables such as tomatoes, squash, and egg-

plants. Severe hurricanes, with accompanying flood tides ranging from 9 to 13 feet, discouraged further farming efforts on Sanibel. The hurricane of 1926 flooded the entire island with saltwater effectively ending cultivation.[7]

Early Conservation Movement

The primary concerns of local people changed little over the years. The first island newspaper editorialized about washboard roads and inadequate or unenforced conservation laws. Committees were formed but only the roads received token improvements.[8] In 1926, residents organized the Sanibel Community Association which began a campaign to protect a "treasured" island.[9] The conservation movement was moving well but needed a champion with influence in Tallahassee and Washington. It finally found one in J.N. "Ding" Darling, an articulate defender of wild creatures and the natural environment.[10]

Jay Norwood Darling was a political cartoonist whose strongly conservationist viewpoint was reflected in his work and eventually attracted the attention of President Franklin D. Roosevelt who asked him to head the U.S. Biological Survey (today's Fish and Wildlife Service). Darling took the job in 1934 and despite frequent tilts with land developers and the Secretary of Agriculture he acquired $20 million in federal funds for conservation projects and added more than 4 million acres to the federal system of wildlife refuges in just 20 months.[11]

Darling visited Captiva Island (north of Sanibel) in March 1936, and was deeply impressed. He continued to work

hard for conservation and became a leader of the Izaak Walton League, a founder of the National Wildlife Foundation, and also served on the Board of Directors of the National Audubon Society between 1936 and 1939. Meanwhile, it was through his efforts that Sanibel and Captiva became a wildlife refuge by a special act of the 1939 Florida Legislature.[12] The J.N. (Ding) Darling National Wildlife Refuge was established on October 31, 1945. The refuge boundary includes approximately 4,700 acres of waterways, mangrove forests, and upland.[13]

Little growth had occurred on the island between 1927 and 1944 (the year-round population was about 100), except for a small annual increase in the number of visitors and the development of cottages along the beach. In the 1950's, however, Sanibel's reputation for shell collecting and abundant wildlife prompted a new surge of tourism and a parallel growth in residences and services. The last and most significant growth began with the completion of a causeway to the mainland in 1963.[14]

Development Problems

Hurricane Donna passed through the islands in 1960 beginning a decade of drastic changes. When the construction of a causeway to the mainland appeared imminent, the Sanibel Island Improvement Association initiated a movement to get local control of island zoning. Through their efforts, the Sanibel Island Zoning Authority was created in 1959 by a special act of the Florida Legislature. Islanders were sharply divided on the bridge issue with some arguing that business would improve and that it would be good to have quick egress from the islands in

time of emergency. Others, including the U.S. Fish and Wildlife Service and the Florida Conservation Board, predicted heavy development would follow construction of a causeway creating a mountain of problems. After everyone had been given a say at public meetings, the 2.9 mile long bridge-causeway was approved and eventually opened on May 26, 1963.[15]

Within a few months of the opening of the causeway, Sanibel's right to zone itself was challenged in court and ruled unconstitutional. Because they lacked the necessary support of island residents who did not realize the implications, the zoning board did not appeal the decision. After five years with no zoning control and no plan, the islands were confronted with an unprecedented building boom.[16]

In 1967, Sanibel and Captiva residents were successful in opposing a proposal for a large trailer park on Sanibel by claiming an adverse impact on wildlife and citing overcrowded conditions on the island.[17] The same year, the Lee County Commission hired a consulting firm to develop a county-wide comprehensive plan. The zoning proposed for Sanibel and Captiva by the consultants sent shock waves through the island communities. Buck Key and all of Captiva except the public beach, were recommended for high-rise, high-density development, as was most of Sanibel. In addition, a four-lane highway was proposed which would have bisected the wildlife refuge.[18]

Almost immediately, a group of Sanibel citizens, aware of the island's delicate ecology and alarmed by the implications of the county's prodevelopment attitude, banded together with the citizens of Captiva to form the Sanibel-Captiva Planning Board.

Although the board remained unofficial, it commented on zoning applications before the Lee County Commission.[19] The planning board urged a ban on high-rise, high-density construction on the islands.

In 1970 a temporary (six-month) building height limit of 35 feet for Sanibel and Captiva was passed by the Lee County Commission and later extended through January of 1971.[20] Finally, after three years of frustration, the 35 feet restriction on building height became an ordinance in February 1971. At that time, accompanying requests for low-density construction and beach setbacks of at least 100 feet from the high tide mark were refused.[21] Later in the year, the county commissioners established a Sanibel-Captiva Planning Committee. The committee was to formulate a proposal for designation of the islands as areas of environmental concern with comprehensive zoning and land use provisions.[22]

Early Planning

As property values skyrocketed, the Lee County Commission asked various county and state departments, along with the Sanibel-Captiva Planning Board, to provide the necessary statistics for the Sanibel-Captiva Planning Committee to draw up a comprehensive plan for the islands. Meanwhile, developers rushed projects to completion, often poorly planned, built, and located, while receiving building permits years ahead of construction. However, there was a cautious optimism as the comprehensive plan was completed.[23]

A series of public hearings on the comprehensive plan

were held. The plan called for a population ceiling of about 41,000 persons and provided for no more than 14,582 dwelling units. This was substantially lower than the population densities allowed by the existing Lee County zoning which permitted up to 30,000 dwelling units or about 90,000 persons.[24]

In the Spring of 1973, Lee County established a county planning commission and hired a qualified planner and staff.[25] The comprehensive plan was completed and presented to the county planning commission for approval. At that point it was stalled pending a suit brought by an attorney who claimed that the Sanibel-Captiva Planning Committee which drafted the plan violated Florida's Government in the Sunshine Law. Rather than pursue the matter, the Lee County Commission directed its planner to draft a new plan. In August, one week before the first public hearing for the new plan, the county's planner was fired on unsubstantiated charges by three county commissioners.[26] The delayed Sanibel-Captiva plan was activated in September but quickly halted by court action requiring it to be part of a county-wide plan.[27] With the firing of the county's planner it became obvious that the county commissioners were more interested in development than guiding and directing growth through the adoption and implementation of comprehensive plans.

