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MECHANISMS TO PROTECT THE ECOLOGICAL
INTEGRITY OF STATE-MANAGED PUBLIC USE AREAS
NEAR LINCOLN, NEBRASKA

by

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A MASTER'S THESIS

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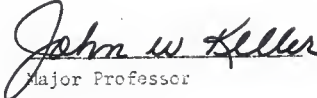
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CHAPTER I

EXURBAN DEVELOPMENT IN THE SALT VALLEY

Introduction

Practically since this nation's inception, a precept of the American values system has expressed the ideal that continual growth was the pathway to greater qualities of life. The American society has perceived its vast natural resource base as limitless--capable of accommodating any conceivable dimension of growth. These tenets, linked with and inspired by the capitalistic doctrine of a free-enterprise market economy, have nurtured society's desire to harness this "land of opportunity" and to utilize its resources to their greatest productive capacities.

In recent years, these growth mores often have been subject to reappraisal, as visible "by-products" of society's quest have demonstrated that the natural resource base is not limitless, but both finite and fragile. As the deep-seated growth ethic has firmly entrenched itself over a long period of time, the acceptance of self-constraint within society's desire to improve its condition will likewise require lengthy gestation, as emerging ideals of controlled, quality growth are antagonistic toward contemporary mores. Ultimate public awareness and acceptance seem attainable only through a lengthy and turbulent shift of public attitudes within an economic environment which prices natural resources and amenities at full-replacement value.

As it may be ecologically disastrous to await an autonomous shift in society's values and resource pricing system in favor of self-constrained, beneficial growth, the public sector has been entrusted, both in theory and in policy, to protect society from itself by effectuating efforts to thwart continued degradation. Each tier of government--national, state, and local--has responded to the range of environmental problems in a variety of ways. While most attempts have focused on mitigating harmful effects associated with growth (i.e., the "by-products"), emerging emphases have reflected

efforts to circumvent the origins of the problems--growth itself.

Expanding physical development in the Lincoln, Nebraska area exemplifies a phenomenon which has occurred throughout the country and has been of major concern in agriculturally-oriented regions: a vast extension of urban functions into areas principally devoted to productive agricultural use. Not only has this "sprawl" occurred in areas adjacent to existing development, but has appeared in locations virtually isolated from Lincoln as well. Increasingly popular sites for construction of new housing are those which adjoin lakes or natural areas, providing pleasing visual surroundings and ease of access to recreational opportunities.

Considerable "exurban" development of this nature has occurred near state-managed recreational facilities within the Salt Creek Watershed. The Salt Creek Valley, which envelops portions of Lancaster, Seward, Saunders, Cass and Saline counties, has endured a history of serious flooding, culminated by a massive flood in 1950 which caused an estimated \$12 million in damage and claimed 22 lives.¹ Subsequent extensive research led to the eventual construction of numerous dams in the valley which were estimated to reduce potential flood damage by at least 50 percent. The completion of the project resulted from cooperative efforts of the U. S. Army Corps of Engineers, the Soil Conservation Service, the Salt Valley Watershed District, and the Nebraska Game and Parks Commission.²

Although the major purpose of the project was to control flooding, another benefit--recreation--was also provided. State law authorized and empowered the Nebraska Game and Parks Commission to "acquire by gift, devise or purchase real estate bordering on the shore of any lake or reservoir constructed for the storage of water, for the purpose of developing public recreation areas and promoting the conservation of natural resources."³ Although the Commission was granted the power to acquire recreational lands through eminent domain,⁴ much of the land surrounding the Salt Valley was

¹U. S. Army Corps of Engineers, "Salt Valley in Nebraska: A Legacy for Tomorrow," pamphlet, 1968.

²Ibid.

³Nebraska, Reissue Revised Statutes of Nebraska 1943, 1977 Cumulative Supplement, 37-424 (Laws 1947, c. 141, sec. 1, p. 386).

⁴Ibid., 81-815.26 (Laws 1959, c. 436, sec. 6, p. 1466.)

leased to the Commission by the Federal government.

The primary focus of this thesis is directed toward the twelve public recreational facilities in the Salt Valley which are managed by the Nebraska Game and Parks Commission. These sites, including the water impoundments and state-purchased or leased adjacent lands, have been classified as either "State Recreation Areas" (SRAs) or "State Special Use Areas" (SUAs).

The SRAs are defined as "those areas with a primary value for day use, but with secondary overnight-use facilities or potential, which have reasonable expansion capability, and are located in accordance with sound park management principles."⁵ Fifty-four SRAs are widely scattered throughout the state and "have been oriented to basic water resources including lakes, rivers, sandpit lakes, and reservoirs."⁶ Approximately 90 percent of the SRAs have been leased from various governmental agencies and private organizations.⁷

The SUAs identify those areas such as wildlife refuges, game management areas, lands needed for access to rivers or reservoirs, natural areas, and reservoirs which have received only minimal development.⁸ Approximately 80 percent of the land in Nebraska's 110 SUAs is owned by the Game and Parks Commission, with the remainder under Commission control through lease and management agreements with agencies such as the U. S. Army Corps of Engineers, the Bureau of Reclamation, and local power and irrigation districts.⁹

A location map of the Salt Valley SRAs and SUAs (hereinafter referred to as the Salt Valley public use areas) is shown in Plate I. Table 1 outlines a general description of their location, size and recreational uses.

⁵Ibid., 81-815.22 (Laws 1959, c. 436, sec. 2, p. 1464).

⁶Nebraska Game and Parks Commission, State Comprehensive Outdoor Recreation Plan, (Lincoln, 1973), p. 7.4.

⁷Ibid.

⁸Ibid., p. 7.8.

⁹Ibid., pp. 7.8-7.9.

EXPLANATION OF PLATE I

Location map of public use areas in the Salt Valley which are managed by the Nebraska Game and Parks Commission.

PLATE I

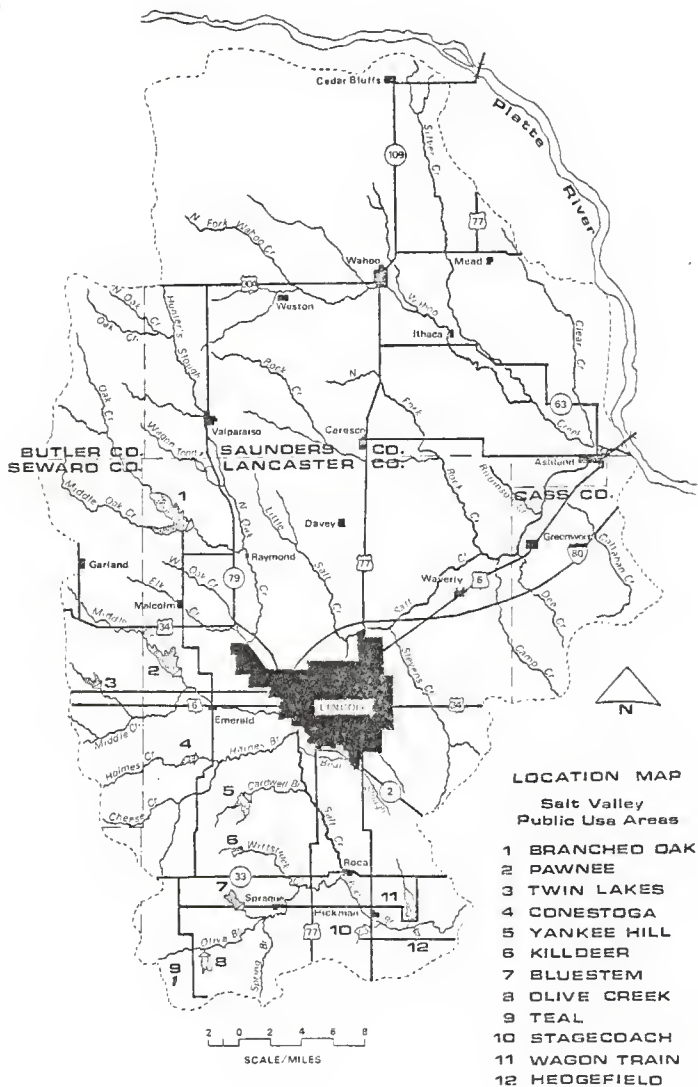


TABLE 1

GENERAL DESCRIPTION OF THE SALT VALLEY PUBLIC USE AREAS*

<u>NAME^a</u>	<u>LOCATION</u>	<u>TOTAL AREA (acres)</u>	<u>LAND AREA (acres)</u>	<u>SURFACE-WATER AREA (acres)</u>	<u>ACTIVITIES</u>
Bluestem SRA	2 1/2 miles west of Sprague	808	483	325	Fishing, Hunting, Picking, Camping, Boating, Hiking, Water-skiing
Branched Oak SRA, SUA	3 miles north of Malcolm	5,595	3,795	1,800	Fishing, Hunting, Picking, Camping, Boating, Hiking, Water-skiing, Swimming
Conestoga SRA	3 miles south and 1/2 mile west of Emerald	716	486	230	Fishing, Hunting, Picking, Camping, Boating, Hiking, Water-skiing
Olive Creek SRA	2 miles east and 3/4 mile south of Kramer	612	437	175	Fishing, Hunting, Picking, Camping, Boating, Hiking
Pawnee SRA	2 miles north and 1 1/2 miles west of Emerald	2,544	1,804	740	Fishing, Hunting, Picking, Camping, Boating, Hiking, Water-skiing, Swimming
Stagecoach SRA	1 1/2 miles south and 1/2 mile west of Lickman	607	412	195	Fishing, Hunting, Picking, Camping, Boating, Hiking

TABLE 1 (continued)

<u>NAME^a</u>	<u>LOCATION</u>	<u>TOTAL AREA (acres)</u>	<u>LAND AREA (acres)</u>	<u>SURFACE-WATER AREA (acres)</u>	<u>ACTIVITIES</u>
Twin Lakes SUA	1/2 mile north and 1/2 mile west of I-80 Pleasant Dale Interchange	1,270	1,015	255	Fishing, Boating, Hiking
Wagon Train SRA	2 miles east of Hickman	1,035	718	315	Fishing, Hunting, Picnicking, Camping, Boating, Waterskiing, Swimming, Hiking
Yankee Hill SRA	2 1/2 miles east and 1 mile south of Denton	938	728	210	Fishing, Hunting, Camping, Boating, Hiking
Hedgefield SUA	3 miles east and 1 mile south of Hickman	115	71	44	Fishing, Hunting, Camping, Boating, Hiking
Killdeer SUA	2 1/2 miles north of Martell	90	70	20	Fishing, Boating, Hunting, Camping, Hiking
Teal SUA	2 1/2 miles south of Kramer	93	66	27	Fishing, Boating, Hunting, Camping, Hiking

^aSRA: State Recreation Area; SUA: State Special Use Area

*Source: Nebraska Game and Parks Commission, State Comprehensive Outdoor Recreation Plan (Lincoln, 1973), p. 7.12.

Land-Use Changes Near the Public Use Areas

The physical growth of Lincoln, as mentioned previously, not only has exhibited an expansion outward from existing built-up areas (see Plates II and III), but also in "exurban" locations virtually isolated from the city. Many new homes have been built and planned on sites near the Salt Valley recreational facilities, with the Wagon Train, Stagecoach, Yankee Hill, Pawnee, and Bluestem public use areas realizing substantial growth pressures (see Plates IV, V, VI, VII, VIII, IX, X, and XI).

During the 1970s, several subdivision proposals were submitted for review and approval. In 1970, a preliminary plat was approved for "Pawnee Lake Acres," a 36-lot, 47-acre development near the Pawnee SRA, at the intersection of Northwest 84th and Adams Streets (see Plate IV). A final plat, however, was never submitted for approval.

A preliminary plat was approved in 1977 for the "Pawnee Estates" subdivision, a 14-lot, 54.5-acre site immediately north of the Pawnee SRA, near the intersection of Northwest 123rd Street and West Fletcher Avenue (see Plate IV). In 1977, construction began on the "Bluestem Heights" subdivision, which comprises 25 lots on 91.6 acres adjacent to the Bluestem SRA near the intersection of Southwest 42nd Street and Nebraska Highway 33 (see Plates V and VI).

The final plat has been approved for the "Yankee Hill Lake" subdivision located to the north of the Yankee Hill SRA, south of Denton Road and east of Southwest 56th Street (see Plate VII). The 111 acre development, currently under construction, is to include 30 residential lots.¹⁰

The appearance of new homes and increasing subdivision activity has aroused concern among both state officials and private citizens regarding the potential adverse effects which may arise from continued residential construction near the public use areas. Of particular interest is possible water pollution resulting from improper sewage disposal. Another concern included the possible inadequacy of storm water drainage from new subdivisions, potentially leading to soil erosion and overtaxing the capacity of a reservoir as a storm-water collection area.

¹⁰ Lincoln City-Lancaster County Planning Department.

Another issue, which has experienced a tenuous history of examination in the courts, involves scenic views and aesthetics. If public use area visitors wish to "escape" the urban environment and to experience the "peaceful" rural landscape, the promulgation of new subdivisions nearby may prevent the fulfillment of such an experience, possibly diverting recreation area-users to some other location.

These and other issues have led to the consideration of instituting a variety of regulatory mechanisms which would attempt to preserve the ecological and visual integrity of the public use areas. Consideration of additional factors, such as water quality and the speculative buying and selling of property, may point to a strong necessity for reassessing the "appropriateness" of exurban development along with the potential application of various protective regulatory techniques.

Escalating Property Values

One of the consequences which usually accompanies suburban or exurban development is the rise in property values of adjoining agricultural lands which are expected eventually to convert to urban uses. To evaluate the inflationary effects of development on properties near the Salt Valley public use areas, a survey of 1970 property values¹¹ was conducted for lands near those public use areas which have faced developmental pressures in recent years: Branched Oak, Olive Creek, Pawnee, and Yankee Hill. These values were then compared to property values in eastern Lancaster County where agricultural lands have not been subject to urbanization pressures. The statistics listed in Table 2 represent the value of the land only (i.e., without property improvements). In addition, it was assumed that there were no differences in agricultural productivity among the lands inventoried.

As indicated, the range of property values of holdings exceeding 75 acres was more stable in the eastern portion of the county than that of similar-sized properties near the public use areas. However, there appeared to be no significant difference (\$13.5) in the average price per acre. The average price per acre increased as the size of properties decreased, with the ranges of values becoming more volatile. Consequently, although the

¹¹Property values in Lancaster County are currently in the process of being reassessed. Therefore, the values discussed here actually may be understated, since considerable subdivision activity has occurred since 1970.

EXPLANATION OF PLATE II

Extent of urban development in Lincoln, Nebraska in 1950, 1960 and 1970.

EXPLANATION OF PLATE III

Extent of urban development in Lincoln, Nebraska in 1950, 1960 and 1970 in relation to the Salt Valley public use areas.

EXPLANATION OF PLATE IV

Existing and proposed residential land-uses adjacent to or near the Pawnee State Recreation Area.

EXPLANATION OF PLATE V

Proposed residential land-uses adjacent to the Bluestem State Recreation Area.