Island civic groups made one last stand. On October 31, 1973, with construction up 70 percent over the previous year, they requested a building moratorium until a comprehensive plan could be implemented. With many representatives of the construction industry crowded into the county commission meeting, only one commissioner favored a slowdown of any sort. At the

end of a decade of few solid gains and a bundle of broken promises, the islanders opted to explore home rule as a mechanism for coping with growth pressures.[28]

The Home Rule Study

Although the island's visitors and residents had been increasing steadily since the causeway linking the mainland had been built in 1963, the population explosion took off in 1970. Building permits were issued by county officials at a record rate and seawalls began to line the beaches. The kind of people who live on Sanibel because of its uniqueness started to fear that the island would suffer the same fate as Miami Beach and Marco Island. The Sanibel-Captiva Planning Board conducted a brief study in the Fall of 1973 on the pros and cons of incorporation, including an estimate of what the city budget might look like. A straw vote later in the Fall conducted by the planning board showed island residents were favorable to pursuing the possibility of incorporation. A "town meeting" was held on November 20th with more than 300 islanders attending. A study of the merits of home rule and of alternatives for governing the island received almost unanimous approval at the meeting.[29]

The Sanibel Home Rule Study Group was established as a nonprofit corporation in November. By December, the decision to seriously consider incorporation had been made. It was also decided that Captiva would not be included in home rule attempts because of the need for county support of beach erosion protection. Funds were raised to hire a consultant to explore

Sanibel's alternatives. At this point, Lee County hired a new planner.[30]

The Home Rule Study Group began meeting with their consultant in January 1974. Officers of the group met with a State Representative who gave them the time schedule the legislative delegation had to follow for presentation of an incorporation bill in the 1974 legislature. The legislative delegation would be requested to introduce a bill in the 1974 session granting home rule if that alternative was selected. However, the timing was awkward because the Home Rule Study Group had voted to "study" the alternatives, not support a home rule charter. The legislative delegation scheduled a public hearing for February 18 so a draft city charter had to be completed by that time. Thus, the charter was prepared first and the report on the alternatives to incorporation second.[31]

A report entitled "Sanibel Island: Its Alternative Futures," was prepared outlining the implications of three basic alternatives. These were to incorporate, to create a special taxing district, or to continue trying to seek accomodation with the county commission. New estimates were made of what a city government would cost. The report concluded with a recommendation favoring incorporation as the only way to obtain the home rule powers necessary to give island residents the opportunity of controlling their own destiny.[32]

The framework for the new city was designed and public meetings held to discuss the implications of the move. In March, residents met at the Sanibel Community Association to vote on placing an incorporation referendum on the November

ballot. With a margin of 436 to 358 votes the referendum gained a place on the ballot. The proposed charter called for a five-member city council and a city manager. The new city would have zoning power and the authority to develop and implement a land use plan that controlled growth and preserved environmental values. The incorporation proposal included the right to set and enforce density ratios, height restrictions on buildings, and setback lines from the beaches.[33]

Results of the meeting were transmitted to the legislative delegation considering the incorporation bill with a request that the bill be introduced in the present legislative session. However, the following day, the chairman of the committee announced that because of alleged defects in the bill, it could not be introduced and that incorporation for Sanibel was "dead" for that session. The announcement was unexpected although the proincorporation forces were well aware that there was a great deal of opposition to home rule for Sanibel. Proponents knew that some island developers and large land owners who had good relations with county officials would fight incorporation. It was clear that the next step was to get the bill introduced into the Legislature.[34]

The Fight for Incorporation

The island's consultant flew to Tallahassee to talk to the chairman of the legislative delegation and pointed out to him that Sanibel's charter was based on the model charter drafted by his committee. He promised to request the delegation to introduce the incorporation bill if it received favor-

able review by the House Committee on Community Affairs staff. The bill was introduced into the House on April 20. It was quickly referred to the committee. A Naples attorney and land owner on Sanibel requested the committee to amend the bill to allow nonresident property owners to vote but he made it clear that he wanted to "kill" the bill, not amend it. After hearing from proponents and opponents of the bill, the committee voted unanimously to approve the bill without amendment. The bill passed the House and was sent to the Senate in the last days of the session. With some effort, the bill passed the Senate but opponents tried to persuade the governor that it was a bad bill and should be vetoed. They failed and the bill became a Special Act of the 1974 Legislature without the Governor's signature.[35]

The dominant theme of the incorporation campaign was the need to secure stronger local control over island land use decisions. The principle opposition was led by members of the Chamber of Commerce who formed an Action Committee. The Chamber itself was divided over incorporation with the biggest opponents the land developers and builders. Attempts were made to dissuade citizens from voting for incorporation and attempts were made to block incorporation in the courts but this failed. A new Florida law, the County Powers Act (which permitted counties to tax unincorporated areas for "municipal purposes"), sidetracked the cost-of-government issue which was expected initially to be a major factor in the campaign. Under the Act, Sanibel would have had its taxes increased by the county to pay for municipal services if it did not incorporate.[36]

The islanders, however, did not lose interest in the cost of operating a new city. The opposition continued to say it would be "too much" and the proponents to show how little it would cost. Both estimates were published in the island newspaper and were of little difference. Proponents of incorporation formed a new group called Sanibel Tomorrow. The chairman of the group delivered a copy of the incorporation bill to the Lee County Supervisor of Elections with appropriate publicity in order to insure that deadlines would not be missed for getting the charter on the ballot. After the Lee County Commission agreed to place the charter on the November ballot, the Naples attorney filed suit in Circuit Court asking for a declaratory decree and injunction to halt the referendum. The suit was dismissed but the attorney had also filed suit in federal court to stop the election with the argument that his constitutional rights as a property owner were being infringed upon by restricting the right to vote to "residents." The suit was not heard prior to the referendum and was ultimately dismissed.[37]

With 84.6 percent of the island's registered voters casting their ballots, Sanibel was incorporated as a city on November 5, 1974 by a two-to-one vote.[38] The Act establishing the City includes the following: ". . . in the planning for the orderly future development of an island community known far and wide for its unique atmosphere and unusual natural environment and to ensure compliance with such planning so that these unique and natural characteristics of the Island shall be preserved..." Among the powers conferred upon the City by its charter is the power to prepare and adopt a comprehensive plan.[39]

The City Council was elected on December 3rd and included the publisher of the Island Reporter (the island newspaper), the former chairman of the Sanibel-Captiva Planning Board, the chairman of Sanibel Tomorrow, a conservationist, and an "old timer."[40] The new city government took over on December 16 and immediately imposed a moratorium on all new building permits. During the intervening six weeks, however, the county had authorized nearly $10 million in building permits, about ten percent of the assessed valuation of the city.[41] Nothing could be done about the building permits already issued by Lee County but it was clear that the days of unlimited development were gone.

FOOTNOTES

[1]John Clark, The Sanibel Report: Formulation of a Comprehensive Plan Based on Natural Systems, (Washington, D.C.: The Conservation Foundation, 1976), p. 3.

[2]Elinore Mayer Dormer, The Sea Shell Islands: A History of Sanibel and Captiva, (New York: Vantage Press, 1975), p. 4.

[3]Clark, p. 3. [4]Dormer, p. 28. [5]Clark, p. 5. [6]Ibid.

[7]Ibid., p. 6. [8]Dormer, p. 191. [9]Clark, p. 6.

[10]Dormer, pp. 191-92. [11]Ibid., p. 192.

[12]Ibid., pp. 192-94. [13]Clark, p. 7. [14]Ibid., pp. 6-7.

[15]Dormer, pp. 196-98. [16]Ibid., p. 198. [17]Clark, p. 12.

[18]Dormer, p. 198.

[19]David R. Godschalk et al., Constitutional Issues of Growth Management, rev. ed., (Chicago: Planners Press, 1979), pp. 277-78.

[20]Clark, p. 13. [21]Dormer, pp. 198-99. [22]Clark, p. 13.

[23]Dormer, p. 199. [24]Clark, p. 13. [25]Ibid.

[26]Dormer, p. 199. [27]Clark, p. 13.

[28]Dormer, pp. 199-200.

[29]Aileen Lotz, "An Island Acts to Save Itself: The Sanibel Story," Florida Environmental and Urban Issues II (April 1975):7.

[30]Clark, p. 14. [31]Lotz, pp. 7-8. [32]Ibid., p. 8.

[33]Clark, p. 14. [34]Lotz, p. 8. [35]Ibid., pp. 18-19.

[36]Clark, p. 14. [37]Lotz, pp. 19-20. [38]Ibid., p. 7.

[39]City of Sanibel, Comprehensive Land Use Plan, (City of Sanibel, Lee County, Florida, 1976), p. 1.

[40]Lotz, p. 20. [41]Godschalk, p. 278.

CHAPTER 5

THE SANIBEL PLAN

The Sanibel City Council was elected to control growth on the island through the development of a reasonable land use plan. Replanning necessarily became a top priority for the new government. The Council immediately enacted several resolutions which became effective upon passage. No new building permits or zoning changes were to be issued for at least ninety days, or until a comprehensive land use plan was adopted. A flood of forty-two building permits had been issued by Lee County between the incorporation referendum and the time the new city government took office. Only those builders who had received building permits before the incorporation vote and who had actually broken ground within sixty days thereafter were allowed to continue construction.[1]

Early in 1975, the Sanibel Planning Commission developed specifications for a new land use plan and began the process of selecting a planning consultant. In April, The City Council selected as planning consultants the firm of Wallace, McHarg, Roberts, and Todd (WMRT hereafter) of Philadelphia who were asked to design the plan and recommend a zoning ordinance, building codes, subdivision regulations, and other pertinent land use regulations. The planning consultants were also re-

sponsible for receiving public input through interviews and workshops with "representative groups."[2]

For the express purpose of maximizing involvement of residents of Sanibel in the preparation of the plan, the planning commission appointed ten task forces to work with the consultants. The task forces included more than fifty persons familiar with different aspects of the island who assisted in gathering data, evaluated findings of the consultants, and gave public input to all phases of the planning process. The task forces met regularly with the planning consultants in public work sessions to discuss goals and objectives and alternative planning recommendations for their achievement.[3]

Concurrently, citizen organizations selected the Conservation Foundation to assist the city by providing a detailed description of Sanibel's natural systems and by suggesting means for conservation of those natural systems and other natural resources. The natural systems study was designed both to provide information useful to the city and to test a planning approach that could be instructive to Florida and to the nation regarding local implementation of coastal zone management and, in particular, barrier island resources management.[4]

The importance of studying Sanibel's natural systems is due in part to the city being located on a barrier island. Most of the world's barrier islands are eroding through the process of a eustatic rise in sea level.[5] Barrier islands are unique among coastal structures in their ability to migrate landward, while mainland shores erode in place. One of the processes responsible for landward barrier island migration is

dune migration. It is pure speculation to anticipate the environmental effects of various programs of barrier manipulation such as the construction of barrier dunes or other alterations to natural systems without detailed studies.[6] For this reason, it was important for the Conservation Foundation to conduct detailed studies before the plan for the island's development was completed. The Conservation Foundation engaged a team of experts to conduct a carrying capacity assessment of the island's natural systems.[7]

Carrying Capacity Analysis

Carrying capacity can be defined as the amount of activity that an area can support without suffering irreversible harm. Carrying capacity was first used in biological sciences but it holds widespread applications to land use problems. The relationship between zoning capacity (the number of structures permitted by present zoning) and the actual capability of land and water resources is often left to chance (as in the case of Lee County's zoning of Sanibel). An imbalance between carrying capacity and zoning capacity can lead to serious consequences. Whenever carrying capacity is exceeded, water supply or water quality problems will arise. There is no number that will establish for all time the ultimate carrying capacity of a region. Even if there were such a number, its utility would be severely limited. Carrying capacity is not fixed; it can and will fluctuate with changes in lifestyles and technology and the availability of infrastructure for development. Regional changes outside the control of a local planning jurisdiction can also alter

carrying capacity.[8]

Planners should define the current planning capacity (or current carrying capacity) of a community based on an estimate of the amount of development that can take place under existing conditions. It may be more reasonable to base todays planning and zoning decisions on an understanding of "what is" rather than "what might be." As one moves into the future, current planning capacity will be subject to revision. Current planning capacity can be defined as the measure of a region's ability to accomodate growth and development within limits defined by existing infrastructure and natural resource capabilities. (Existing infrastructure includes facilities in existence or under construction, those for which funds have actually been appropriated, and those proposed within the next six years as part of a capital improvements program.)[9]

Carrying capacity is one of the few growth management methods that explains why development should be guided in a certain way. Other growth management tools state how development proposals will be reviewed, and where, when, and in what amounts development will be encouraged. A carrying capacity analysis provides the rationale for these other implementation techniques, demonstrating the public health and safety impacts of urban development on the capacity of service systems and the natural environment. A scientifically conducted analysis--one that is objective, replicable, and quantifiable--can provide a lasting and defensible foundation for a public policy on growth.[10]

Carrying capacity analysis frames the relationship be-

tween public health and safety, urban development, environmental quality, and investment in public service systems. It identifies the thresholds within natural and manmade systems beyond which development impacts can cause serious environmental degradation or human hazards unless new infrastructure, management capacity, or regulations are added. Operational methods for determining carrying capacity are available at various levels of technical sophistication. The simplest and most common methods involve straightforward calculations of public service systems capacities and inventories of natural resource capabilities. A typical analysis might estimate the ratio of demand to capacity for roads, water supply, and sewage treatment; it would combine these ratios with inventories of soils, flood prone or other hazard areas, groundwater, vegetation, wildlife, and other elements to arrive at development performance standards. Besides Sanibel, plans based on this approach have been adopted at Lake Tahoe and Sparta, New Jersey.[11]

Technology has expanded human horizons but has also imposed limitations in terms of the systems which deliver resources. Roads, sewers, and water lines all have capacities imposed by their design. Such limits normally can be increased although it is frequently expensive and time-consuming to do so.[12] Many communities fail to consider the carrying capacity of their infrastructure or the cost of increasing its capacity when deciding on new development. More importantly, most ignore the carrying capacity of natural resources such as air quality, water quality and quantity, and the ability of the land to support more growth and development. These considerations are es-

pecially acute on islands where resource supplies are relatively fixed. Therefore, carrying capacity seemed most appropriate for the basis of Sanibel's Comprehensive Land Use Plan.