EXPLANATION OF PLATE VI

Aerial view of the Bluestem Heights subdivision adjacent to the Bluestem State Recreation Area. (looking northeast)

PLATE II

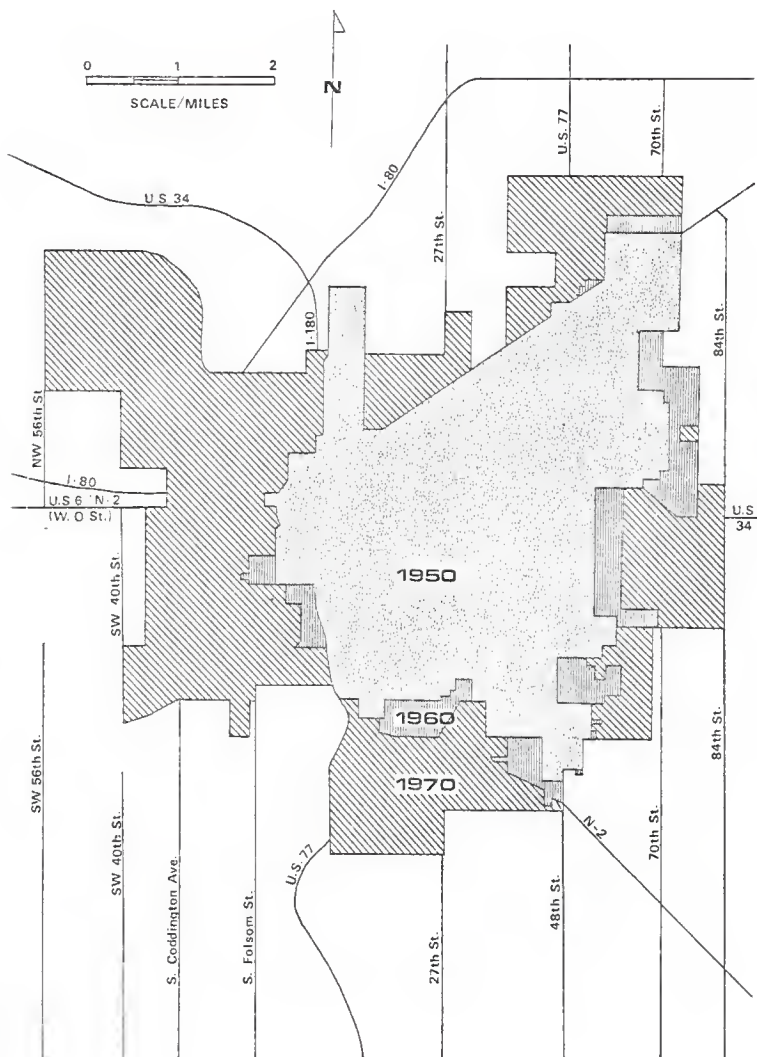
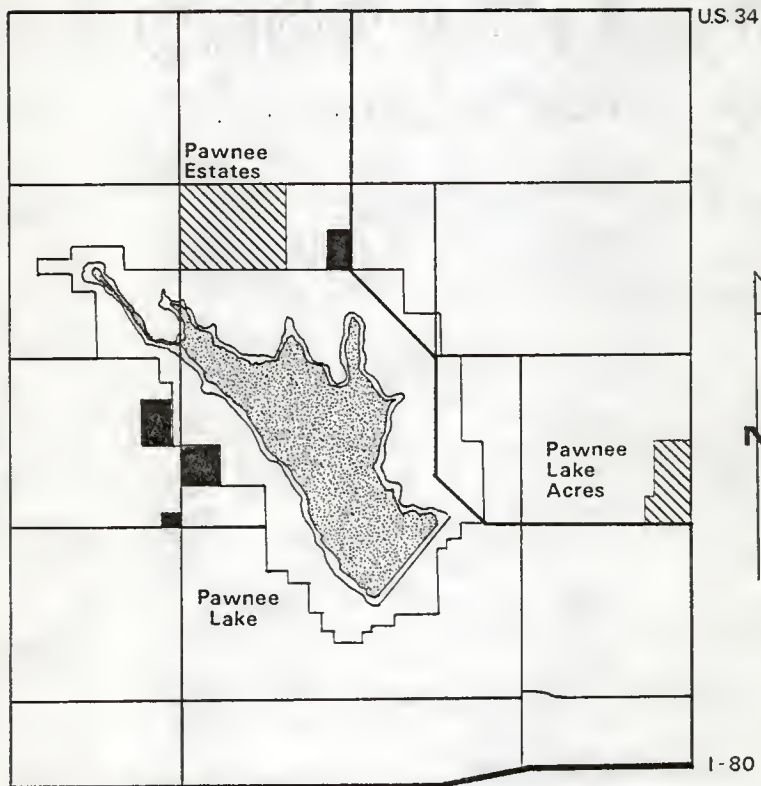


PLATE IV

PAWNEE

NW 140 St.



Existing Dwellings

Subdivisions
(Preliminary/Final Plat Approved
or Under Construction)

NW 84 St.

PLATE V

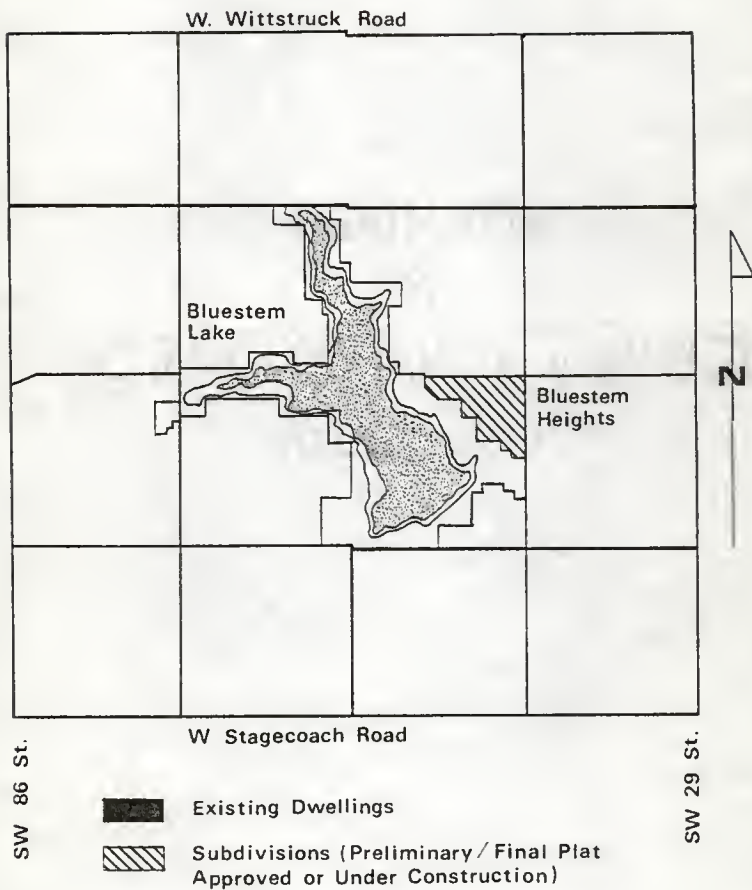
BLUESTEM



PLATE VI

EXPLANATION OF PLATE VII

Existing and proposed residential land-uses adjacent to or near the Yankee Hill State Recreation Area.

EXPLANATION OF PLATE VIII

Existing residential land-uses adjacent to or near the Stagecoach State Recreation Area.

EXPLANATION OF PLATE IX

Aerial view of residential land-uses adjacent to the Stagecoach State Recreation Area. (looking north)

EXPLANATION OF PLATE X

Existing residential land-uses adjacent to the Wagon Train State Recreation Area.

EXPLANATION OF PLATE XI

Aerial view of residential land-uses adjacent to the Wagon Train State Recreation Area. (looking southeast)

PLATE VII

YANKEE HILL

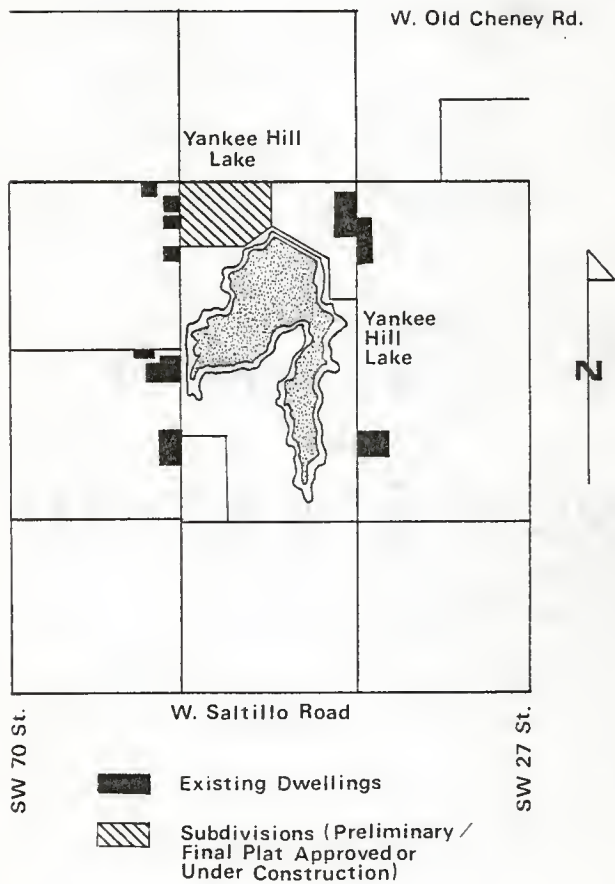


PLATE VIII

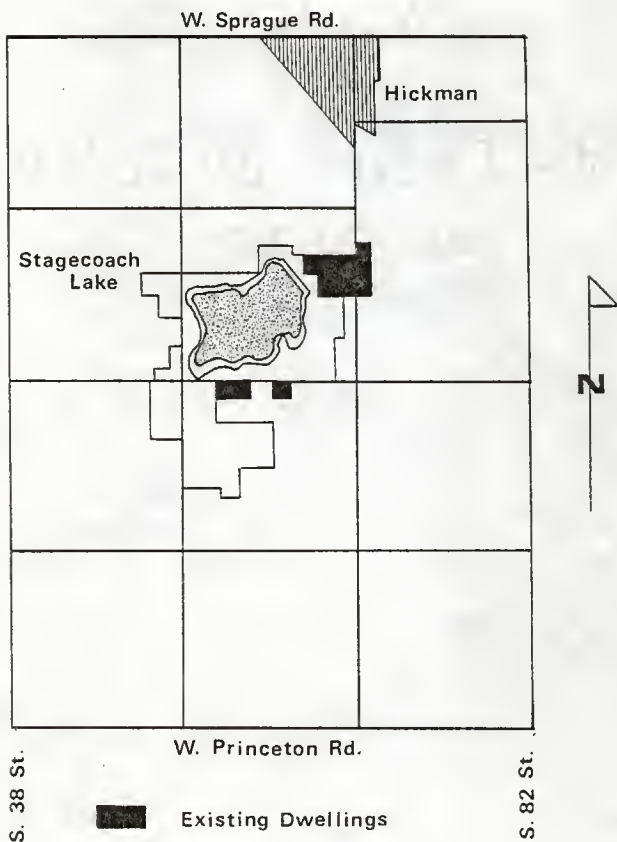
STAGECOACH



PLATE IX

PLATE X

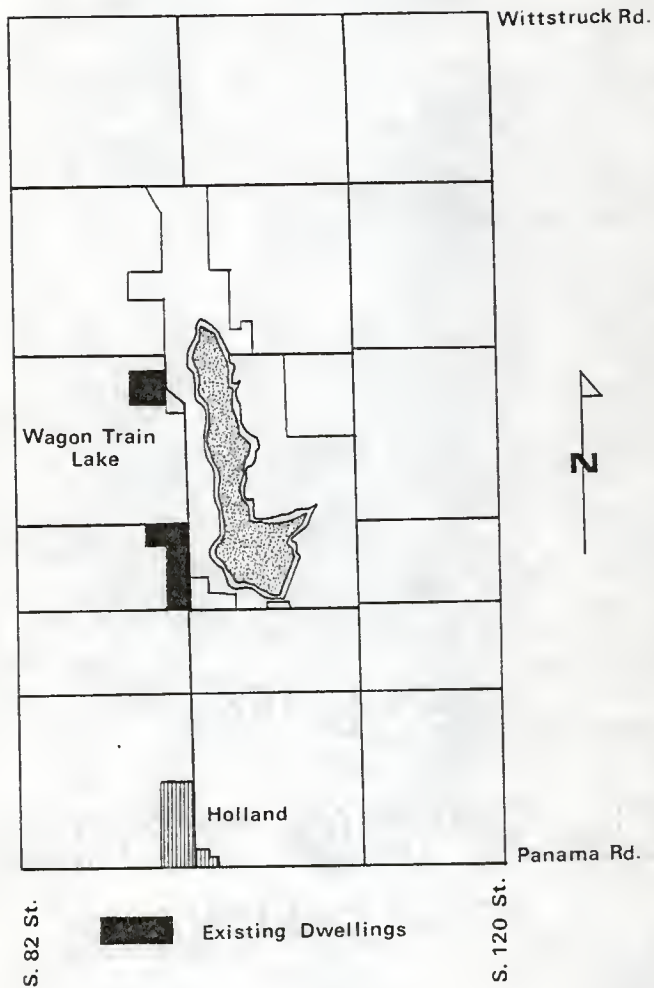
WAGON TRAIN



PLATE XI

average value of land near the lakes in sizes exceeding 75 acres were similar to those of holdings in the eastern portion of the county, the owners of smaller holdings have realized a much greater value, which may provide a considerable impetus for owners of larger properties to yield to those who wish to subdivide land for non-farm uses.

Tax Assessment Provisions for Agricultural Uses

An effort to mitigate the speculative potential of converting prime agricultural land to residential use (and the concomitant problems associated with urban sprawl) was attempted through the enactment of state legislation which authorized agricultural lands to be assessed at use value rather than market value. Following the trend established by other states, the 1972 Nebraska Legislature enacted a measure calling for the presentation to the voters of a constitutional amendment authorizing the legislature to fix the value of those lands in agricultural production.¹² The amendment was approved, which allowed the legislature in 1974 to establish special assessment provisions.¹³ The main thrust of the statutes directed that:

Any land which is within an agricultural use zone and which is used exclusively for agricultural use shall be assessed at its actual value for agricultural use and not the actual value it would have if applied to other than agricultural use if application for such special assessment is made . . . Provided, that the special assessment provisions shall not be applicable to that portion of lands zoned for agricultural residential use.¹⁴

The process for designating the agricultural use zone is retained by the local political subdivision (i.e., the municipality or county), but the state reserved the power to define the permitted uses:

Agricultural uses shall mean the use of land for the purpose of obtaining a profit by raising, harvesting, and selling crops or by the feeding, breeding, management, and sale of, or the produce of, livestock, poultry, fur-bearing animals, or

¹²Nebraska, Laws 1972, L.B. 837.

¹³Nebraska, R.R.S. 1943, 1977 Cum. Supp., 77-1343 through 77-1348 (Laws 1974, L.B. 359).

¹⁴Ibid., 77-1344.01 (Laws 1974, L.B. 359, sec. 2.01).

TABLE 2

1970 Assessed Value (100%) per Acre of Land (without improvements)
in Lancaster County, According to Location and Size*

<u>Location and Size</u>	<u>Number of Properties Inventoried</u>	<u>Range of Land Values per Acre (\$)</u>	<u>Average Land Value per Acre (\$)</u>	<u>Standard Deviation of Average Land Value per Acre (\$)</u>
Eastern Lancaster County; 75 or more acres	24	130.1 to 310.0	229.8	49.0
Land adjacent to or near lakes; 75 or more acres	82	62.7 to 358.7	243.3	60.7
Land adjacent to or near lakes; 20 to 74.9 acres	15	58.5 to 663.7	281.9	154.2
Land adjacent to or near lakes; 10 to 19.9 acres	6	400.0 to 737.1	608.9	118.7
Land adjacent to or near lakes; 5 to 9.9 acres	11	151.9 to 1,054.4	811.9	247.7
Land adjacent to or near lakes; 2 to 4.9 acres	5	775.0 to 1,078.6	978.5	110.2
Land adjacent to or near lakes; 1.9 or less acres	8	1,000.0 to 1,700.0	1,317.2	219.4

*Source: Lancaster County Assessor

honeybees, or for dairying and the sale of dairy products, or any other agricultural or horticultural use.¹⁵

The 1974 law instructed the county tax assessor to appraise the land at its agricultural use value, at the landowner's request. Thus, participation in this program is optional. If the landowner elected to participate and subsequently converted his land to a differing use, or intended to sell for subsequent non-agricultural activity, a retroactive tax would then be assessed against the land based on its market value for the preceding five years, or from the date of its designation as agricultural use, if sooner. In addition, an interest rate of six percent would be imposed on the deferred tax.¹⁶

Since enrollment in this program is optional, the landowner must weigh the costs and benefits associated with participation versus non-participation. Assuming the inflationary trend continues, if the landowner was inclined to sell or convert his land to a non-agricultural use in the future, he would need to consider whether to (1) enroll in the program and bear the burden of paying the six percent interest on the deferred taxes (deflated at current values) when the use changes, or (2) not enroll in the program and be subject to the constant inflating valuation. Simply stated, he must ask whether the six percent interest charge offsets the rate of inflation or vice versa.

Considered in a broader context, it is questionable if either alternative serves as an adequate incentive to maintain the land in agricultural production. Unfortunately, it is impossible to evaluate the effects of Nebraska's provisions. Although a review of comparable legislation in other states indicated that the Nebraska law provides similar purposes and procedures, the opinion of the Nebraska Attorney General rendered it inoperative in practice, as local zoning resolutions and ordinances have not provided for exclusive agricultural uses.¹⁷

¹⁵Ibid., 77-1343.01 (Laws 1974, L.B. 359, sec. 1.01).

¹⁶Ibid., 77-1348 (Laws 1974, L.B. 359, sec. 6).

¹⁷182 Op. Nebr. Att'y. Gen. 243 (1974).

The opinion, delivered by then-Nebraska Attorney General Clarence A. H. Meyer, noted that the provisions of L. B. 359 were to apply to exclusive agricultural districts:

Section 2(1) provides that the land must be both zoned for agricultural use and used exclusively for agricultural purposes. We construe this to mean that there must be a zoning ordinance by either a municipality or a county, enacted pursuant to one of the designated statutory provisions, limiting the use of land to agricultural purposes . . . To construe L. B. 359 to authorize special treatment of land not used for agricultural or horticultural purposes, as commonly understood, would be to render L. B. 359 unconstitutional . . .¹⁸

The opinion also concluded that livestock feeder operations and tree nurseries did qualify for the special tax treatment, but livestock sale barns and greenhouses did not.¹⁹

In a letter to State Senator Jerome Warner, Nebraska Assistant Attorney General Ralph H. Gillan reiterated Meyer's opinion regarding the implementation of the preferential assessment law:

If we construe these provisions to permit the special treatment of land which is in a zoning district which is not exclusively agricultural, but simply in one which permits agricultural use, very limited meaning can be given to the requirement that it be in an agricultural use zone.²⁰

Gillan explained that local units of government, under the broad language of state enabling legislation, were empowered to establish districts which restricted land uses exclusively to agricultural enterprises.²¹ Citing decisions rendered by the Nebraska Supreme Court, he concluded that such zoning provisions would probably be upheld by the judiciary. Gillan also

¹⁸ Ibid., at 244.

¹⁹ Ibid., at 245.

²⁰ Ralph H. Gillan, Nebraska Assistant Attorney General, to Jerome Warner, Nebraska State Senator, 8 September 1975.