The Conservation Foundation Study

The experts the Conservation Foundation engaged to assist in the carrying capacity assessment of the island furnished individual reports. These reports were then integrated into a program of environmental management specifications. Studies were begun in May 1975 with the basic task to develop principles and requirements for future development which could prevent damage to the remaining natural systems. The Conservation Foundation also developed requirements for the restoration of past damage to natural systems. The management program that resulted from the Conservation Foundation's recommendations was designed to achieve maximum protection and perpetuation of the natural systems of the island, particularly through optimization of the basic water systems that govern their health.[13]

The Conservation Foundation realized that other planning policies developed by the city could impose constraints on development in addition to those suggested, or that (conversely) the optimum development pattern for the island might require modification of some of the natural systems protection measures suggested. The basic approach to the natural systems study was to formulate a data collection plan from a preliminary survey of Sanibel and from existing knowledge of the ecosystem and natural resources and to divide up the necessary work along disciplinary lines (such as hydrology, botany, wildlife biology,

etc.) for assignment to survey teams.[14]

Both WMRT and the Conservation Foundation studied the Sanibel ecosystem identifying and classifying the characteristics of the subsystems which provide a basis for division of the island into discrete ecological zones, including beaches, interior wetlands, ridges, and mangroves. Permitted land uses, density limits, and performance standards in the plan are all keyed to the ecological zones and their differing levels of tolerance.[15] The ecological zones were described in initial maps of zones prepared by the Conservation Foundation in June and July. These were later modified and refined by WMRT and the Planning Commission.[16]

The Ecological Zones

Ecological zones were used in setting performance standards for development. Similar standards were written for each zone, but the standards reflect the zones' unique ecological values to be safeguarded.[17] The Comprehensive Land Use Plan provides that the type and intensity of future land uses permitted shall be determined by the capacity of the island to accomodate further development in an orderly manner with minimum negative impact. In addition to these overall considerations, environmental factors intrinsic to each ecological zone, compatibility with existing land uses, availability of adequate human support systems, and compatibility with all elements of the plan influenced the choice of permitted uses and development intensity.[18]

The general principles on which the use regulations are

based are:

Gulf Beach (including Back Beach): permitted uses should be restricted to recreation and conservation uses that will not cause degradation of the natural environment, because this zone is a fragile and dynamic system providing protection from storms, habitat for wildlife, and recreation amenity for people.

Bay Beach: an active beach zone, extending along the island's bay shore line and delineated by a fifty-foot setback from the mean high water line at the shore.

Mangroves: comprise all tidal areas having substantial growth of buttonwood, red, black, and white mangroves. Such areas are generally low lying and wet, and provide rich habitat for wildlife performing diverse and important ecological functions.

Wetland Lowlands: subject to seasonal high water table and generally wet, having plant materials and wildlife associated with wetland ecology. Low-intensity residential land uses are permitted here.

Wetland Uplands: are the elevated ridges of the wetlands that are generally not wet but are subject to occasional high water table and flooding. Horticulture and agricultural uses are permitted.

Special Blind Pass: this area is not currently developed as intensively as the eastern sections of the island, nor does it have the same level of human support systems.

Gulf Beach Ridge: this zone is landward of the beach environment by virtue of a setback and is generally on land having an elevation of at least five feet above mean sea level. It can accommodate various land uses provided that they are in moderate or low-intensity and that standards for site modification and building construction are designed to protect the natural environment and all property. It is the policy of the plan not to permit further intensive urban development in this ecological zone and that open space should be preserved to the maximum degree feasible. Moderate residential densities are permitted along with accessory uses, selected on the basis of compatibility with existing land uses and current or prospective availability of human support systems such as utilities and traffic access.

Mid-Island Ridge: compromises the major ridge along

> the center of the island and includes some of the highest elevations. The elevation plus its distance from both the Gulf and the Bay, make it a relatively protected location for development; also the natural environment is the least fragile and dynamic of any on the island. Roads and other human support systems are either in existence or planned for, and the historic pattern of development is that of mixed land uses at moderate and low-densities. Low-intensity residential uses are permitted.
>
> Filled (altered) Land: land recently disturbed by man. It includes the major areas on the island where such disturbance has taken place, are generally at three feet or more elevation, have had the majority of natural vegetation removed, and are largely urbanized.[19]

Table 1 (page 72) shows the permitted uses for each ecological zone on the island. Figure 2 (page 73) delineates the zones.

Developing Plan Alternatives

After tabulating and mapping the present conditions and capacities of the island, the consultants presented several alternatives to the planning commission for policy decisions. Alternative future levels of development were projected based on a future total of 6,000, 8,000, 16,000, and 24,000 dwelling units on the island. These alternative development levels were derived from capacity levels of public service systems and zoning regulations tied to the permitted uses for each ecological zone. For each level of development, estimates were made to show the commitment of public funds that would be necessary to provide adequate capital improvements to safeguard public health and safety and to protect the environment. Specific limits on Sanibel's growth were outlined, limits which could only be exceeded at considerable public expense without jeopardizing public health and safety.[20]

—by ecological zone—

Gulf Beach
- *Recreation & Conservation
- *Elevated Walkways

Bay Beach
- *Recreation & Conservation
- *Boat Docks & Marinas

Mangroves
- *Recreation & Conservation
- *Residential
  - *Single-Family Detached

Wetland Lowlands
- *Recreation & Conservation
- *Public Facilities
- *Agriculture
- *Residential
  - *Single-Family Detached

Wetland Uplands
- *Recreation & Conservation
- *Public Facilities
- *Educational Facilities
- *Commercial
- *Restricted Commercial
- *Residential
  - *Single-Family Detached
  - *Duplex

Special Blind Pass
- *Recreation & Conservation
- *Public Facilities
- *Commercial
- *Residential
  - *Single-Family Detached
  - *Duplex

Gulf Beach Ridge
- *Recreation & Conservation
- *Public Facilities
- *Commercial
- *Residential
  - *Single-Family Detached
  - *Duplex
  - *Multi-family
  - *Resort Housing

Mid Island Ridge
- *Recreation & Conservation
- *Agriculture
- *Public Facilities
- *Commercial
- *Restricted Commercial
- *Residential
  - *Single-Family Detached
  - *Duplex
  - *Multi-family

Filled Land
- *Recreation & Conservation
- *Agriculture
- *Public Facilities
- *Commercial
- *Restricted Commercial
- *Residential
  - *Single-Family Detached
  - *Duplex
  - *Multi-family
  - *Resort Housing

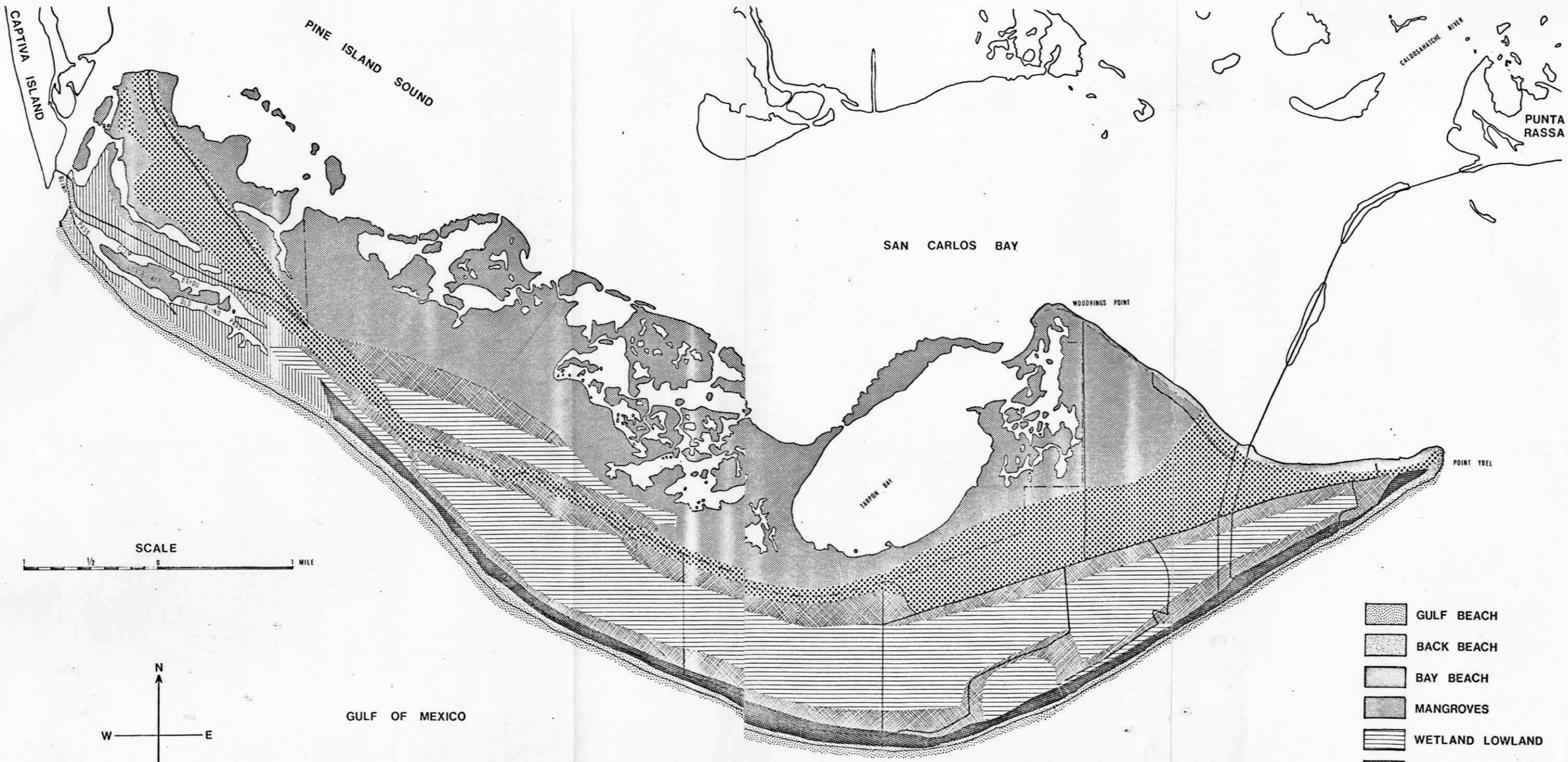
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SANIBEL ISLAND

Map 2

Ecological Zones



In addition to discussions concerning preparation of the plan at regularly scheduled public meetings, the planning commission held three special public meetings for public information and input. It was on the basis of these discussions and the public response to planning studies that the city planning commission adopted policies for growth thresholds; island-wide policies with respect to health, safety, and welfare; and performance standards for development or management of ecological zones.[21]

Previous reports and work papers submitted by the planning consultants to the planning commission presented the data base of environmental and socioeconomic conditions existing on Sanibel (Phase One) and the subsequent interpretation of this data as problems and opportunities with regard to future development (Phase Two). When the planning commission reviewed the alternative policies to be adopted in September 1975 (Phase Three) it became evident that Lee County zoning and development as permitted under existing provisions were in conflict with the terms of the City Charter and the intent and purposes of the Local Government Comprehensive Planning Act (the Act requires communities to prepare and adopt plans and requires zoning and development to be in conformance with the plan). It was also evident that the city government of Sanibel was faced with major difficulties in providing for the protection of health, safety, and welfare of present and future population on the island.[22]

The planning commission reviewed prospective impacts of future urban growth projections and unanimously adopted recom-

mendations of their consultants that the plan be based upon a total of 6,000 residential units or two thousand more than the amount existing in 1975. Also adopted were island-wide policies that will give protection for life and property, and performance standards for development that ensures such protection.[23]

From the permitted uses list the residential, commercial, and resort housing uses were extracted and displayed on an official permitted uses map. The permitted uses are further restricted by limits placed on development intensity according to ecological zones. After establishing a policy of limiting future growth on the island to about 2,000 dwelling units, at least for the foreseeable future, these units were allocated throughout the city. Appropriate residential intensities were determined by analyzing municipal economy, physical land capability, and service capability.[24]

Once the units were allocated, the planning commission made adjustments taking into account existing development and ownership patterns and the extent to which existing subdivisions and projects were consistent with the goals and policies of the plan. As a result, allocated densities range from one unit per 33 acres to five per acre. A total of 3,580 additional dwellings could be built under 100 percent build-out conditions. The plan further specified that distribution of residential development must be in accordance with allocations specified on a map drawn for these purposes.[25]