²¹ Nebraska, R.R.S. 1943, 1977 Cum. Supp., 23-114.03 (Laws 1967, c. 117, sec. 4, p. 368): "Within the area of jurisdiction and powers established by [citation], the county board may . . . regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of non-farm buildings, or structures . . ."

noted that non-conforming use conditions should be included within the regulations.

The zoning ordinances currently enforced in Lancaster and Seward Counties do not authorize districts of exclusive agricultural use, thus nullifying the application of the use-value assessment provisions. In addition to those uses which would be consistent with those as permitted in the 1974 legislation, the following land-uses presently are allowed in Lancaster County's "'AA' Rural and Public Use District" (denoted as L)²² and Seward County's "A-1 Agricultural Farming District" (denoted as S):²³

- irrigation facilities, dams, reservoirs (S)
- fire stations (S)
- public and private recreation areas (L,S)
- public utilities (L,S)
- railroads (L,S)
- United States military establishments (S)
- private and commercial kennel facilities (L,S)
- milk processing establishments (S)
- seed, feed, fertilizer establishments (S)
- non-farm dwelling units (minimum 3-acre lot) (S)
- single family dwelling units (minimum 1-acre lot) (L)
- mobile trailer homes (S)
- sanitary land fills (S)
- seasonal dwelling units (S)
- communications transmission facilities (S)
- churches and related institutions (L,S)
- public and private educational institutions (L,S)
- fuel and chemical storage facilities (L,S)
- cemeteries (L)
- hospitals and other public service institutions (L)
- extractive industries (L)
- processing/manufacturing of extractive materials (L)

It would appear that a major revision of the zoning regulations would be required to qualify agricultural lands for use-value assessment. It also seems that many "non-farm" elements (e.g., public utility transmission facilities) would be regarded as essential elements in such a district, and should be regarded as acceptable allowances. Under the current provisions, however, the non-farm dwelling unit probably is the most significant impediment to the law's implementation.

²²Lancaster County, Nebraska, Revised Zoning Regulations, sec. 402.

²³Seward County, Nebraska, Zoning Ordinance, secs. 7.1 and 7.2.

"Ineffective" Subdivision Regulations

In addition to the relative permissiveness of agricultural zoning regulations throughout Nebraska, Lancaster County's "unique" subdivision regulations also have been judged as ineffective in controlling suburban and exurban "sprawl". Individual lots in Lancaster County which comprise five or more acres are exempted from subdivision permit requirements.²⁴ A law enacted by the state legislature in 1975 directed that all local subdivision regulations enforced throughout the state would apply to lots which contained 10 acres or less.²⁵ However, the five-acre definition utilized in Lancaster County, established in 1959, exempted the county from the provisions of the 1975 state law.²⁶

Partly due to this inconsistency in parameters, the Lancaster County Board of Commissioners questions if the five-acre definition is capable of controlling the "burgeoning growth of acreage developments."²⁷ Although the Board has yet to take action, it appears that aligning Lancaster County's provisions with other counties in Nebraska eventually will be considered.

Safety Considerations Near Public Hunting Areas

Although locational controls relating to residential land-use generally have been delegated to local units of government, a state law addressing safety considerations near public hunting areas directed that:

It shall be unlawful to hunt, kill, take or pursue or attempt to hunt, kill, take or pursue any form of wild mammal or wild bird within a two hundred yard radius of an inhabited dwelling; Provided that this section shall not prohibit any owner, tenant or operator or their guests from hunting, killing, taking or pursuing any form of wild mammal or wild bird within such radius if the area is under their ownership or control.²⁸

²⁴ Lancaster County, Nebraska, Land Subdivision Regulations, Para. II, sec. 2.

²⁵ Nebraska, R.R.S. 1943, 1977 Cum. Supp., 19-921 (Laws 1975, L.B. 410, sec. 7).

²⁶ Lincoln Star, 20 September 1977.

²⁷ Ibid.

²⁸ Nebraska, R.R.S. 1943, 1977 Cum. Supp., 37-526 (Laws 1967, c. 214, sec. 1), p. 575.

While this statute is designed to protect home-dwellers from the actions of hunters, no reciprocal law is provided which, in essence, protects the hunter from the homeowner. Thus, that portion of a public hunting area which is situated within 200 yards of a dwelling unit would be closed to hunting, even though the hunting area was designated prior to the construction of the house. Each Salt Valley public use area, except for the Twin Lakes SUA, possesses designated areas for hunting activity. If residential development continues to occur, those areas provided by public moneys for public hunting purposes may be thwarted in serving those purposes due to the actions of private individuals.

Water Quality in Public Use Areas

In addition to the administrative and legislative problems associated with land-use conversion, another aspect for consideration is the possibility that continued residential development near the public use areas might contribute to the degradation of waters in the reservoirs. The State of Nebraska currently is enforcing water quality standards to be achieved in designated surface waters of the state,²⁹ in order to meet the "highest statutory and regulatory requirements for all new and existing point sources and feasible regulatory programs,"³⁰ as stipulated by the provisions of the Federal Water Pollution Control Act Amendments of 1972.³¹ Commencing on September 26, 1976, the following requirements are in effect for "State Recreation Areas, Special Use Areas, and other impounded waters for public use:"

Fecal Coliform Organisms (colon bacillus) shall not exceed a geometric mean of 200 per 100 milliliters, nor equal or exceed 400 per 100 milliliters in more than 10 percent of the samples in surface waters that are assigned as a full body contact use and shall not exceed a geometric mean of 1,000 per 100 milliliters, nor equal or exceed 2,000 per 100 milliliters

²⁹ Ibid., 81-1501.01 (Laws 1971, L.B. 939, sec. 1); 81-1505.02 (Laws 1971, L.B. 939, sec. 5).

³⁰ Ibid.

³¹ 42 U.S.C.A. sec. 1251 et seq.

in more than 10 percent of the samples in surface waters that are assigned as a partial body contact use . . . The geometric mean shall be determined from samples taken over a period of five consecutive days.³²

All reservoirs in the Salt Valley public use areas examined in this report, except for Stagecoach and Teal, were designated as those waters which "shall be protected for full body contact, partial body contact, and fish and wildlife contact," defined as follows:

Full Body Contact: A full body contact use occurs when the human body may come in direct contact with the raw surface water to the point of complete body submergence. The raw water may be ingested accidentally and certain sensitive body organs, such as the eyes, ears, nose, etc., may be exposed to the water. Although the water may be ingested accidentally, it is not intended to be used as a potable supply unless acceptable treatment is applied. This water may be used for swimming, water skiing, skin diving, and other similar activities.

Partial Body Contact: The partial body contact occurs when the body may come in direct contact with the raw surface water but normally not to the point of complete submergence. It is very unlikely that this water will be ingested nor will critical organs such as eyes, ears, and nose normally be exposed to the water. This water may be used for fishing, hunting, trapping, boating, and other similar activities.

Fish and Wildlife Protective: The use of the raw surface water shall be suitable for the growth and propagation of fish, waterfowl, furbearers, other aquatic life, semiaquatic life, and wildlife. This water may be used for fish habitat, wildlife habitat, and other similar uses.³³

The Stagecoach and Teal reservoirs were classified according to the "partial body contact" and "fish and wildlife protective" parameters. Hence, the absence of required "full body contact" standards has permitted the attainment and maintenance of less strenuous levels of quality for these two lakes as compared to the other Salt Valley lakes.

The Nebraska Department of Environmental Control (DEC) conducted studies in 1971 and 1972 which were designed to "take a general look at the

³²Nebraska, R.R.S. 1943, 1977 Cum. Supp., 81-1501.01, 81-1505.02.

³³Ibid.

bacteriological condition of as many reservoirs and lakes as possible . . ."³⁴
 Thirty-three "high-use lakes and reservoirs" were examined, including nine Salt Valley impoundments: Branched Oak, Pawnee, Twin Lakes, Conestoga, Yankee Hill, Bluestem, Olive Creek, Stagecoach, and Wagon Train.

The study considered the presence of fecal coliform organisms in the lakes, and addressed their origins:

High coliform numbers have been found in many of our streams which flow into reservoirs: the fate of these coliform organisms in the reservoir is unknown. Also of concern is the effect of cabins and homes which have septic tanks that line the shores of many of our reservoirs. Do these cabins and homes significantly contribute to bacterial increases in the reservoirs; and if so, should we consider restriction of their development or at least alteration of the present method of waste disposal when new reservoirs are built or housing areas expanded on existing reservoirs?³⁵

Neither the 1971 nor the 1972 studies indicated that the geometric mean (G.M.) values of coliform samples taken in the lakes exceeded the designated limit. However, a G.M. for samples taken in 1971 at Yankee Hill Reservoir was reported at 188.4, just under the level of 200 allowed for surface waters of its class. In addition, a G.M. of 177.6 was determined from samples taken at Wagon Train Reservoir in 1972. A summary of geometric means for each of the nine inventoried lakes follows below in Table 3:

TABLE 3

Geometric Means of Fecal Coliform Organisms for
 Selected Salt Valley Reservoirs in 1971 and 1972*

Reservoir	Number of Sampling Stations	Geometric Means		Percent Change
		1971	1972	
Bluestem	5	11.62	23.36	+11.69
Branched Oak	5	3.34	9.29	+278.14
Conestoga	2	8.85	16.35	+84.75
Olive Creek	3	41.37	24.25	-41.38
Pawnee	4	2.68	15.42	+475.37
Stagecoach	3	10.27	29.15	+183.84

³⁴Nebraska Department of Environmental Control, Bacteriological Survey of Selected Recreational Waters in Nebraska From May-September 1971 and From May-September 1972, (Lincoln: November, 1971 and December, 1972).

³⁵Ibid., November, 1971, p. 1.

TABLE 3 (continued)

<u>Reservoir</u>	<u>Number of Sampling Stations</u>	<u>Geometric Means</u>		<u>Percent Change</u>
		<u>1971</u>	<u>1972</u>	
Twin Lakes	3	4.93	11.79	+139.15
Wagon Train	5	31.20	45.87	+47.02
Yankee Hill	2	99.45	10.95	-88.99

*Source: Nebraska Department of Environmental Control.

Although the results indicated that the geometric means are well below the limit as established by statute, the amount of increase as demonstrated in most cases may indicate a reasonable cause for concern.

Several individual samples taken revealed a coliform level higher than the "full body contact" criteria permitted (i.e., exceeding 400 organisms per 100 milliliters in more than 10 percent of the samples), as shown in Table 4:

TABLE 4
INDIVIDUAL SAMPLES OF FECAL COLIFORM ORGANISM
INCIDENCE EXCEEDING 400 ORGANISMS PER 100 MILLILITERS*

<u>Reservoir</u>	<u>Sampling Station Location</u>	<u>Date</u>	<u>Organism Level</u>
Bluestem	West shore near camping area	June 1972	490
Bluestem	South boat ramp	May 1972	480
Bluestem	Impoundment outlet	June 1972	640
Branched Oak	Inlet of north branch	July 1971	950
Olive Creek	East beach	May 1971	1,620
Olive Creek	East beach	May 1972	1,560
Olive Creek	Impoundment outlet	June 1971	500
Stagecoach	Northwest inlet	May 1972	2,600
Wagon Train	Southwest shore near feedlot	June 1972	480
Wagon Train	East upper shore	June 1972	960
Wagon Train	East upper shore	August 1972	1,240
Wagon Train	East upper shore	September 1972	1,500
Yankee Hill	Northwest shore near side-road	June 1972	400

*Source: Nebraska Department of Environmental Control

Citing that the Salt Valley lakes collectively held the highest geometric means of all lakes included within the study, DEC noted that the Salt Valley lake-waters exhibited a high state of eutrophication³⁶ at times.³⁷ The individual violations as noted in Table 4 were not attributed to improper sewage disposal as originally expected, but from "human or pet defecation in the area . . . (and) picnic grounds . . . located near swimming beaches with refuse sometimes reaching the water."³⁸ This implied that water quality problems in these lakes arose from the public use area visitors, rather than the adjacent land-use, except in instances where high bacteriological counts were also attributed to agricultural run-off. Thus, at least in 1971 and 1972, no water quality problems were directly associated with residential development.

The Lincoln/Lancaster County
Comprehensive Regional Plan

Designed as an instrument to alleviate problems associated with continued urban development, an updated city-county "Comprehensive Regional Plan" was adopted on January 25, 1977 by the Lincoln City Council and the Lancaster County Board of Commissioners. The Plan, prepared by a private consulting firm for the Lincoln City-Lancaster County Planning Department, outlined recommendations within a scope extending to the year 2000. Recognizing the inherent problems associated with "exurban development," the Plan stated:

The high auto accessibility afforded county residents has allowed many the flexibility to work in Lincoln but live in the countryside. As a result, the rural villages and farmlands of the county have seen a continuing influx of rural non-farm residents. While this type of development can be accommodated within the incorporated villages, it has a direct impact upon the character of development, demand for services, and the ability to maintain efficient agricultural operation

³⁶Abnormally high growth rate of aquatic plants which results in a deficiency in the oxygen supply, adversely affecting other aquatic organisms.

³⁷Nebraska Department of Environmental Control, November, 1971, p. 5.

³⁸Ibid., p. 4.

within the unincorporated villages, and rural portions of the county. To conserve the county's most precious resource--its agricultural potential--the plan must make provision to control the nature and disposition of rural non-farm development.³⁹

The Plan projected county population to increase from a 1970 level of 167,972 to 325,000 in 2000. Of this, the city of Lincoln was predicted to grow from 152,581 to 300,000. The Plan also anticipated continuing growth in the "rural non-farm" population, which includes those "exurbanities" residing near the Salt Valley public use areas. This component was expected to almost double in size from 6,759 to 11,495.⁴⁰

The Nebraska State Office of Planning and Programming (SOPP) suggested that the Plan's projections might be overestimated. SOPP listed its most recent Lancaster County high, medium and low population projections for the year 2000 as 305,975, 248,481 and 220,849 respectively.⁴¹ Even if the Plan's projections are exaggerated, it may still possess value if based on a "horizon" concept.⁴² If the recommendations of the Plan are implemented by 2000, assuming that its population projections are not yet realized, the policies in force and facilities provided might be capable of absorbing the population growth yet to occur (assuming that the established parameters are still adequate).

The Plan outlined several goals and policies in establishing the rationale for its recommendations. Three of these goals--"Parks and Recreation Facilities", "Environment" and "Development"--delineated policies which, if implemented, would appear to exert a direct impact on the environmental integrity of the Salt Valley public use areas.

The Parks and Recreation Facilities goal accentuated the need to provide county residents with "convenient access to a wide range of

³⁹Lincoln City-Lancaster County Planning Department, The Lincoln-Lancaster County Comprehensive Regional Plan, Review Draft (with annotated changes), (1977), p. 8.

⁴⁰Ibid.

⁴¹W. Don Nelson, Director, State Office of Planning and Programming; to Verl R. Borg, Deputy Director, Lincoln City-Lancaster County Planning Department; 26 January 1977.

⁴²Planning on the basis of a specific population level, rather than the year in which that level is expected to be attained.

recreational opportunities" along with "continued expansion of parks and recreation facilities as they become needed."⁴³ It was proposed that the county's natural areas aligning streamcourses or wooded areas be developed as recreational trails or linear parks in a manner which would not be environmentally detrimental. Other natural areas in a "wild" state deemed worthy of total preservation would not be subject to development as recreational facilities. The Plan suggested that these areas be purchased at fee-simple to ensure their continued wild state.⁴⁴

The Environment goal resembled the intentions of the previous goal, but embraced broader objectives. Echoing sentiments currently popular throughout the country, the goal was aimed toward maximizing "the opportunities to provide a quality of environment which is ecologically sound, healthful and safe, (and) aesthetically pleasing . . ."⁴⁵ It suggested that taxation policies (presumably preferential assessment for agricultural land) be enacted to mitigate development which would adversely affect the natural and social environment, reiterating the importance of agriculture to the county's economy.

This goal alluded to the use of eminent domain procedures, rather than the police power, as a mechanism to protect environmentally-sensitive areas. In addition to fee-simple purchase of streamcourses and wooded areas mentioned previously, the Environment goal's policies also suggested the possible use of development right (less than fee) acquisition as an alternative. It also proposed "adequate compensation to the landowners to allow relocation and/or replacement" when wooded areas and streamcourses were to be developed for recreational purposes.⁴⁶

Apparently without regard to state-initiated floodplain zoning regulations currently in force, a policy of the Environment Goal suggested that floodplain areas be retained as open space through public acquisition or taxation policies (again, presumably through some form of preferential assessment). The latter might encourage the retention of a non-urban land-

⁴³ Lincoln City-Lancaster County Planning Department, p. 38.

⁴⁴ Ibid., pp. 38-39.

⁴⁵ Ibid., p. 42.