The comprehensive plan changes Lee County zoning and development standards which allowed approximately 30,000 residen-

tial units on Sanibel with no policies or performance standards for protection of the environment. It recommends that growth to approximately 6,000 residential units be paralleled with capital improvements by the city so that the public welfare is protected from hurricanes; so that sufficient good quality water is provided; so that a safe and efficient circulation system is available; and so that sewage can be disposed of without jeopardy to public health. Also it is essential that basic public services of fire protection and police service are improved and that all public services have long term planning to meet future needs.[26]

Hurricane Evacuation

Since the first storm altered the coastline of the emerging island 5,000 years ago, Sanibel and Captiva have experienced hurricanes. Florida averages about one a year and there is one chance in twelve that a hurricane will hit the Lee County area. Of Florida's 17 hurricanes between 1888 and 1966, six went through the islands, with the worst one in 1910.[27] Although there have been no major hurricanes on Sanibel since 1960, between 1930 and 1968, 23 hurricanes and 23 tropical storms passed within 50 miles of Lee County. Due to its low profile, all points on the island are vulnerable to hurricane damage and flooding (which became obvious when the hurricane of 1926 sent flood waves over the entire island). Assuming that evacuation from the island is the only reliable method to protect lives during a hurricane, the number of people who may safely reside on Sanibel is directly limited by the circumstances of evacua-

tion.[28]

An analysis of the evacuation capacity of the island during the approach of a hurricane reveals that the city can anticipate between 4,900 and 6,250 cars can be evacuated depending upon the severity of the storm if there are no major calamities which disrupt the evacuation route for more than one hour of the evacuation period.[29] It is important to note that sections of the road on the mainland end of the Sanibel causeway are so low that they can flood completely before hurricane evacuation begins, blocking all escaping traffic.[30] It is also noted that Sanibel and Captiva are the last areas to be evacuated over this route according to the county's evacuation plan so other delays can be caused before Sanibel residents even begin to evacuate.[31] The causeway is the only means of escape from the island for automobile traffic.

The city is very aware of these situations and addresses them in the Comprehensive Land Use Plan and, more recently, through a request for a proposal on hurricane evacuation and hazard mitigation. The proposal asks that consultants be hired to prepare a new evacuation plan for the island (City of Sanibel, Resolution No. 79 - 40, adopted November 20, 1979). To demonstrate the importance of hurricane awareness, the hurricane safety element is the first element of the plan. For these reasons, another limitation on the population growth on the island is the amount of people (in cars) that can be evacuated over the causeway in the evacuation period before the approach of a hurricane.

Legal Challenges

The city has been involved in litigation since its incorporation, most cases dealing with challenges to reduction in density. Some developments were given negotiated density settlements, higher than presently permitted, because plans were presented showing the developments had already committed financial resources for development of the project.[32] The city won its first court battle against developers of the Hilton Hotels. Permits for both Hilton and Ramada Inns have been denied.[33]

Several suits have been brought challenging the validity of the Sanibel plan. These suits have not challenged the concept of environmental carrying capacity on which the plan is based but the application of density or use allocations to individual properties. In Nationwide Realty v. City of Sanibel, the plaintiffs originally raised the issue of the reasonableness of the allocation formula which allocates higher-densities to the eastern end of the island (the subdivision in question is located on the western end of the island). At trial, however, the plaintiffs relied solely on the fact that they had expended money on the basis of Lee County zoning. The case is undecided.[34]

Another case that alleged the density allocation to be unreasonable was Chianelli v. City of Sanibel. This case also attacked the alleged lack of openess of the plan adoption procedures and claimed a taking.[35] Although the case is undecided, the attack on the plan adoption procedures appears weak. The final draft of the plan was prepared by the consultants in

Philadelphia but the City Planning Commission and City Council had held more than 200 hours of public meetings on the plan and Florida law only requires one meeting.

Two cases concerning the validity of the Gulf Beach setback line have been settled. The Cassavell v. City of Sanibel suit was dismissed and the plaintiff agreed to build within the setback. The City of Sanibel v. Antrium Condominium suit was brought by the city against a project that had inadvertently been built over the setback line. The developer paid the city $92,000 in damages.[36]

In the case of Goode v. City of Sanibel, the plaintiff had purchased a lot on the island zoned by the county for commercial uses. After the island incorporated, the city's adopted plan designated the property as residential. The plaintiff attacked the zoning regulations, and the trial court found the classification unreasonable and arbitrary, and therefore void. On appeal (City of Sanibel v. Goode) the city argued that the trial court failed to accord the plan proper credence. The intermediate court disagreed, stating that the trial court had given the plan its proper weight when it balanced the plan's protection of the public health, safety, and welfare against the harm caused to the landowner by the plan's application to his property. The court noted that the plaintiff's land was virtually surrounded by commercial uses, some of which were nonconforming uses for which there was no amortization schedule. In addition, the court determined that the plaintiff had been deprived of the "only beneficial use to which his property is suited, i.e., commercial." The court also stated that it could

not ignore the fact that the rezoning of the property reduced its value from $105,000 to $17,500. Finally, the court held that the trial court did not err when it directed the city to rezone the property commercial, since it did not designate a specific commercial use.[37] The city has been able to resolve several suits out of court. The city is trying to work with developers to negotiate compromise solutions.

Rate of Growth Ordinance

A rate of growth ordinance has been approved in a city referendum. The ordinance will limit the maximum annual number of residential development permits to 180 (beginning in 1980). Criteria for evaluation of development applications includes:

(1) availability of public facilities and sewers,

(2) a balance of housing types and values, and

(3) quality of design and contribution of public welfare and amenities.

The ordinance notes that the growth rate on Sanibel had continued since the adoption of the comprehensive plan, with the following trends in residential building permits:[38]

year	no. of permits
1975	146
1976	277
1977	561

Since 1977, the number of building permits for residences has gone back down to the 1976 rate with 271 permitted in 1978 and 280 permitted in 1979.[39] The ordinance states that a controlled growth rate is necessary to ensure that development is in

harmony with the comprehensive plan (which calls for a maximum of 6,000 dwelling units) and the capital improvements program.[40] At the end of 1979, there were approximately 5,535 dwelling units permitted on the island. At the new rate of 180 permits per year, the temporary ceiling of 6,000 dwelling units would be reached by the end of 1982. However, the plan is to be reviewed every three years with the possibility of raising the total number of dwelling units permitted after each review depending on existing and proposed capital improvements.

The exact effects of the Sanibel plan on the rate of growth of the island are not clear. There has been a moratorium either in effect or under discussion since the city incorporated in 1974. These moratoria or threats of moratoria have artificially lowered or raised the pace of development making it difficult to separate out the influence of the plan itself. The plan has not had a no-growth result, although it has influenced the location, rate, and density of development since its adoption.[41]

FOOTNOTES

[1]John Clark, The Sanibel Report: Formulation of a Comprehensive Plan Based on Natural Systems, (Washington, D.C.: The Conservation Foundation, 1976), p. 15.