⁴⁶ Ibid., p. 42.

use which would still provide the property owner with some economic return.⁴⁷ However, the "public acquisition" suggestion is contradicted in a later policy which states that floodplain regulations be improved "so as to allow reasonable use of land within the floodplain and to protect the health and safety of those using the floodplain and adjacent lands without the expenditure of public funds."⁴⁸ (emphasis added)

Other Environment policies suggested the use of buffer zones between differing land-uses, improved water control standards to encourage statewide uniformity, and design standards to mitigate negative aesthetic effects (e.g., stricter sign ordinances, development of screening policies and landscaping criteria).⁴⁹

The Development goal encouraged future development to occur within and adjacent to existing developed areas, suggesting that: "Growth in the urban area should generally radiate outward in all directions from a more intensely developed downtown and should be interspersed with a series of less intensely developed subcenters of activity."⁵⁰ It also suggested that the "Rural and Public Use District" zoning regulations be modified to increase minimum lot sizes for the purposes of discouraging sprawl. Currently, both the city and county zoning ordinances designate one acre as the minimum lot size within this district.⁵¹

The Plan, however, did not fully discourage exurban development. Policies within the Development goal stated that "existing rural areas should be protected from urban sprawl through planned development" and to "provide for necessary regulatory measures, tax incentives, etc., to allow development of rural non-farm housing within the rural area of the county, not in conflict

⁴⁷Ibid., p. 43.

⁴⁸Ibid., p. 46.

⁴⁹Ibid., pp. 43-44.

⁵⁰Ibid., p. 46

⁵¹Lincoln, Nebraska, Lincoln Municipal Code, sec. 27.08.040(d); and Lancaster County, Nebraska, Revised Zoning Regulations, sec. 404.2.

with other goals relating to the preservation of agricultural land and orderly urban development of Lincoln and other communities."⁵² (emphasis added) Review of the Plan may lead to difficulties in interpreting the phrases "planned development" and "conflict with other goals".

The "Implementation" goals section encouraged "the coordination of projects by all jurisdictions within the framework of the comprehensive plan through development of positive attitudes toward common objectives, and by utilizing a process of referral of projects for review."⁵³ This policy alluded to the concept of regionalism and issues of greater than local significance. The intent of the phrase "by all jurisdictions" presumably referred to the county, municipalities, and special districts, but not to the state.

The policy did not indicate the strength of the review process (i.e., required advisory review, or strict adherence to conclusions brought forward by other agencies). The referral process is presently performed on an informal basis, as the City-County Planning Department routinely notifies other governmental agencies, including state entities (e.g., Department of Environmental Control, State Office of Planning and Programming, Game and Parks Commission) about pending developmental and policy proposals.

The Plan designated "planning subareas" (a generalized form of zoning districts) within the "Lincoln City/Lancaster County Region" (see Plate XII). Two of these subareas--"Open Space" and "Agriculture"--were applied to classify future land use in areas adjacent to the Salt Valley reservoirs.

As defined by the Plan, the purpose of the open space subareas was to "preserve the open space character of the land . . . for example . . . to enhance and protect the value of lakes and reservoirs."⁵⁴ Provisions for linear parks and the protection of natural areas also were to be included. Existing public use areas were identified as open space subareas, but no additional acquisition or protection of adjacent lands was suggested. However, "open space easements" were proposed along water courses

⁵²Lincoln City-Lancaster County Planning Department, pp. 45, 46.

⁵³Ibid., p. 50.

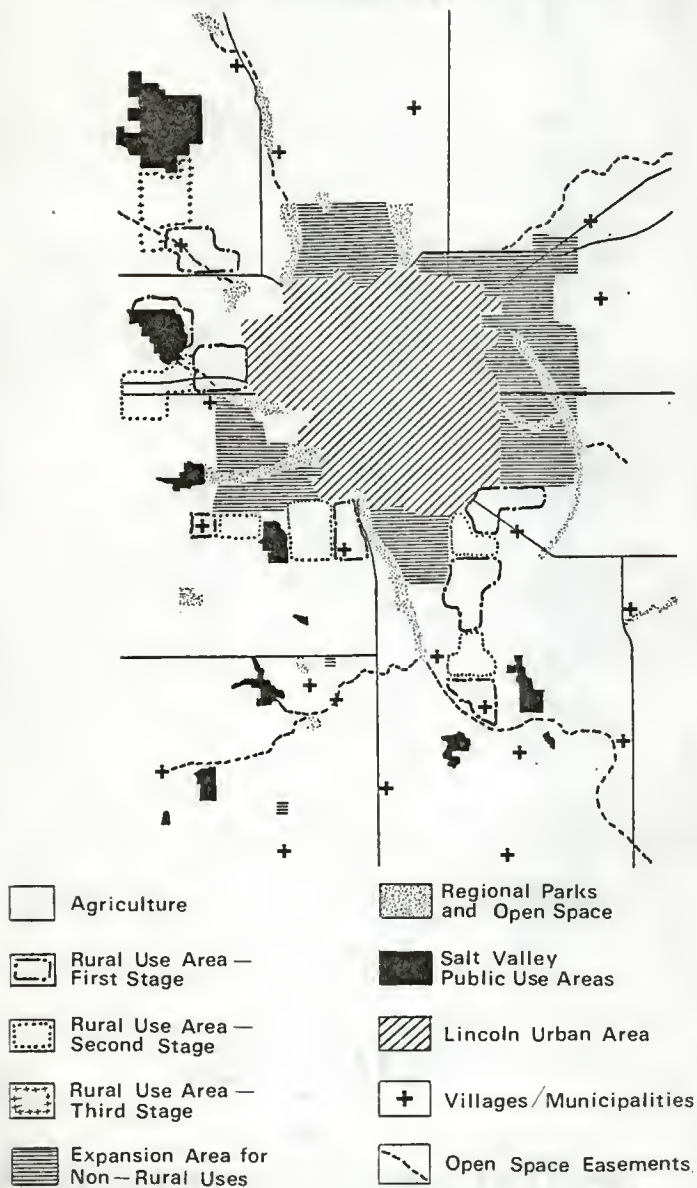
⁵⁴Ibid., p. 57.

EXPLANATION OF PLATE XII

Generalized land-use plan for Lancaster County for the year 2000.

(Source: Lincoln City-Lancaster County Planning Department)

PLATE XII



downstream from the Olive Creek, Bluestem, Wagon Train and Pawnee reservoirs, and a five mile-long strip-park was planned downstream from the Conestoga reservoir. Similar activity was proposed for water courses downstream from the Yankee Hill and Stagecoach reservoirs. However, no preservation or recreation provisions were proposed upstream from any of the Salt Valley lakes, except for a bike-hike trail system suggested along the water course north of the Wagon Train reservoir.

The Agriculture Subarea included "most of rural Lancaster County." Its main objective was to "preserve and protect agricultural activities and the potential for the agricultural and/or 'open' use of land. Nonagricultural uses may be permitted in such areas so long as they do not detract significantly from (the) the achievement of this primary objective."⁵⁵ (emphasis added) This subarea was divided into categories, two of which--agriculture and rural use--were applied to classify future land uses in those areas adjacent to the Salt Valley public use areas.

The Agriculture land-use category was established to assure that "agricultural lands are maintained in a manner which allows it (sic) to be farmed economically."⁵⁶ Its objective was to discourage non-agricultural uses, such as rural non-farm subdivisions, but such activity could be permitted "so long as they (did) not detract significantly from (the) primary objective" of efficient agricultural production."⁵⁷ It is questionable, however, if such allowances would qualify properties for use-value tax assessment provisions, as well as deter continued exurban development.

Properties surrounding the 12 public use areas in the county were classified as "Agricultural", except for some portions adjacent to Branched Oak, Pawnee, Conestoga and Wagon Train which were designated as "Rural Use Areas." This classification denoted "land use types, while not truly agricultural, (which) do not conflict with the rural character of the environment or demand services which cannot be met by existing facilities or capabilities. As such, the rural use areas designate those areas where ex-urban or rural non-farm development would be located."⁵⁸

⁵⁵ Ibid., p. 55.

⁵⁶ Ibid., p. 78.

⁵⁷ Ibid.

⁵⁸ Lincoln City-Lancaster County Planning Department, p. 47.

Among the criteria used in defining and delineating such areas is the provision that rural uses be located near developed areas, rural villages and towns, or existing concentrations of rural non-farm activities. Such a designation would allow continued development to occur near existing non-farm uses adjacent to the Salt Valley public use areas. The Plan stated that "rural use opportunities are provided in areas of generally pleasing amenity and are located . . . such that they do not occupy areas of unique environmental amenity nor prime agricultural land."⁵⁹

The rural use areas were subdivided into three categories:⁶⁰

- Stage One Lands: those areas which are currently developing in a rural use form, and, therefore should be the location for future rural use development over the short-term.
- Stage Two Lands: those areas which would be the next location subject to rural use development pressures.
- Stage Three Lands: those areas expected to be least affected during the first half of the planning period (roughly through 1989).
- Rural non-farm development was planned to occur near four public use areas in Lancaster County:
- Branched Oak: Agricultural use, except for a mile-wide "Stage Three" corridor extending south from the southern boundary.
- Pawnee: "Stage One" to the north and east; "Stage Two" to the southeast; Agricultural to the southwest and west.
- Wagon Train: "Stage Three" to the west; Agricultural use in all other directions.
- Yankee Hill: "Stage Two" to the east and northwest; Agricultural to the south and southwest; a one-half mile-wide pocket of Agricultural to the north, serving as a buffer to the recreation area from and "urban reserve" district (an area for future residential expansion).

⁵⁹Ibid., pp. 77-78.

⁶⁰Ibid., p. 76a.

To achieve the various goals and objectives of the Plan, it was suggested that alternatives to the "traditional" mechanisms of zoning and eminent domain be investigated. Although not discussed in detail, the Plan mentioned the potential use of the transfer of development rights technique. Creation of easements through the purchase of development rights was also suggested. for environmental protection and "other purposes."⁶¹

Overall, the objectives and policies of the Plan appear to be attuned to environmental issues. However, its suggestions to foster continued rural non-farm growth in selected areas adjacent to the Salt Valley public use areas might discourage attempts to preserve their characteristic natural or rural qualities. Since rural use areas are not to be located in areas of "unique environmental amenity," to propose continued development near the Salt Valley lakes suggests that these sites do not possess this quality, however defined. "Environmental amenity" could be perceived within an array of connotations. Although much of the vegetation in these areas is not naturally occurring, it serves as a screening device and as valuable habitat. The rural characteristic of lands surrounding the public use areas may in itself be considered an amenity resource. The Plan, however, failed to address these concepts when considering the effect of continued development near the reservoir areas.

The Seward County Plan

Seward County has not experienced the pressures of urbanization as encountered in Lancaster County. The basic attitude of Seward County residents appears to reflect that of maintaining the "status quo." The county land-use plan virtually has not provided for any substantial conversion of agricultural lands into urban-related uses, save for the "natural" expansion of Seward and other municipalities.

The eastern boundary of the Twin Lakes SUA is situated approximately one-half mile west of the interchange of Interstate 80 and Nebraska Highway 103. Presently, gasoline service stations adjoin the northeast and northwest interchange access ramps. The county plan designated further limited

⁶¹Ibid., p. 234.

development in the interchange area, with commercial uses designated for land adjacent to the southeast and southwest access ramps. The total area of the planned "I-80 Interchange Commercial Zone" will be contained by a square with one-half mile on each side, centering upon the core of the interchange. The one-quarter mile wide "buffer" area between the commercial zone and the Twin Lakes SUA is to be retained in agricultural use. The plan also proposed that farming uses be maintained on properties adjoining that portion of Branched Oak SRA extending into northeastern Seward County from Lancaster County.⁶²

The Status Quo: A Conclusion

The land-use controls currently implemented appear to have been ineffective toward mitigating those problems associated with exurban development near Lincoln, especially on those lands abutting public use areas. The relative permissiveness of the zoning ordinances of both counties, the "ineffective" subdivision regulations of Lancaster County and the inapplicability of the preferential assessment law have been incapable of discouraging residential speculation in outlying areas. Even though the Lancaster County comprehensive plan expressed a concern toward environmental misuse, it appeared that no effective provisions were proposed to adequately protect public use areas from encroaching development.

Aside from the possible detriment to the scenic environment arising from increasing development near the public use areas, as yet no evidence has indicated that residential construction has adversely affected the water quality of the lakes. Studies conducted in 1971 and 1972 indicated that high bacterial counts in lakewaters were attributed to agricultural runoff (from those lands supposedly identified as compatible with recreational use) and from the public use area-users. Since no studies have been conducted very recently, no documentation exists which would indicate that adverse environmental effects have arisen from heightened residential construction. Therefore, it must not be assumed that future subdivision activity will be compatible with the quality of reservoir waters and adjacent recreational lands.

⁶²R. Usnick, Vision-17 Areawide Planning Agency, Lincoln, Nebraska, interview, August, 1977.

CHAPTER II

THE NEED FOR A "SUPRA-LOCAL" APPROACH

The Theory of Externalities

In recent years, several theorists have suggested that environmentally-related issues and problems, due to their potential wide areal extent, must be considered on a basis of greater than local scope, in order to effectively internalize the external (or "spillover") effects associated with such phenomena. In essence, an externality "occurs when some of the benefits or costs associated with the production or consumption of a good spill over to third parties."¹ An example of a spillover cost (or "negative" externality) occurs after a manufacturing firm releases untreated wastes into a river. Residents downstream would be required to incur greater water-treatment costs than if the manufacturer had treated the effluent before releasing it. The spillover costs were those which were shifted from the manufacturer to the general public.

Externalities associated with higher education provide an example of spillover benefits (or "positive" externalities). As McConnell noted:

Education entails benefits to individual consumers: "more educated" people generally achieve higher incomes than do "less educated" people. But education also confers sizable benefits upon society; for example, the economy as a whole benefits from a more versatile and more productive labor force, on the one hand, and smaller outlays in the areas of crime prevention, law enforcement, and welfare programs, on the other.²

This concept can be utilized when considering the benefits which

¹Campbell R. McConnell, Economics, 5th ed., (New York: McGraw-Hill Book Company, 1972), p. 93.

²Ibid., p. 94.

spill over from a public use area to adjacent private properties. Although the public use area is to serve the broader public, its presence may have a strong influence on adjoining individual properties by enhancing their attractiveness for residential use-- an unintended externality arising from the provision of recreational services. Conversely, the actions of adjacent private property holders may be injurious to the general public, as agricultural runoff or domestic sewage from nearby properties may seep into the lakes, adversely affecting water quality of the public use area reservoir.

Clientele Survey of the Salt Valley Public Use Areas

Although in many instances, the state-managed public recreational lands in Nebraska may actually be utilized by a local (county or municipality) population, these areas have been intended to serve residents of the entire state as well as out-of-state visitors. A policy statement developed by the Nebraska Game and Parks Commission indicated that one objective in providing recreational needs of the public was directed toward developing:

. . . a balanced state park system by providing non-urban park areas for the inspiration, recreation and enjoyment primarily of resident populations; wayside parks for picnic areas or rest stops to accommodate the traveling public; and historic parks to offer representative interpretation of the rich Nebraska historical heritage for the education and enjoyment of Nebraskans and visitors to the state.³ (emphasis added)

In July of 1974, the Nebraska Game and Parks Commission conducted a survey to determine usership characteristics in four of the Salt Valley public use areas (Branched Oak, Pawnee, Stagecoach and Twin Lakes).⁴ The survey was conducted during various hours over a period of 23 non-consecutive days. Carload groups passing "checkpoints" in each public use area were interviewed by Commission personnel. A total of 980 carload groups, representing 2,723 individuals, comprised the survey sample. The consensus of opinion in each carload served as the reported survey response.⁵

³ Nebraska Game and Parks Commission, State Comprehensive Outdoor Recreation Plan, (Lincoln, 1973), p. 1.2.

⁴ Nebraska Game and Parks Commission, Unpublished data.

⁵ Reported totals in ensuing tables may be inconsistent with one another, due to either (1) lack of item response from individual carloads, or (2) rounding error.

Information regarding the "primary activity" (i.e., the main purpose of the visit) was sought from each carload group. As shown in Table S, swimming appeared to be the most popular primary activity among both in-state and out-of-state visitors. The "other" category, which elicited a significant response from both visitor groups, included those activities which did not appear originally within the survey (e.g., playing ball, throwing a "frisbee").

TABLE S

PRIMARY ACTIVITY OF CARLOAD GROUPS VISITING
SELECTED SALT VALLEY PUBLIC USE AREAS IN
JULY 1974, BY STATE OF RESIDENCE*

<u>Primary Activity</u>	<u>Nebraska</u>		<u>Out-of-state**</u>	
	<u>number</u>	<u>percent</u>	<u>number</u>	<u>percent</u>
Swimming	312	33.8	17	35.4
Fishing	194	21.0	3	6.3
"Other"	190	20.6	13	27.1
Waterskiing	71	7.7	1	2.1
Camping	56	6.1	10	20.8
Power boating	56	6.1	1	2.1
Non-power boating	22	2.4	0	0.0
Picnicking	16	1.7	2	4.2
Nature study	2	0.2	0	0.0
Hiking	2	0.2	1	2.1
Horseback riding	1	0.1	0	0.0
TOTAL	<u>922</u>	<u>100.0</u> (rounded)	<u>48</u>	<u>100.0</u> (rounded)

*Source: Nebraska Game and Parks Commission: Unpublished data.

**Includes the following states: California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, North Carolina, New York, Ohio, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming.

Table 6 and Plate XIII denote the county of residence of the surveyed public use area users. More than two-thirds (68%) of those interviewed lived in Lancaster County, distantly followed by visitors from Douglas, Seward, York, and Platte Counties. Almost six percent of the respondents lived

TABLE 6

RESIDENCE OF VISITORS TO SELECTED PUBLIC USE AREAS, BY NEBRASKA COUNTY AND OUT-OF-STATE*

Residence	Branched Oak		Pawnee		Stagecoach		Twin Lakes		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Nebraska County										
Adams	2	0.8							2	0.2
Antelope			1	0.2					1	0.1
Boone			1	0.2					1	0.1
Burt	1	0.4							1	0.1
Butler	1	0.4	2	0.3	1	1.1			4	0.4
Cass	3	1.2	1	0.2					4	0.4
Cuming	1	0.4							1	0.1
Dakota			1	0.2					1	0.1
Dawes			1	0.2	1	1.1			2	0.2
Dodge	3	1.2	4	0.7					7	0.7
Douglas	82	32.4	41	6.9	3	3.3	7	16.3	133	13.6
Fillmore			3	0.5					3	0.3
Franklin			1	0.2					1	0.1
Gage	2	0.8	1	0.2	3	3.3	1	2.3	7	0.7
Gosper			1	0.2					1	0.1
Hall	1	0.4	2	0.3					3	0.3
Hamilton			2	0.3					2	0.2
Jefferson			3	0.5					3	0.3
Kimball			1	0.2					1	0.1
Lancaster	114	45.1	454	76.7	77	83.7	21	48.8	666	68.0
Madison	1	0.4							1	0.1
Morrill			1	0.2					1	0.1
Nemaha					1	1.1	1	2.3	2	0.2

TABLE 6 (continued)

Residence	Branched Oak		Pawnee		Stagecoach		Twin Lakes		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Nebraska County										
Otoe	1	0.4	3	0.5					4	0.4
Platte	7	2.8	2	0.3					9	0.9
Polk			3	0.5					3	0.3
Saline			1	0.2	2	2.2			3	0.3
Sarpy	9	3.6	1	0.2					10	1.0
Saunders	6	2.4	1	0.2			4	9.3	7	0.7
Seward	5	2.0	16	2.7			1	2.3	25	2.6
Washington			1	0.2			1	2.3	2	0.2
York	6	2.4	6	1.0	1	1.1	1	2.3	14	1.4
Out-of-State**	8	3.2	37	6.3	3	3.3	7	16.3	55	5.6
Total	253	100.0 (rounded)	592	100.0 (rounded)	92	100.0 (rounded)	43	100.0 (rounded)	980	100.0 (rounded)

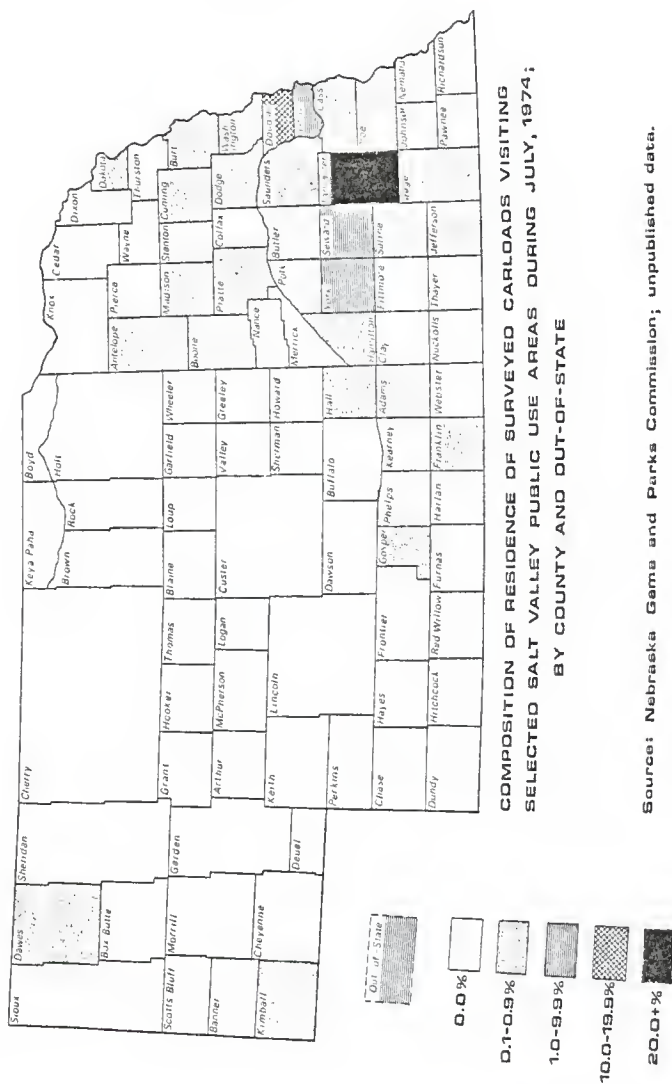
*Source: Nebraska Game and Parks Commission: Unpublished data.

**Includes groups from California (2), Colorado (4), Florida (2), Illinois (1), Indiana (3), Iowa (8), Kansas (3), Maryland (1), Minnesota (5), Missouri (3), North Carolina (1), New York (4), Ohio (1), Oklahoma (1), South Dakota (3), Texas (1), Wisconsin (3), Wyoming (1), and 8 not indicated.

EXPLANATION OF PLATE XIII

Composition of residence of surveyed carloads visiting selected Salt Valley public use areas during July, 1974; by county and out-of-state.

PLATE XIII



COMPOSITION OF RESIDENCE OF SURVEYED CARLOADS VISITING
SELECTED SALT VALLEY PUBLIC USE AREAS DURING JULY, 1974;
BY COUNTY AND OUT-OF-STATE

out-of-state. It should also be noted that since the survey was conducted during July, the college student population, representing the University of Nebraska-Lincoln and other area institutions, was essentially "controlled," since comparatively fewer students attend summer sessions than during other times of the year.

Respondents were also asked to identify the population size of their place of residence. As Table 7 indicates, over three-fourths (76%) of the visitors lived in urban areas with a population of 50,000 or greater. When analyzing these statistics in conjunction with Table 6 and Plate XIII, it may be concluded that the majority of these visitors are residents of Lincoln.

TABLE 7

RESIDENCE OF PUBLIC USE AREA USERS BY TYPE/SIZE OF PLACE*

<u>Type/Size of Place</u>	<u>Number</u>	<u>Percent</u>
Farm or ranch	26	2.7
Less than 1,000	74	7.6
1,000 to 5,000	55	5.7
5,000 to 50,000	71	7.3
More than 50,000	745	76.0
TOTAL	<u>971</u>	<u>100.0</u>

*Source: Nebraska Game and Parks Commission, Unpublished data.

Although the dominance of Lancaster County residents as patrons of the Salt Valley public use areas indicates the importance of these facilities in fulfilling local recreational needs, a significant minority of non-area residents utilize these areas as well. Thus, the concept of greater-than-local significance is an applicable parameter in identifying the importance of these, and possibly other, state public use areas.

Two major "precedents" in Nebraska illustrate action taken at the state level to ensure statewide interest in those issues which transcend local boundaries. Floodway regulations were initiated at the state level, recognizing that potential widespread danger, extraordinary costs of local governments, and home-buyer protection were issues associated with flooding that

rationalized state involvement. In addition, a state-enacted regulatory measure implemented to protect the visual integrity of the Nebraska State Capitol injected statewide interests into the scope of Lincoln's application of the police power. Further discussion of these "precedents" may assist in developing a mechanism to protect the integrity of the Salt Valley public use areas.

Floodway/Flood Plain Regulations

Since 1967, flood-prone areas of Nebraska have been subject to land-use regulation, with significant legislation added in 1975 and 1976. In justifying the control of development in these areas, state law directed that:

. . . because of the loss of lives and property caused by floods in various areas of the state, in the interest of public health, safety, and general welfare, floodway-encroachment lines are to be established along watercourses and drainways, and other appropriate regulations made as to the floodways of watercourses and drainways, in order to minimize the extent of floods and reduce the height and violence thereof insofar as such are caused by a natural or artificial obstruction restricting the capacity of the floodways of the waters of the state.⁶

Several pertinent definitions within the statutes have been questioned in recent years as to their applicability and appropriateness. In setting the framework for this discussion, these and other key phrases are listed below as they have appeared in the statutes:

Artificial obstruction shall mean any obstruction which is not a natural obstruction; . . .

Drainway shall mean any depression two feet or more below the surrounding land serving to give direction to a current of water less than nine months of the year, having a bed and well-defined banks; Provided, that in the event of doubt as to whether a depression is a watercourse or drainway, it shall be presumed to be a watercourse; . . .

Floodway shall mean the channel of a watercourse or drainway and those portions of the flood plain adjoining the channel which are reasonably required to carry and discharge the flood water of any watercourse or drainway; . . .

⁶Nebraska, R.R.S. 1943, 1977 Cum. Supp., 2-1506.03 (Laws 1967, c.1, #3, p. 63).

Flood plain shall mean the area adjoining the watercourse or drainway which has been or may hereafter be covered by flood water; . . .

Obstruction shall mean any dam, wall, wharf, embankment, levee, dike, pile, abutment, projection, excavation, channel rectification, bridge, conduit, culvert, building, wire, fence, rock, gravel, refuse, fill, or other analogous structure or matter in, along, across, or projecting into any floodway which may impede, retard or change the direction of the flow of water, either in itself or by catching or collecting debris carried by such water, or that is placed where the natural flow of the water would carry the same downstream to the damage or detriment of either life or property; . . .

Political subdivision shall mean and be limited to any incorporated city or village or any county organized and having authority to adopt and enforce land-use regulations . . . ; and

Watercourse shall mean any depression two feet or more below the surrounding land serving to give direction to a current of water at least nine months of the year, having a bed and well-defined banks; Provided, that it shall, upon order of the (Natural Resources) (C)ommission, also include any particular depression which would not otherwise be within the definition of watercourse.⁷

The law directed the Nebraska Natural Resources Commission (NRC) to identify those floodways subject to a flood of one hundred year frequency (or a flood which has a one percent chance of occurring within any given year). After these floodways have been delineated, the NRC was to "establish . . . floodway encroachment lines for such a floodway within which a political subdivision may establish land-use regulation"⁸ The NRC was directed to provide each political subdivision with rules, regulations and suggested minimum standards to be enforced at the local level. The political subdivision, however, was permitted to enforce regulations which were more stringent than those of the NRC. If the locality failed to adopt land-use regulations sufficient to meet the statute's criteria, the NRC was to assume direct control over land use in those neglected areas, thus usurping local control.

⁷ Ibid., 2-1506.02 (Laws 1967, c. 1, #2, p. 61; Laws 1975, L.B. 108, sec. 1).

⁸ Ibid., 2-1506.03 (Laws 1967, c. 1, #3, p. 63).

Any artificial obstruction within the floodways which would, in essence, adversely affect the flow of water was declared as a "public nuisance unless a permit had been obtained for such artificial obstruction from the commission or responsible political subdivision."⁹ Artificial obstructions located within floodways prior to October 23, 1967 were treated essentially as non-conforming uses. They were allowed to remain and be maintained, but could not be altered without the approval of the appropriate governmental entity.

Certain criteria were to be considered in deciding whether to accept or deny the issuance of a permit to construct an obstruction within a designated floodway:

- (a) the danger to life and property by water which may be backed up or diverted by such an obstruction or land use,
- (b) the danger that the obstruction or land use will be swept downstream to the injury of others,
- (c) the availability of alternate locations,
- (d) the construction or alteration of the obstruction in such a manner as to lessen the danger,
- (e) the permanence of the obstruction or land use,
- (f) the anticipated development in the foreseeable future of the area which may be affected by the obstruction or land use,
- (g) hardship factors which may result by approval or denial of the application . . . ¹⁰

The law also permitted additional requirements to be imposed by the NRC or political subdivision as they "may deem advisable."¹¹

The NRC was granted discretionary authority to remove, at its own expense, obstructions created by natural causes (e.g., fallen trees).

⁹ Ibid., 2-1506.04 (Laws 1967, c. 1, #4, p. 64; Laws 1969, c. 18, #1, p. 172).

¹⁰ Ibid., 2-1506.06 (Laws 1967, c. 1, #6, p. 65; Laws 1969, c. 18, #3, p. 173; Laws 1973, L.B. 188, sec. 1).

¹¹ Ibid.

However, if non-exempt obstructions caused by the landowner were not in compliance with the criteria established by state law, the NRC was to remove those obstructions at the expense of the owner.

Unless declared by the NRC, regulations would not be imposed on a floodway if the drainage area above it was less than one square mile in extent. The likelihood of flood danger in these areas was not judged significant as to warrant imposition of such land-use control measures.

In 1975 and 1976, legislative acts granted the Nebraska Department of Water Resources (DWR) regulatory power relative to construction of artificial obstructions in floodways and flood plains "not being enforced" under the authority of the NRC.¹² This legislative addendum invoked an increased areal coverage of land-use regulatory activity by the state, and provided for divided administrative responsibility between NRC and DWR. The new legislation basically paralleled the provisions for floodways cited earlier, but also declared as public nuisances those artificial obstructions located within the flood plain.

The ambiguities associated with the definitional relationship between "floodways" and "flood plains" contributed to administrative uncertainty in the application of the laws. After considerable debate, DWR adopted the following revised definitions on August 1, 1977 (see also Plate XIV):

Floodplain: The area adjacent to a watercourse or drainway which has or may hereafter be covered with flood water. For administrative purposes in Nebraska the floodplain is considered to be the area inundated upon occurrence of the 100-year frequency flood.

Floodway: The channel of a watercourse or drainway and those portions of the floodplain adjoining the channel which are reasonably required to carry and discharge floodwaters. Additionally it is that portion of the floodplain upon which elevating of the surface (filling) or the construction of structures would cause a significant increase in water surface elevation at or upstream of the building site.

Flood Fringe: That portion of the floodplain outside of the floodway but in an area which flood damage can occur if

¹²Ibid., 2-1506.15 (Laws 1975, L.B. 108, sec. 5).

structures are not flood-proofed or elevated above the regulatory flood datum.¹³

Flood plain inventory procedures, delegation/recall of enforcement powers, and the like resembled those required to implement floodway regulations, except that the county alone was charged with enforcing flood plain regulations. Floodway regulatory power was delegated to a "political subdivision" which referred to both counties and incorporated cities and villages.

Expanding on the preamble to the 1967 floodway statutes, DWR re-emphasized the need for regulatory activity in flood-prone areas, to:

1. Protect adjacent, upstream and downstream private and public landowners from increases of flood heights and velocities, nuisances due to floating structures and debris, increased sedimentation and resulting increases in flood damages.
2. Minimize extraordinary direct and indirect costs to governmental units caused by developments within flood plains for roads, sewer and water, flood control works, flood relief and emergency services.
3. Reduce health and safety risks to the individual or his family or guests, prevent blighting and prevent economic losses which detract from community well-being and the tax base.
4. Protect individuals from buying lands which are unsuited for intended purposes because of flood hazard.¹⁴

The most significant rule adopted by DWR concerns proposed locations for "dwellings for human habitation":

Home construction will not be permitted within the floodway but may be permitted outside the floodway (within the flood fringe) contingent upon the first floor elevation being at least 1.0 foot above the elevation of the 100-year frequency flood. Basements are prohibited unless certified by a Registered Professional Engineer or other qualified technical person as being flood-proofed.¹⁵

¹³Nebraska Department of Water Resources, Rules of Procedure Governing Application for and Issuance of Flood Plain Permits, (1977, amended 1 August 1977), Rules 10(g), 10 (h), 10 (i).

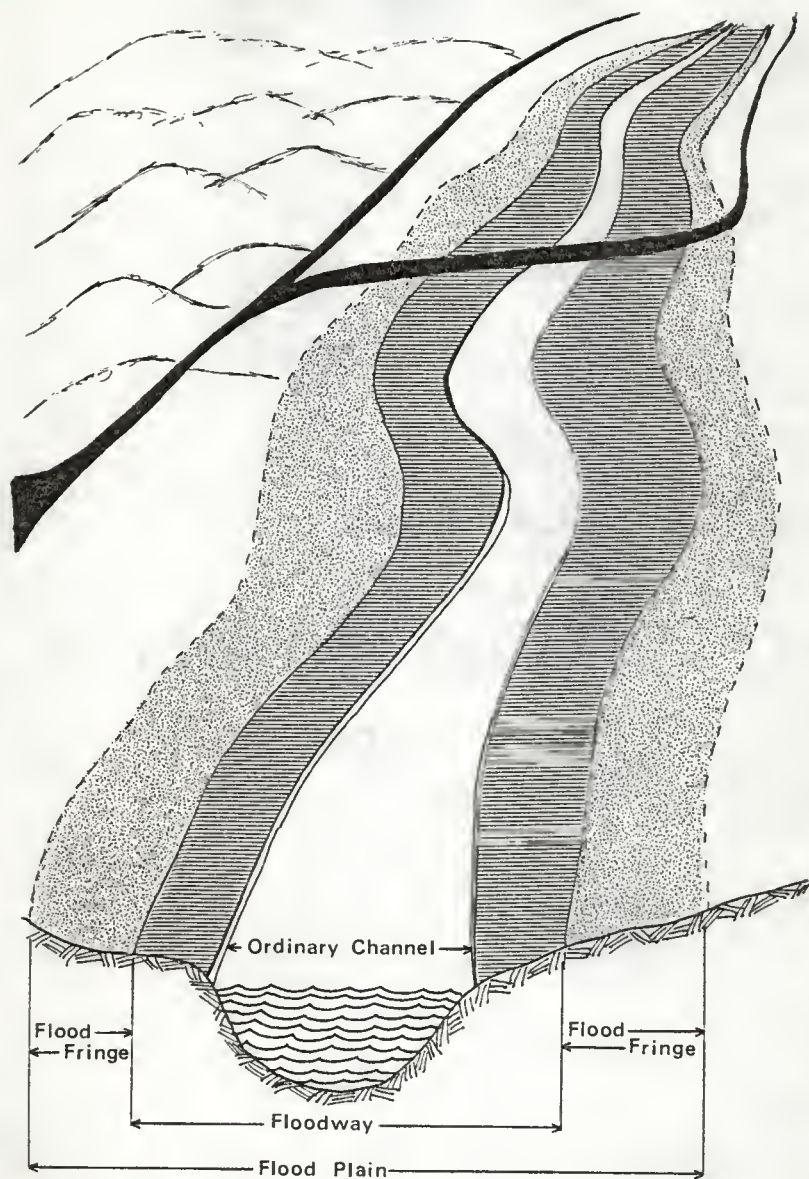
¹⁴Ibid., p. b.