[2]Ibid.

[3]City of Sanibel, Comprehensive Land Use Plan, (City of Sanibel, Lee County, Florida, 1976), pp. 1-2.

[4]Clark, p. 15.

[5]A eustatic rise in sea level is caused by the melting of icecaps.

[6]Stephen P. Leatherman, ed., Barrier Islands, (New York: Academic Press, 1979), p. x.

[7]Clark, p. 18.

[8]George H. Nieswand and Peter J. Pizor, "How to apply Carrying Capacity Analysis," in Management and Control of Growth, Vol. IV, ed. Frank Schnidman, Jane A. Silverman, and Rufus C. Young, Jr. (Washington, D.C.: The Urban Land Institute, 1978), p. 140.

[9]Ibid., p. 141.

[10]David R. Godschalk, "Carrying Capacity: A Promising Growth Management Tool," Environmental Comment (December 1977): 10.

[11]Ibid., pp. 10-11. [12]Nieswand, p. 141.

[13]Clark, p. 18. [14]Ibid.

[15]David R. Godschalk et al., Constitutional Issues of Growth Management, rev. ed., (Chicago: Planners Press, 1979), p. 278.

[16]Clark, p. 19. [17]Godschalk et al., p. 287.

[18]City of Sanibel, p. 181. [19]Ibid., pp. 181-82.

[20]Godschalk et al., pp. 278-79. [21]City of Sanibel, p. 2.

[22]Ibid. [23]Ibid. [24]Godschalk et al., p. 287. [25]Ibid.

[26]City of Sanibel, p. 2.

[27]Elinore Mayer Dormer, The Sea Shell Islands: A History of Sanibel and Captiva, (New York: Vantage Press, 1975), p. 179.

[28]Godschalk et al., p. 279. [29]Ibid. [30]Clark, p. 19.

[31]Interview with Robert Duane, Associate Planner of Sanibel, Sanibel, Florida, 10 March 1980.

[32]Ibid.

[33]Aileen Lotz, "An Island Acts to Save Itself: The Sanibel Story," Florida Environmental and Urban Issues II (April 1975):20.

[34]Godschalk et al., p. xx. [35]Ibid. [36]Ibid.

[37]Edith Netter, ed., Land Use Law and Zoning Digest 31 (November 1979):15.

[38]Godschalk et al., p. xix. [39]Duane.

[40]Godschalk et al., p. xx. [41]Ibid.

CHAPTER 6

CONCLUSION

Due to recent population shifts to coastal areas, the nation is becoming increasingly concerned with the protection of its coastal resources. Recent Congressional and presidential actions have begun to address this concern with laws (such as the Coastal Zone Management Act) and executive orders (11988 and 11990 signed by President Carter in May 1977) which affect many federal and state agencies' programs. Many efforts have been made to focus on and expand the role of protection and enhancement of the coastal environment for the future of the nation. Although the establishment of many national environmental policies has occurred, there is a clear need to provide special protection of barrier islands. Every barrier island is a dynamic and interdependent part of a resource system. The level of protective effort determined to be most feasible must consider islands as a continuum and not as independent, discontinued pieces of real estate.[1]

Sanibel, Florida is one barrier island whose residents have become very concerned about the island's natural systems and the protection of its ecologically sensitive environment. Following the island's incorporation as a city serious planning efforts were initiated to manage future growth and development.

Sanibel's primary planning goal (as stated in the city's charter) is "to plan for the orderly future development of the island such as to insure that the unique atmosphere and the unusual natural environment of the island be preserved."[2]

Sanibel falls entirely within the coastal zone as defined by the Coastal Zone Management Act so all resources of the island are coastal resources. All elements of the comprehensive plan which deal with the enhancement, maintenance, management, and protection of these resources address coastal zone protection. The elements of the plan that deal specifically with the concerns and policy requirements of the Coastal Zone Management Act include:

(1) Survey of existing vegetation.

(2) Regulations relating to beach protection.

(3) Policies related to maintenance, restoration, and enhancement of overall quality of the coastal zone; preservation of ecological functions related to health, safety, and welfare; wetland protection; historic preservation; scenic preservation; and community design element.

(4) Policies with respect to maintenance of wildlife.

(5) The Comprehensive Land Use Plan establishes policies and regulations necessary to assure orderly and balanced utilization and preservation consistent with sound conservation principles of living and nonliving coastal resources.

(6) Creating environmental performance standards.

(7) Ecological planning principles.

(8) Proposed management and regulatory techniques.[3]

Even though the federal government has mandated the management of growth and development in the coastal zone, legal challenges have been and will continue to be, raised against

growth management programs. Communities must be aware of which growth management techniques have been upheld in court and which have been invalidated. When there is a lack of consensus between courts on the validity of a technique the community should look closely at federal court decisions and particularly at decisions rendered by its own state's courts. Federal courts and many state courts do look favorably on growth management techniques based on the protection of ecologically sensitive land and resources. For this reason, it seems that Sanibel's reliance on carrying capacity analysis of the island as the basis for the city's comprehensive plan would be legally defensible. However, this is not always the case.

Probably the most serious problem in the use of the carrying capacity approach is its effect on the right of people to move and settle in the communities of their choice. It has been claimed by civil rights advocates and developers that carrying capacity plans which limit growth violate right to travel protections which guarantee free movement within the United States. Plans based on carrying capacity are also challenged as unconstitutionally exclusionary because they make it particularly hard for lower-income families to find housing in the community as they are usually the ones kept out when a local housing market is restricted. Such plans are also challenged by property owners on taking and equal protection grounds.[4] Fortunately, the preparers of Sanibel's plan recognized that special provisions would have to be made for addressing the housing needs of low- and moderate-income families.

It is important to point out that the Sanibel plan is

not a static document. The ecological zones are being refined and other elements will be revised to deal with changing conditions. In addition, the plan is subjected to a general review every three years to evaluate the possibility of raising the maximum number of dwelling units permitted on the island. A final judgement of the plan should be withheld at this time, although preliminary observations can be made. Three elements have combined to provide support for the plan:

> (1) the plan grew out of citizen action and strong public support,
>
> (2) the economic conditions of the Florida housing market, and
>
> (3) the high quality of the planning effort which went into preparation of the plan.[5]

The comprehensive plan and the city's incorporation were the product of citizen action and a great deal of public support. This support was broadened and strengthened through an open planning process and continued after the plan was adopted. While 50,000 unsold condominiums glut Florida's housing market, demand for low-density residential development has increased. Since developers have found it feasible to build condominiums at a density of five to an acre on Sanibel, they have not been inclined to challenge the city's actions as a taking. The city's planning effort has produced a tightly integrated, well documented plan based on careful analyses of environmental and public service capacities.[6]

Sanibel's uniqueness should discourage most mainland localities from adopting a similar plan. However, the city's overall growth management approach should be applicable to many other places (particularly islands) with fragile ecosys-

tems and limited water and sewer capacity. The significance of the Sanibel experience is that growth management plans can be based on the available supply of natural resources and public services, as well as on the demand for those resources and services generated by growth. The success of the Sanibel plan rests in the balance of the needs and desires of affected parties on both sides.[7]

Another aid to Sanibel in its growth management effort was Florida's Local Government Comprehensive Planning Act of 1975 which requires all local governments to prepare and adopt comprehensive plans. In addition, once the plans were adopted, all zoning and development were to be in conformance with the plan. More specifically, the Act (in Section 163.3161 et seq. Florida Statutes) requires that through the process of planning, local governments "preserve, promote, protect and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire protection and general welfare." The Act is particularly significant in that the intent and purpose provides a basis for local governments to "prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing and other requirements and services, and conserve, develop, utilize and protect natural resources within their jurisdictions."[8]

It would seem that Sanibel would have little problem implementing a legally defensible growth management program. With the State's commitment to comprehensive planning, Sanibel's

elaborate comprehensive land use plan and location within the coastal zone (as defined in the CZMA), it would seem that the city has a broad legal base to work from. However, the city has lost in some of the challenges to its plan. One problem is that the state of Florida has not adopted a coastal zone management plan. Adoption of a state plan would reinforce Sanibel's plan, helping it withstand legal challenges. Another problem is that even though the Florida Legislature has required zoning to be consistent with comprehensive plans, a state appeals court in City of Sanibel v. Goode merely used the plan as a guide for development in upholding a lower court decision directing the city to rezone a tract of land to commercial when the city's plan designated the lot as residential.[9]

The literature cited is very complimentary of Sanibel's growth management program. It is probably one of the most sophisticated programs in the country particularly for a community of its population size. However the program is not perfect. Some problems have already been identified such as the city not having an amortization schedule for nonconforming land uses. Another problem may be in the city's attitude towards low-income housing.

Many low-income persons are employed but do not live on the island. This is mainly due to the high cost-of-living on the island. Not only housing but other goods and services are more expensive there than on the mainland. The city has a policy of encouraging construction of low-income housing by private developers however this may not be enough. The city may have to take further steps in the future to provide housing for lower-

income persons to avoid legal challenges on exclusionary grounds. Another issue the city may have to face in the future is the number of persons the island's natural systems can support on a daily basis. The city's growth management program has been based on limiting the rate of construction and amount of dwelling units on the island in hopes of keeping the city's population within the capabilities of the island's natural systems. However, this program does not consider daily visitors who do not stay overnight on the island.

In the city's effort to build a legally defensible growth management program they chose to restrict the number of dwelling units (as Ramapo and Petaluma have successfully done) rather than restrict the total number of people (as Boca Raton unsuccessfully tried to do with its growth cap ordinance). This choice was also in response to Sanibel's dependence on tourists who are the main element of the island's economic base. The city may eventually have to take steps to protect the island's natural assimilative capacity if the number of tourists to the island continues to rise. The city should look for additional growth management techniques and look for a way to manage the growth in the number of visitors to the island.

In conclusion, it appears that Sanibel's approach to growth management could be used as a guide by other islands in devising their own growth management programs. The carrying capacity approach is very appropriate in analyzing island ecosystems. Also, islands in states with adopted coastal zone management plans will have additional authority in managing growth and development. Once again, past legal challenges to

growth management techniques and results should be noted in devising management strategies. However, there can be no guarantee that any growth management program will be legally defensible in all challenges; even a significant program like Sanibel's can lose on some narrowly construed issue.

FOOTNOTES

[1]U.S., Department of the Interior, Alternative Policies for protecting Barrier Islands along the Atlantic and Gulf Coasts of the United States, 1980, p. 1.

[2]City of Sanibel, Comprehensive Land Use Plan, (City of Sanibel, Lee County, Florida, 1976), p. 30.

[3]Ibid, pp. 142-43.

[4]David R. Godschalk, "Carrying Capacity: A Promising Growth Management Tool," Environmental Comment (December 1977): 11.

[5]David R. Godschalk et al., Constitutional Issues of Growth Management, rev. ed., (Chicago: Planners Press, 1979), pp. 293-94.

[6]Ibid. [7]Ibid., p. 294. [8]City of Sanibel, p. 1.

[9]Edith Netter, ed., Land Use Law and Zoning Digest 31 (November 1979):15.

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BUILDING LEGALLY DEFENSIBLE GROWTH MANAGEMENT IN A COASTAL COMMUNITY: THE SANIBEL EXPERIENCE

by

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A change in national settlement patterns has occured in the past twenty years. New areas of population growth have been on the edges of metropolitan areas, in rural areas, and along the coasts with the dominant trend being growth in coastal areas. The growth management movement has been a response to these new settlement trends but has run into many legal challenges. Population growth and development in coastal areas needs to be managed due to the many competing demands on coastal lands and resources. Legally defensible growth management is needed for coastal areas. Two methods of exploring ways to build legally defensible growth management are through: (1) a review of the Federal Coastal Zone Management Act and legal challenges to existing growth management programs; and (2) a case study of Sanibel Island, Florida.

The Coastal Zone Management Act was enacted by Congress because of the severity of the problems in the coastal zone and the absence of state and local initiatives to combat the problems in the coastal zone. The Act requires states to delineate their coastal zones and specifies procedures for interactions between states and local governments. State participation in the Act has been encouraged through federal grants for management plan development. The federal legislation helps in legal defense of growth management programs at the local level. Other help comes from a review of significant legal challenges in other communities noting trends in decisions by federal and state courts.

Sanibel Island incorporated as a city in 1974 in order to exercise control over land use and development on the is-

land. Planning and legal consultants were hired to compile a comprehensive land use plan and implementation regulations to make up a growth management program which would be legally defensible. It was assumed that since the State of Florida had mandated planning (through its Comprehensive Planning Act which requires all cities to prepare and adopt comprehensive plans) and the fact that the island is in the coastal zone (as defined by the Coastal Zone Management Act) the growth management program would be able to withstand legal challenges. However, this has not always been the case.

The State of Florida has not adopted a state coastal zone management plan and has no official document regulating land use development in an established coastal zone. For this reason, the federal legislation is of little use to the island. Also, even though the state has mandated planning, the state courts do not recognize comprehensive plans as legally binding and have focused legal decisions on individuals' rights to a fair return on land investments. This was the case in Sanibel v. Goode decided in a court of appeals in June of 1979. It can therefore be concluded that even the best growth management programs can not be assured of success in every legal challenge.