¹⁵Ibid., Rule 3 (3)(c).

EXPLANATION OF PLATE XIV

Graphical representation of parameters utilized in establishing
Nebraska's floodway/flood plain regulations.

PLATE XIV



Source: Nebraska Department of Water Resources.

The 1975 and 1976 flood plain provisions were declared not to apply to:

land area (a) which is located within the flood plain of any drainway, (b) which is not located within the jurisdictional limits, for zoning purposes, of any municipality, and (c) which is not determined by the director to be of such a nature that either the depth or velocity of potential floodwaters thereon presents a serious or significant threat to lives or property.¹⁶

Thus, the NRC retained authority (either delegated to or recalled from political subdivisions) over land-use in (1) floodways of watercourses and drainways within the zoning jurisdiction of municipalities, and (2) floodways of drainways, regardless of location. The DWR assumed authority (either delegated to or recalled from counties) over land-use in floodways and flood plains within areas of county zoning jurisdiction. In the Salt Valley, regulations have been imposed downstream from the Salt Valley lakes, but are in force upstream from only three of the reservoirs: Branched Oak, Pawnee, and Wagon Train.

The Nebraska State Capitol Environs
Protection and Improvement Act

The Nebraska State Capitol Environs Protection and Improvement Act¹⁷ was approved by the 1977 Nebraska Legislature and signed into law by the governor on March 8, 1977. The main thrust of the Act was to regulate the height of buildings near the State Capitol for the purpose of maintaining its prominence as "one of the architectural masterpieces of the world."¹⁸

The Act defined the structure as one of greater than local significance (i.e., statewide), thus justifying the involvement of state government in protecting the Capitol's integrity as a scenic landmark:

The Legislature . . . finds that the preservation of the dominant height of the State Capitol in relation to surrounding structures should not only be a concern for the citizens of the

¹⁶Nebraska, R.R.S. 1943, 1977 Cum. Supp., 2-1506.18 (Laws 1976, L.B. 795, sec. 1).

¹⁷Nebraska, R.R.S. 1943, 1977 Cum. Supp., 90-301 through 90-305 (Laws 1977, L.B. 172).

¹⁸Ibid., 90-302 (Laws 1977, L.B. 172, sec. 2).

city of Lincoln, but for all of the citizens of the state, for the State Capitol is a financial, cultural, and esthetic investment and resource of the entire citizenry. Therefore, the Legislature declares and explains its intention to reclaim certain regulatory powers that it has delegated to municipalities, in this case to the city of Lincoln, by directly imposing maximum height restrictions in the State Capitol environs. The Legislature implements these restrictions for the benefit of all the citizens of Nebraska . . .¹⁹ (emphasis added)

In essence, the importance of the State Capitol in serving as a major point of interest for all citizens of Nebraska--not just for Lincoln residents--was the integral purpose for legislating a recovery by the state of those powers once delegated to the city (i.e., the formulation of height regulations through the zoning ordinance). In actuality, the Act merely formalized existing interim height restrictions which were enacted by the city upon the advice of a city-state advisory committee.

The Act noted that real estate values on properties near the State Capitol have been increasing and will continue to rise because of (1) the properties' physical proximity to the Capitol, and (2) continued maintenance of and improvements to the Capitol building and grounds. Without restrictions, the high property values and the associated tax assessment might be an inducement for property owners or potential buyers to consider increasing the density of use in these areas (i.e., taller structures) to recoup the higher property taxes. Since the Capitol enhances the values of these adjacent properties, height restrictions would serve to protect the building's prominence as well as possibly curbing the increased market value of adjoining lands and structures. The rationale which would sidestep the "just compensation" issue would be that regulations would provide protection for the State Capitol, and so the public welfare. In addition, adjacent property owners would be benefitted through decreased developmental demands facing their holdings, as well as realizing a more stable tax assessment.

Therefore, the state initiated regulatory involvement "in conjunction with the regulatory power of the city of Lincoln, (to) inject a greater degree of stability in the governmental process for regulating heights in

¹⁹ Ibid.

the State Capitol environs, which will in turn benefit all Nebraska citizens."²⁰ If a landowner desired to exceed the height restrictions, he must seek a change in the state enabling legislation as well as a zoning change from the city (the latter of which has been granted the power to enforce the Act).

The Nebraska State Capitol Environs District comprises five areas near the Capitol, each with a specific height limitation as depicted in Plate XV. The full width of the right-of-way of the boundary streets are also included within the district. Various appurtenances (e.g., chimneys, church spires, elevator bulkheads) are exempt from the specific height restrictions, but may not extend more than twenty feet above the designated limit.

The state (through the Department of Administrative Services), the city and the county were empowered to act singly or jointly in expending funds for projects which would "beautify" the district (e.g., special lighting, landscaping, or decorative walkways), except that eminent domain could not be utilized to fulfill the objectives of the Act, save for the acquisition of public rights-of-way.

Summary and Conclusions

The Salt Valley public use areas, like the State Capitol Building, have exemplified a significance which transcends local boundaries. Thus, a major issue has developed when considering that land-use decisions of local scope, implemented through the application of the Lancaster and Seward County zoning ordinances and subdivision regulations, may affect the ecological integrity and attractive potential of these recreational facilities of regional or statewide importance.

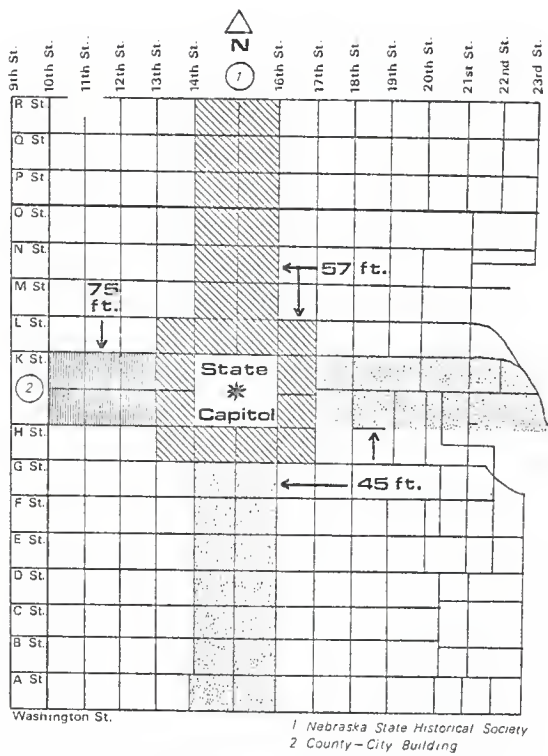
The externality created by the recreation areas--the attractiveness of situating a housing development nearby to "capture" the amenities--may have imposed a negative externality from the development back onto the public use areas in the form of environmental degradation. This example of growing conflict between the interests of the locality and the state has evoked observations from many scholars who have suggested that the state has

²⁰ Ibid.

EXPLANATION OF PLATE XV

The Nebraska State Capitol Environs District.

PLATE XV



Source: Nebraska: R.R.S. 1943, 1977 Cum. Supp., 90-301 through 90-305
[Laws 1977, L. B. 172].

the right to intervene to protect its investment, as well as for environmental protection. In assessing this conflict of interests, Slavin noted that:

Decisions of . . . communities adversely affect the environment, economies and social conditions of entire regions and no way has been found to deal with them effectively. The solution to the problem requires that the State realign its development planning and control mechanisms and those of city and county governments. This realignment appears to require the State to increase its policy-making role and provide higher standards for public agencies' performance.²¹

Udall suggested a sharing of land-use control powers between the state and local levels of government in an approach to solve problems relating to jurisdictional questions:

While perhaps 90 percent of all land use decisions affect only the immediate jurisdiction involved--and should rightfully remain subject to local control--the state should play a role in the broader land use questions. Many decisions are matters properly of state concern: the siting of public facilities such as airports and highway interchanges; developments of regional benefit including energy facilities and low-cost housing; large-scale developments including large-scale subdivisions and land sales projects; and developments in floodplains, wetlands, and natural hazard areas.²²

Linowes and Allensworth also suggested that cities consider those issues of wider areal scope, but proposed that regulatory powers be retained by the local units of government:

. . . state enabling legislation should require decisions to consider metropolitan, regional, and statewide factors. The present stipulations in this regard would be eliminated and new constraints added and the most important of the present ones is that which restricts the "health, safety, and general welfare" requirement to the local community. New legislation should require a broader context, or, in other words, local government should be required to take into account factors and needs on a

²¹Richard H. Slavin, "Toward a State Land Use Policy: Harmonizing Development and Conservation," State Government: The Journal of State Affairs, XLIV, no. 1 (Lexington, Ky.: Council of State Governments, Winter 1971), pp. 2-11.

²²Morris K. Udall, "Land Use: Why We Need Federal Legislation," in No Land is an Island, ed. Benjamin F. Bobo, et al, (San Francisco: Institute for Contemporary Studies, 1975), p. 67.

wider scale in making land-use decisions. Local considerations are certainly relevant, but they should not be the exclusive or sole concern as they are now.²³

As will be outlined in detail later on in this thesis, the courts have also recognized that land-use decisions may affect a "general welfare" of a scope larger than a local community. Reiner observed:

Increasingly, decisions have been emphasizing the "dangers inherent in each municipality determining land use policy without regard to the needs of the region of which it is a part." Recent cases such as Oakwood at Madison, Inc. v. Township of Madison, In re Appeal of Joseph Girsch, In re Appeal of Kit-Mar Builders, Construction Industry Association of Sonoma County v. City of Petaluma, and Golden v. Town Board of Ramapo, are significant indicators of the current imperative that regional needs are a proper and necessary condition in local zoning.²⁴

As will be discussed in the next chapter, the states have become increasingly involved in asserting control over "critical areas," "developments of regional impact," and other land-use issues described by various titles. The recent Nebraska legislation which limited building heights near the State Capitol Building and construction activity in flood plains should be considered as major precedents for state intervention in the local application of regulatory activity. The premises outlined here and elsewhere in this thesis strongly suggest the applicability of state intervention in controlling land-uses near the Salt Valley public use areas. Briefly reiterated, these observations include:

- a. The professional literature and the courts support a regional approach to land-use issues of greater-than-local significance.
- b. The purposes of the Nebraska state park system, supported by a user-survey, indicated that the public use areas are intended to serve, and have served, a usership not restricted to the immediate area wherein they are located.

²³R. Robert Linowes and Don T. Allensworth, The States and Land-Use Control, (New York: Praeger Publishers, 1975), p. 172.

²⁴Edward N. Reiner, "Traditional Zoning: Precursor to Managed Growth," in Management and Control of Growth, ed. Randall W. Scott, vol. 1, (Washington: Urban Land Institute, 1975), p. 219.

c. The application of local land-use regulations may potentially adversely affect the viability of the ecology and usership of the Salt Valley public use areas.

d. The State of Nebraska possesses existing mechanisms, and can adopt additional regulatory measures to protect the environment and state investments for public recreation.

CHAPTER III

PROTECTIVE MECHANISMS INITIATED AT THE FEDERAL AND STATE LEVELS

Introduction

Various programs aimed toward environmental protection have been implemented recently at the Federal level and by many states. The objectives of these programs have addressed problems of "supra-local" scope, thus requiring intervention by that unit of government which could attempt to internalize and efficiently manage these land-use concerns. This chapter will examine major Federal and State efforts dealing with "supra-local" issues, with particular consideration given to programs addressing circumstances similar to those encountered in the vicinity of the Salt Valley public use areas.

Major Federal Programs

The National Environmental Policy Act of 1969 (NEPA)¹ established a precedent in nationwide environmental regulatory controls, as the Federal government "for the first time began rather direct regulation of land use."² The major feature of the Act required Federal agencies, before initiating a project or program, to prepare and submit a detailed "Environmental Impact Statement" (EIS) accounting for the potential environmental effects of the proposed action. In essence, Federal agencies were to:

. . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed

¹42 U.S.C.A., sec. 4321 et seq.

²Donald G. Hagman, Urban Planning and Land Development Control Law, (St. Paul: West Publishing Company, 1975), p. 527.

statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.³

The U.S. Department of Transportation and the U.S. Army Corps of Engineers have filed the majority of Environmental Impact Statements. However, not only did the law apply to those projects undertaken directly by Federal agencies, but also to activities of other entities which were approved, funded or licensed by the Federal government. In addition, many states have followed the lead of NEPA by formulating state environmental protection acts (SEPA's), requiring environmental impact statements to be filed by state agencies and, in some cases, private enterprises.⁴

The national legislation also established the Council of Environmental Quality (CEQ), charged with the formulation of guidelines governing EIS preparation and approval. An agency which was considering a program or project was to circulate the related draft EIS among various Federal, state and local agencies, and the public for review and comment. The final EIS was utilized in the decisionmaking process to determine actions of environmental protection to be undertaken by the applying agency.

The constitutionality of NEPA's intent was upheld in Zabel v. Tabb.⁵ In this Federal case a developer brought suit against the U.S. Army Corps of Engineers, which had denied the developer permission to build in a dredged

³42 U.S.C.A., sec. 4332(2)(c).

⁴Natural Resources Defense Council, Land Use Controls in the United States: A Handbook on the Legal Rights of Citizens, (New York: The Dial Press, 1977), pp. 18-26.

⁵430 F.2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910.

landfill. The developer contended that a permit could not be denied on environmental grounds, to which the Circuit Court responded that Congress maintained the constitutional right to protect the environment:

We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy . . .⁶

In evaluating the effectiveness of NEPA's provisions, the Natural Resources Defense Council concluded that: "In general, actual preparation of NEPA statements by Federal agencies and fully independent Federal assessments are the best assurances that the most objective and environmentally sound decisions will be made in the long run."⁷

The 1970 Clean Air Amendments⁸ to the Air Quality Act of 1967⁹ required the Federal Environmental Protection Agency (EPA) to establish national ambient air quality standards. The premise of universality was based on the notion that "air should meet a certain freedom from pollution quality in every region of the nation."¹⁰

The amended Act was directed toward the mitigation of adverse effects resulting from the emission of six major pollutants: carbon monoxide, particulates, hydrocarbons, sulfur oxides, nitrogen dioxide, and photochemical oxidants. "Primary emission standards" were established to set a

⁶Ibid., at 200-201.

⁷Natural Resources Defence Council, p. 21.

⁸42 U.S.C.A., secs. 1857-1858a.

⁹Ibid., secs. 1857-1857L.

¹⁰Hagman, p. 527.

level of air quality adequate to protect the public health. "Secondary standards" were promulgated to protect the public welfare.

Each state was required by the Act to develop "implementation plans to attain the maintain the federal standards."¹¹ If the EPA Administrator determined that state provisions were unsatisfactory, he was to establish federal regulations which would rectify deficiencies.

The EPA divided each state into "air quality control regions," based on the incidence and severity of pollutant output. The creation of such regions was to encourage a unified approach by areawide governments to attain and maintain air quality standards.¹²

The Federal Water Pollution Control Act and Amendments of 1972¹³ directed EPA to "establish research programs and provide . . . grants for research and development and for pollution control programs."¹⁴ To be eligible for federal grants, states or other governmental entities were to be enforcing areawide waste treatment management plans in accordance with EPA guidelines. Public and privately-operated sewage treatment plants, as well as other "point" sources, were subject to regulation. Effluent or emission standards were established by EPA, but individual states were to formulate ambient standards, leading to national non-uniformity. "Non-point" source (such as pollution resulting from agricultural runoff) regulation was also addressed by the Act.

Each state was also required to identify publicly-owned fresh-water lakes and was to implement "methods (including land-use requirements) to control sources of pollution of such lakes."¹⁵ The Wisconsin Shoreline Management Act and the Tahoe Regional Planning Compact, discussed later in this thesis, are examples of mechanisms established to meet this requirement.

¹¹Natural Resources Defense Council, p. 40.

¹²Ibid., p. 42.

¹³42 U.S.C.A., sec. 1251 et seq.

¹⁴Hagman, p. 573.

¹⁵42 U.S.C.A., sec. 1324.

A permit was required from EPA for the discharge of any pollutants into "any waters of the United States." States were allowed to issue such permits, but only after meeting EPA criteria. The EPA also required that the method of discharge be in accordance with an areawide waste treatment plan.¹⁶

The National Flood Insurance Act of 1968¹⁷ allowed for federally-subsidized insurance to be made available to communities which had adopted "appropriate" land use and control measures in flood-prone areas. The Federal government was to delineate the local flood hazard areas and provide flood data to assist communities in establishing regulatory mechanisms.

The Flood Disaster Protection Act of 1973¹⁸ strengthened the provisions of the 1968 legislation, mandating that no federal assistance or loans were to be granted for acquisition or construction of property in flood-prone areas, unless the community in which the property was located was participating in the National Flood Insurance Program. In addition, property owners could not obtain federal assistance unless their property was covered adequately by flood insurance.

Heightened awareness of the recreational and scenic values of the nation's rivers led to the passage of the Wild and Scenic Rivers Act of 1968.¹⁹ The policy set forth by the Act specified that:

. . . certain selected rivers of the Nation which, with their immediate environments, possess outstanding remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values shall be preserved in free-flowing condition, and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations.²⁰

The Act originally designated all or portions of eight existing rivers and adjacent lands to be included within the "Scenic Rivers System," and established criteria for additional designations. The System was to be

¹⁶ Hagman, pp. 573-578.

¹⁷ 42 U.S.C.A., sec. 4001 et seq.

¹⁸ Ibid.

¹⁹ 16 U.S.C.A., sec. 1271 et seq.

²⁰ Ibid., sec. 1271.

administered by the Secretary of the Interior and in part by the Secretary of Agriculture.

To qualify for inclusion into the System, a river (or portion thereof) was required to be "free-flowing," defined as "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway."²¹ Existing minor diversions, however, were permitted, as long as such action was not "construed to authorize, intend, or encourage future construction of such structures within components of the national wild and scenic rivers system."²²

The Act authorized Congress to appropriate funds to acquire lands or interests therein (e.g., scenic easements) adjacent to the designated rivers. Restrictions were also imposed upon water resource projects, including federal efforts, which would "directly affect" the rivers in the System.²³

Generally, designated rivers were to be "administered in a manner that protects and enhances the values which led to (their) inclusion in the system. Primary emphasis in this administration must be given to protecting aesthetic, scenic, historic, archeological, and scientific features."²⁴ Designated lands and waterways within the jurisdiction of local governments were to be regulated through local zoning provisions based upon Federal guidelines.

The Coastal Zone Management Act of 1972²⁵ provided Federal funding for state regulation of land-uses in coastline areas. Recognizing the adverse environmental effects resulting from increasing urbanization in seaboard areas, the preamble of the Act stated that:

The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the loss of living

²¹Ibid., sec. 1286(b).

²²Ibid.

²³Natural Resources Defense Council, p. 135.

²⁴Ibid., p. 136.

²⁵16 U.S.C.A., sec. 1451 et seq.

marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion . . .²⁶

Congress therefore mandated as national policy efforts "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations . . ."²⁷

The Act defined coastal zones as the waters and adjacent land area of the coastal states, which included "transitional and intertidal areas, salt marshes, wetlands, and beaches."²⁸ The landward limits of the zone were to be determined by the individual states, but were to include enough land "to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."²⁹ Coastal waters were identified as:

- a. the Great Lakes and their connecting waters and estuary-type areas such as bays, shallows, and marshes; and
- b. the oceans and other waters adjacent to the shorelines which contain a measurable quantity of seawater, including, but not limited to, sounds, bays, lagoons, bayous, and estuaries.³⁰

Federal grants could fulfill up to two-thirds of the costs of state program development and implementation, which, as Linowes and Allensworth pointed out, was the first instance of Federal financial assistance for zoning purposes.³¹ States bounding the oceans and the Great Lakes, Puerto Rico, the Virgin Islands, Guam and American Samoa were eligible to receive this Federal aid.

Administrative responsibility was assigned to the U. S. Secretary of Commerce, who delegated this authority to the National Oceanic and Atmospheric Administration (NOAA). In order to qualify for Federal funding, states

²⁶Ibid., sec. 1451(c).

²⁷Ibid., sec. 1452.

²⁸Ibid., sec. 1453(a).

²⁹Ibid.

³⁰Natural Resources Defense Council, p. 101.

³¹Linowes and Allensworth, pp. 104-105.

and protectorates were required to prepare a coastal zone management plan which contained:

- a. an identification of the boundaries of the coastal zone subject to the management program;
- b. 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;
- c. an inventory and designation of areas of particular concern within the coastal zone;
- d. an identification of the means by which the state proposes to exert control over the land and water uses . . . , including a listing of relevant constitutional provisions, legislative enactments, regulations, and judicial decisions;
- e. broad guidelines on priority of uses in particular areas, including specifically those uses of lowest priority; and
- f. 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.³²

In order to implement the coastal zone management plan effectively, the state or protectorate also was to assume the capability to:

- a. administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and
- b. acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.³³

Through this provision, the state was also directed to utilize one or more of the following mechanisms to regulate uses in the coastal zone:

- a. direct state regulation;
- b. state-delegated regulatory authority to localities, subject to state review, in accordance with state-established standards;

³²16 U.S.C.A., sec. 1454(b).

³³Ibid., sec. 1455(d).

- c. local regulation, subject to state review for consistency with the management program.³⁴

The state was also charged with assuring that the local regulations did not "unreasonably restrict or exclude land and water uses of regional benefit."³⁵

For those areas which were to be designated for "preservation or restoration for their conservation, recreational, ecological, or aesthetic values," the Act provided federal funding for "acquiring, developing, and operating estuarine sanctuaries for research and educational purposes."³⁶ This acquisition provision reflected the apparent recognition that, if regulations had been imposed, virtually no reasonable economic use of the land would have been retained by the property owner.

The Wisconsin Shoreland Protection Program

In 1966, the Wisconsin legislature established the Water Resources Act which included provisions to protect lake shorelands from the pressures of physical development.³⁷ The legislation resulted in part from a state-sponsored inventory of Wisconsin's natural features, which revealed that many of these attractions, such as "wildlife categories, unique vegetation and unusual geologic formations," were situated within the state's shoreland areas.³⁸

Improvements in access have enhanced the attractiveness of these shoreland areas as sites for second homes and commercial recreation facilities. However, the absence of an appropriate sensitivity to the ecology of the shorelands has resulted in pollution problems from improper waste treatment and construction activity. Bosselman and Callies noted: "The scenic beauty

³⁴ Natural Resources Defense Council, p. 102.

³⁵ 16 U.S.C.A., sec. 1455 (e)(2).

³⁶ Natural Resources Defense Council, p. 103.

³⁷ Wisconsin, Wisconsin Statutes Annotated, ch. 59.971, 144.26 (Supp. 1970).

³⁸ Fred Bosselman and David Callies, The Quiet Revolution in Land Use Control, (Washington: U.S. Government Printing Office, 1971), p. 235.

of the lakes and rivers, and their value as wildlife reserves, were being threatened."³⁹

The primary objective of the Act was to ". . . further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty."⁴⁰ The Wisconsin Department of Natural Resources (DNR) was charged with administering the program and delegated its enforcement powers to the county governments. The Act directed counties to "enact separate zoning ordinances affecting all unincorporated land in their jurisdiction within 1,000 feet of a lake, pond or flowage and 300 feet of a navigable river or stream, or the landward side of the floodplain, whichever is greater."⁴¹ In the event that counties failed to enforce the regulations as prescribed by the Act, the DNR was to assume implementation responsibility.

The DNR was required to prepare recommended criteria and standards to assist counties in drafting regulations. These parameters were to provide for the:

Safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating, and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.⁴²

DNR's Division of Environmental Protection (DEP) formulated more specific "shoreland regulation standards and criteria" to assist the counties, which provided for the establishment of three zoning classifications in shoreland areas (conservancy, recreational-residential, and general purpose), subdivision regulations, sanitary disposal provisions, administrative

³⁹ Ibid.

⁴⁰ Ibid., p. 236.

⁴¹ Ibid.

⁴² Ibid., p. 237.

procedures and land-use regulations. The land-use provisions included the following:

- a. The establishment of minimum lot sizes to alleviate public health dangers resulting from excessive pollution;
- b. The establishment of site location standards as they relate to public health and preservation of scenic beauty;
- c. The establishment of regulations pertaining to the removal of trees and shrubbery;
- d. The establishment of regulations which govern filling, grading, lagooning and dredging.⁴³

A "Model Shoreland Protection Ordinance" based on these criteria was proposed by DEP for potential use by the counties. The prominent provisions of this model included:

- a. The use of private wells only when access to public systems is not "available";
- b. The prohibition of discarding rubbish into navigable streams;
- c. The prohibition of discharging liquid wastes into surface waters when such action would "constitute a nuisance";
- d. The prohibition of discharging industrial and solid wastes into surface waters unless permission is obtained from DEP;
- e. The connection of plumbing fixtures to a public sanitary system "where available";
- f. The allowance of private sewage disposal facilities which meet DEP regulations, when public sanitary systems are not available;
- g. The limitation of tree-cutting within a 35-foot strip paralleling the shoreline. Any cutting activity must retain sufficient cover for screening purposes;
- h. The preservation of shrubbery. If an owner removed any such stands, he was to provide for replacement;
- i. The prohibition of filling, grading, lagooning or dredging which may result in detriment to navigable waters; and

⁴³Ibid., pp. 239-240.

- j. The establishment of three shoreland zoning districts:
1. Conservancy: Designed to protect swamps or marshlands within shoreland areas, designated as "seldom suitable for building." Although some uses were to be allowed (e.g., forestry and golf courses), residential, commercial or industrial facilities were prohibited;
 2. Residential-Recreational: Allowed uses designated for the Conservancy district plus single-family dwellings, signs and, through the special permit process, those establishments associated with the recreation industry (e.g., vacation lodging facilities, restaurants, campground parks and tourist-oriented commercial facilities; and
 3. General Purpose: Allowed for those uses not permitted in the other districts. Special exception required for waste disposal facilities.⁴⁴

In addition, land subdivision is prohibited where the county planning commission deemed as unsuitable those lands which were subject to ". . . flooding, inadequate drainage, soil and rock formations with severe limitations for development, severe erosion potential, unfavorable topography, inadequate water supply or sewage disposal capabilities, or any other feature likely to be harmful to the health, safety or welfare of the future residents of the proposed subdivision or of the community."⁴⁵

Although Bosselman and Callies noted that public attitudes toward the shoreland protection program have been favorable, some inherent deficiencies may have inhibited its effectiveness. Some have argued that counties may resent their enforcement responsibilities as delegated by the DNR. However, Bosselman and Callies observed that communication between the counties and state officials has been "good."⁴⁶

The absence of authority to regulate lands adjacent to non-navigable streams is another noted deficiency, as unchecked pollution originating in these locations might adversely affect the regulated navigable areas downstream.⁴⁷ In addition, since DEP has no statutory capability to ensure

⁴⁴Ibid., pp. 240-242.

⁴⁵Ibid., p. 242.

⁴⁶Ibid., pp. 245-246.

⁴⁷Ibid., p. 247.

adequate county enforcement of the Act, the lack of any compulsory review of county administrative practices might "render the whole regulatory scheme ineffective."⁴⁸

The constitutionality of the shoreland zoning provisions was addressed by the Wisconsin Supreme Court in Just v. Marinette County.⁴⁹ The Court determined that (1) the regulation was not an unreasonable application of the police power, (2) the regulation did not result in the taking of property without compensation, and (3) the State of Wisconsin was justified in limiting the use of private property to its largely natural state for the purpose of preventing danger to the public welfare.⁵⁰

Marinette County, which adjoins the Green Bay of Lake Michigan, implemented a shoreland zoning ordinance based on the model prepared by DEP. The Justs owned property adjacent to Lake Norquebay, situated about 30 miles from the Green Bay, whose waters reach the bay via the Peshtigo River. The Justs had begun to fill an area of their property "covered with aquatic plants," which violated the provisions of the county zoning ordinance. After continued filling was halted by a county injunction, the Justs appealed to the Wisconsin Supreme Court.⁵¹

The Court first distinguished the differences in intent of application between the police power and eminent domain, noting that the police power is employed to regulate property when its use provokes public harm, while eminent domain is applied to acquire property for the public benefit. The Court noted that the State of Wisconsin was obligated, "in the nature of a public trust,"⁵² to mitigate the adverse consequences of pollution. By enacting regulations to this effect, the Court noted that the State was not creating a public benefit (thus requiring eminent domain), but rather preventing damage which would adversely affect the public welfare.

⁴⁸ Ibid., p. 255.

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

⁵⁰ Linowes and Allensworth, p. 180.

⁵¹ Fred Bosselman, David Callies, and John Banta, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control, (Washington: U.S. Government Printing Office, 1973), p. 217.

⁵² Ibid., pp. 218-219.

The Court noted the changing public attitudes toward swamps and wetlands:

The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation . . . What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.⁵³

The Court also negated the Justs' argument that their property had "severely depreciated in value."⁵⁴ The Court noted that the plaintiffs' rationale was based upon the land's potential value after the land had been filled, rather than the actual value in its natural state:

While the loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.⁵⁵
(emphasis added)

The Court summarized its conclusions by reiterating its contention that the zoning ordinance was a proper exercise of the police power and did not constitute a taking:

The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.⁵⁶

⁵³201 N.W. 2d at 768, 769.

⁵⁴201 N.W. 2d at 771.

⁵⁵201 N.W. 2d at 771.

⁵⁶201 N.W. 2d at 771.

The San Francisco Bay Conservation
and Development Commission

The West Coast has been one of the fastest growing areas of the United States for many years, particularly since World War II. Its attractive climate, tourist industry, and diversified economy have lured both commerce and the private citizen to find a new home in this region, creating intense pressures to convert massive quantities of fertile agricultural land into urban uses.

Acute growth problems have occurred within the larger coastal urban areas, especially near San Francisco, where rising demands for residential, commercial, and industrial sites resulted in the reclamation of some submerged and marshland sections of the San Francisco Bay. In the early 1960s, Bay area citizens became alarmed over the prediction that the continued filling of the Bay would reduce it to a "river". Continued public outcry was credited as a major factor leading to the passage of the McAteer-Petris Act of 1969 by the California legislature.⁵⁷ The law established the 27-member San Francisco Bay Conservation and Development Commission (BCDC), which was directed to prepare and implement a plan for future land-uses in the shorelands of the Bay.

The Commission's responsibility was to:

. . . insure that the filling and development of the Bay does not destroy its essential value for water-oriented uses (e.g., ports, power plants and airports) or its function as a recreational area, as a breeding ground for fish and wildlife, or as a beneficial influence on the climate and livability of the San Francisco area.⁵⁸

In essence, it was recognized that environmental amenity and continued development were not totally incompatible, but could, within a reasonable degree, coexist without adversely affecting one another.

The state legislature approved the Commission's Bay Plan, established jurisdictional limits for BCDC's regulatory control, and required all land-owners within that jurisdiction to obtain a permit before commencing any

⁵⁷California, California Government Code, sec. 27000 et seq.

⁵⁸Bosselman and Callies, p. 109.

filling activity. The Commission was to grant a permit only if the proposed action was consistent with the provisions of the Plan.

The extent of BCDC's areal jurisdiction was not easily established. It was observed that construction activity occurring at an appreciable distance from the Bayshore indeed might have some negative impact upon the Bay's ecosystem. Business interests, however, were concerned with the loss of economic potential if a substantial amount of land was subject to the provisions of the Act. A compromise was reached among the various area interests which established BCDC's jurisdiction "over an area 100 feet back from the main shoreline and also over certain wetlands, creeks and diked areas adjoining the Bay."⁵⁹

A proposed fill is in "accord with the Bay Plan" if (1) it is harmonious with the Plan's policies, (2) it is of minimum extent necessary to achieve its purpose, and (3) it fulfills one of the following five conditions:

- a. The activity was a Bay (water)-related purpose (such as ports, water-related industries, and water-related recreational activity); or
- b. An alternate site was not available to the activity (such as airports, roads, and utility routes); or
- c. The activity was of minor extent, designed to improve shoreline appearance or public access; or
- d. The activity was of Bay-oriented commercial recreation and public assembly purposes, "with a substantial part of the project built on existing land"; or
- e. The activity was to be limited to replacement piers (piling-supported platforms) for Bay-oriented commercial recreation and public assembly purposes, provided that it was to cover "less of the Bay than was being uncovered."⁶⁰

Those who desired to conduct fill activities were required to obtain a permit from BCDC. In addition to the five prerequisites cited above, the BCDC also was empowered to attach additional conditions upon issuing the permit. Applicants were still required to follow the pre-existing permit

⁵⁹ Ibid., p. 110.

⁶⁰ Ibid., pp. 128-133.

procedures as stipulated by the city and/or county. These local governments were to then inform the BCDC of their decisions.

The permit process did not pertain to the private sector only, as all agencies of the state and local governments were required to obtain a permit for those activities initiated within BCDC's jurisdiction. In addition, the U.S. Army Corps of Engineers also indicated that it would abide by the provisions of the Plan and the regulatory process.⁶¹

Bosselman and Callies noted that the Commission's impact has "undoubtedly been substantial," in that the rate of filling activity in the Bay has been curtailed considerably.⁶² They also observed that "developers, architects and planners" began to consult with the BCDC in the early stages of their developmental plan framework, thus increasing communication between the applicant and the BCDC, and encouraging project plan formulation which reflected the goals of the Bay Plan to a greater degree.⁶³

Bosselman and Callies suggested another important point:

The Commission's planning, though skillful and articulate, considered only the relatively direct impact of development on or near the Bay and did not examine all of the regional implications.⁶⁴

Essentially, BCDC's efforts to control development in the Bay area might encourage developers to seek land elsewhere, both potentially endangering the natural resource base of these alternate sites and possibly overloading the capacity of their existing infrastructure. Likewise, the economic potential within the immediate Bay area environs may slacken to an extent, as developers seek potential sites elsewhere.

The constitutionality of BCDC's power to plan and regulate land-uses in the Bay area, including its authority to issue permits for development and filling was affirmed in Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission.⁶⁵ The court determined that

⁶¹Ibid., pp. 110-111.

⁶²Ibid., p. 121.

⁶³Ibid., p. 111.

⁶⁴Ibid., p. 122.

⁶⁵Cal. App. 2d, 89 Cal. Rptr. 897 (1970).

(1) BCDC's authority was a proper extension of the state's police power, (2) the exercise of the police power did not infringe upon the rights of the plaintiff, (3) the exercise of the police power did not constitute a taking without compensation, (4) the BCDC's controls were within the regulatory sphere and thus did not involve the taking issue, and (5) the definition of "police power" changes over time as the state develops politically and socially, much as the Federal Constitution has been amended and interpreted over the years to conform with "the demands of society."⁶⁶

Candlestick Properties applied for a fill permit to dispose of demolition-related debris into an area "surrounded by land either filled or in the process of being filled."⁶⁷ The Commission refused to grant the permit on the grounds that the proposed fill was not a water-related use. After the trial court upheld BCDC's decision, Candlestick appealed, arguing that the BCDC and trial court decisions constituted a taking of property without due process of law. The appellate court upheld the trial court, stating:

It cannot be said that refusing to allow appellant to fill its Bay land amounts to an undue restriction on its use. In view of the necessity for controlling the filling of the Bay, as expressed by the Legislature . . . , it is clear that the restriction imposed does not go beyond proper regulation such that the restriction would be referable to the power of eminent domain rather than the police power.⁶⁸

The court reemphasized the purposes of the McAteer-Petris Act, noting that the "general welfare", in this instance, referred to regional rather than site-specific interests:

. . . the legislature has determined that the Bay is the most valuable single natural resource of the entire region and changes in one part of the Bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the Bay is being filled threatens the Bay itself and is therefore inimical to the welfare of both present and future residents of the Bay Area; and that a regional approach is necessary to protect the public interest in the Bay.⁶⁹

⁶⁶ Linowes and Allensworth, pp. 181-182.

⁶⁷ Bosselman and Callies, p. 114.

⁶⁸ 39 Cal. Rptr. 906.

⁶⁹ 39 Cal. Rptr. 905.

The California Coastal Zone Conservation Act

Three years after the San Francisco Bay Conservation and Development Commission was established by the McAteer-Petris Act, the voters of California approved the California Coastal Zone Conservation Act of 1972⁷⁰ (popularly known as "Proposition 20"), which was patterned after the BCDC framework. The legislation arose from public concern toward alleviating (1) the existing fragmented approach undertaken to manage the state's shorelands, and (2) the lack of an effective mechanism to guide development while maintaining environmental quality.

A 12-member state Coastal Zone Conservation Commission and six 12 to 16-member substate regional commissions were created, whose combined jurisdictions included the entire California coastline. The BCDC, however, retained its jurisdiction and regulatory control. The six regional commissions were charged with developing plans and implementing regulatory control within the "coastal zone," an area defined as "from three miles out to sea inland to the highest elevation of the nearest mountain range."⁷¹ In addition to beaches and non-urbanized areas, the coastal zone often included portions of developed areas, such as the downtown area of Santa Monica and the Los Angeles-Long Beach harbor.⁷² Although the jurisdictional extent of the substate commissions differed from BCDC, their goals and objectives were similar, as they both recognized that development could be guided within the parameters of environmental preservation.

The six regional plans, subject to approval by the Coastal Zone Conservation Commission and the state legislature,⁷³ were designed to "concentrate development in already developed areas, preserve agricultural land and wetlands, and prohibit development likely to deface the coastline."⁷⁴

⁷⁰California, California Public Resources Code, sec. 27000 et seq. A special referendum was necessary, since the issue evolved into a deadlock within the state legislature.

⁷¹Robert G. Healy, Land Use and the States, (Baltimore: The Johns Hopkins University Press, 1976), p. 70.

⁷²Ibid., p. 71.

⁷³Linowes and Allensworth, pp. 105-106.

⁷⁴American Institute of Planners, Survey of State Land Use Planning Activity, (Washington: American Institute of Planners, 1976), p. 443.

The Commission proposed that:

- a. Coastal-dependent industrial, commercial, and recreational development be permitted only after needs and environmental restraints are assessed;
- b. Public access to the coast be enhanced through the development of transportation facilities;
- c. There be extensive rehabilitation and state acquisition of land in the coastal area.⁷⁵

During the preparation of these regional plans, the substate commissions held permit authority over development within a zone extending from the high-tide line to 1,000 yards inland. The decision to grant or deny a permit was based upon potential "adverse environmental effects and compatibility with the proposed coastal zone plan, and . . . elements relating to land use, transportation, public services and utilities, population density and public access."⁷⁶ Appeals of a substate commission's decision were directed to the state commission and then to the courts.

The legislation proposed land acquisition by the state as a potential mechanism to prevent development in some coastal areas, premised upon uncertainty regarding the limits of the police power. The extent of this purchase would depend upon the availability of funds for this purpose, of which the state has "little,"⁷⁷ prompting the suggestion that a bond issue be attempted to provide the necessary revenues.⁷⁸

It was also suggested that the strength of local tax bases would diminish as coastal properties were placed under regulation. However, advocates of the Coastal Zone Act stated that the increased value of developed land along the coast would offset the loss in the value of regulated lands no longer attractive for speculative endeavors. Healy observed that local governments would probably realize net gains in tax revenues:

⁷⁵Ibid.

⁷⁶Ibid.

⁷⁷Healy, p. 81.

⁷⁸Ibid., p. 82.

Although there have not yet been enough transactions to make a definitive statement, it appears that prices of large tracts of vacant land in the permit zone are down, while prices of developed property and subdivided lots have risen, and sometimes soared.⁷⁹

Another major issue concerned the potential for jurisdictional inconsistencies among the substate commissions:

. . . there is some reason for caution when six different commissions start applying six different sets of criteria in deciding what will be approved between now and the time the statewide plan is adopted. Furthermore, making such decisions on a case by case basis has turned out to be arbitrary, and time consuming.⁸⁰

The Tahoe Regional Planning Agency

The 512 square mile Lake Tahoe basin, often called the "Jewel of the Sierras", has encountered strenuous growth pressures in recent years which have endangered the viability of its natural features. The significance of this major natural resource, eminent in its fragile ecology and "incomparable" water quality, has been attributed to:

. . . the conformation of the lake, with few natural irregularities, (which) permits good natural circulation of water, . . . important in maintaining its water quality . . . (and) clarity . . . incredible and comparable to only two other known large lakes in the world: Crater Lake in the U.S. and Lake Baikal in the U.S.S.R.⁸¹

The recent completion of a nearby freeway segment has greatly improved access to the lake from the San Francisco urban area, thus enhancing the basin's attractiveness for vacation-related development. Vigorous construction of private resort facilities and second homes has significantly affected the lake's pristine ecology, as the region's "unstable and erosive" soils have been incapable of absorbing the increasing developmental demands.⁸²

⁷⁹Ibid., p. 89.

⁸⁰Architectural Forum, vol. 139, no. 5 (September 1973), p. 76, cited in Healy, pp. 97-98.

⁸¹Kenneth P. Davis, Land Use, (New York: McGraw-Hill Book Co., 1976), p. 179.

⁸²Ibid., p. 181.

As a result, excessive and often irreparable road-cut scarring, grading and filling has adversely affected aquatic life and has obstructed the natural water movement.⁸³

Improper sewage disposal also created problems. The permeability and erodibility of the region's soils permitted practically all uncontrolled wastes to reach the lake, intensifying the eutrophication process which disturbed water quality and clarity.⁸⁴ Public pressure led to the discontinuance of septic tank use in 1972, followed by the construction of four water treatment facilities judged to be among the "best in the country."⁸⁵ The treated water was pumped out of the basin even though its high quality would have allowed its return to the lake.

Solid wastes were removed from the area by truck. Although this method of sewage disposal was judged effective though expensive, contamination of lake waters from runoff still posed a problem and remained unchecked.⁸⁶ Lakefront development (e.g., jetties, piers and marinas) also were judged to be "injurious to the water quality."⁸⁷

Attempts to mitigate environmental damage, through the enforcement of existing shoreland regulations and building permit issuance procedures, were described as "weak."⁸⁸ Furthermore, the proliferation of governmental units with differing jurisdictional boundaries inherently hampered attempts toward effective coordination. The basin essentially contained:

2 states (California and Nevada);

5 counties (2 in California, 5 in Nevada);

1 incorporated municipality (South Lake Tahoe, California);

⁸³Ibid., p. 190.

⁸⁴Ibid., p. 189.

⁸⁵Ibid., p. 181.

⁸⁶Bosselman and Callies, p. 291.

⁸⁷Davis, p. 189.

⁸⁸Ibid., p. 190.

58 local governmental districts and other public organizations (as of 1967);

66 domestic water supply systems (as of 1971); and

several county-governed urban areas.⁸⁹

A review of land-ownership in the basin reflects the massive holdings of the Federal Government: U.S. National Forests constitute 57.4 percent of the land area; State of California, 1.8 percent; State of Nevada, 3.0 percent; and 37.8 percent in private ownership. The lake itself is within Federal jurisdiction since the waters are interstate in nature.⁹⁰

Following many singular attempts to create a mechanism designed to mitigate environmental damage in the basin, the Tahoe Regional Planning Agency (TRPA) was established by Congress and signed into law by the President on December 18, 1969.⁹¹ The TRPA was effectuated by an interstate compact approved by the governors of California and Nevada in 1970. The Federal law succinctly identified the need to protect the basin's ecological resources:

It is imperative that there be established an area wide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls.⁹²

The TRPA's ten-member governing body included one representative from each city (South Lake Tahoe), one from each county (3 in Nevada, 2 in California), and one from each state (California, Nevada) to be appointed by the respective governors. A non-voting "representative of the United States" appointed by the President also served on the governing body. The TRPA also maintained a technical staff for expertise on specific issues.⁹³

The TRPA submitted a Plan in 1971, proposing a regulatory system "under which the type and intensity of development permitted would be

⁸⁹Ibid., pp. 185-186.

⁹⁰Ibid., p. 186.

⁹¹Public Law 91-148, 83 Stat. 360 (1969).

⁹²Ibid., Article I.

⁹³Davis, pp. 195-196.

dependent on (1) the capability of the land to take development without adverse effects, and (2) the impact that the development would have on the scenic character of the area."⁹⁴ The Plan delineated various land-use districts within the basin and established minimum standards to be enforced by the existing units of government. A "grandfather clause" provided that existing uses incompatible with the Plan were to be considered as "permitted and conforming" upon the Plan's adoption.⁹⁵

The conservation element of the Plan estimated that 34,000 acres of non-developed private land should be retained as open space through public purchase.⁹⁶ The TRPA, however, possessed no powers of eminent domain, taxation or legislation,⁹⁷ thus placing the burden of financing and acquisition upon the local and state governments.

Although the propriety of using the police power as a means to conserve the region's ecology has yet to be litigated, the California Supreme Court, in People ex rel Younger v. County of El Dorado,⁹⁸ affirmed the constitutionality of the TRPA, concluding that it did not violate the "home rule" provisions of the California Constitution.⁹⁹

The Court emphasized the need to approach environmental issues within a regional scope:

We could hardly avoid a conclusion that the purpose of the Compact is to conserve the natural resources and control the environment of the Tahoe Basin as a whole through area-wide planning. Lake Tahoe itself is an interstate body of water; the surrounding region, defined by the Compact is also interstate . . . The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive

⁹⁴ Bosselman and Callies, p. 292.

⁹⁵ Davis, pp. 197-198.

⁹⁶ Davis, p. 202.

⁹⁷ Davis, p. 198.

⁹⁸ 5 Cal. 3d 480, 487 P. 2d 1193, 96 Cal. Rptr. 553 (1971).

⁹⁹ Linowes and Allensworth, p. 181.

development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an Agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is the product of the two cooperative efforts and mutual agreement of two states is impressive proof that its subject matter and objectives are of regional rather than local concern.¹⁰⁰ (emphasis added)

The Court also concluded that issues which historically have been within the sphere of local regulatory control may assume greater dimensions over time:

Furthermore, the problems which exhibit exclusively local characteristics at certain times in the life of a community, acquire larger dimensions and changed characteristics at others . . . '(t)he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate.' . . . When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be solved by local methods.¹⁰¹

The Massachusetts Wetlands Protection Program

Since the early 1960s, the Commonwealth of Massachusetts has been implementing regulatory measures drafted to protect both inland and coastal wetlands from the pressures of urbanization. The program's initiation constituted a significant step in critical areas legislation, as pressures of development were not imminent in the commonwealth's wetland areas when the initial statutes were enacted.¹⁰²

The commonwealth's coastal wetlands protection program commenced in 1963 with the passage of the Jones Act,¹⁰³ which was aimed toward preserving

¹⁰⁰ 5 Cal. 3d at 493-494.

¹⁰¹ 5 Cal. 3d at 498-499.

¹⁰² Bosselman and Callies, p. 206.

¹⁰³ Massachusetts, 130 Massachusetts General Laws Annotated, sec. 27A (Supp. 1971).

the wetland wildlife and marine fisheries habitat. Landowners in wetland areas were required to obtain permits from the Massachusetts Department of Natural Resources (DNR) to "alter the natural characteristics of coastal wetlands"¹⁰⁴ (e.g., removing, filling, or dredging). Although the Jones Act permitted the DNR to attach limitations on proposed development, it could not prevent development from proceeding.

The Coastal Wetlands Act of 1965¹⁰⁵ was designed to eventually supersede the Jones Act and granted the DNR additional powers. The 1965 legislation vested the Department with authority to "adopt . . . orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting coastal wetlands."¹⁰⁶ Coastal wetlands were identified as "any bank, swamp, meadow (seasonally wet flood plain area), flat or other low land subject to tidal action or coastal storm flowage and such contiguous land as the Commissioner (of Natural Resources) reasonably deems necessary."¹⁰⁷

After DNR completed an inventory of wetlands potentially subject to regulatory control, it "negotiated" with affected landowners to specify regulations and establish boundaries. If a designation appeared to preclude a property from generating a reasonable economic return in the future, the DNR "probably" would either realign boundaries or exempt the property from regulation to avoid the necessity of applying eminent domain.¹⁰⁸ Such allowances or exemptions, however, could render the Coastal Wetlands Act ineffective, especially if permitted on a wide scale.

"Protective orders" prohibiting most forms of wetlands modification in regulated areas were issued by DNR upon finalizing the "negotiation" process. Once a wetland became regulated by a protective order, the permit requirements of the Jones Act which applied to the area were superseded.¹⁰⁹

¹⁰⁴ Bosselman and Callies, p. 205.

¹⁰⁵ Massachusetts, 130 Mass. Gen Laws Ann., sec. 105 (Supp. 1971).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Bosselman and Callies, pp. 210, 212.

¹⁰⁹ Ibid., p. 205.

Protective orders affected entire wetland areas rather than individual parcels or tracts, and stipulated:

- a. Permitted uses, such as recreational activities, hunting, and grazing of stock;
- b. Conditional uses, such as roadways and underground utilities;
- c. Uses allowed by special permit, such as excavations for boat channels, beaches, and boat-launching ramps.¹¹⁰

However, "the owner retains all property rights and the rights to enjoy his property in privacy as long as he does not seek to develop it in violation of the order."¹¹¹

Bosselman and Callies observed that various land-uses were "allowed with conditions or by special permit solely to maintain strict control over any filling and dredging activity which goes on, not to control the location of the use."¹¹² (emphasis added) In essence, designated uses, subject to conditions and exceptions, were permitted anywhere within the regulated area.

A protective order generally mandated that "no person shall perform any act or use said . . . wetland in a manner which would destroy the natural vegetation of the . . . wetland . . . or otherwise alter or permit the alteration of the natural and beneficial character of the . . . wetland."¹¹³ Its intent reflected the purpose of preventing public harm rather than providing a benefit, thus rationalizing police power application. No requirements stipulated any formal participation by local units of government, as regulatory control rested entirely with DNR. However, local officials have been consulted regularly on an informal basis throughout the designation process and were allowed to enforce stricter controls than those stipulated by the Coastal Wetlands Act.¹¹⁴ Overall, local officials have been generally favorable toward wetland regulation by the Commonwealth.

¹¹⁰Ibid., p. 210.

¹¹¹Ibid., p. 207.

¹¹²Ibid.

¹¹³Ibid.

¹¹⁴Ibid.

Resembling the basic development scheme of the coastal wetland regulatory mechanism, the Commonwealth instituted inland wetland protective measures with the passage of the Hatch Act of 1965,¹¹⁵ requiring the issuance of permits to alter inland wetlands (excluding those lands in agricultural production). The law's purpose differed from its coastal counterparts, as it sought protection for those inland wetlands "essential to public and private water supply or proper flood control."¹¹⁶

Permit requests were to be filed with the applicable local unit of government and the Massachusetts Department of Public Works. Subsequent recommendations were forwarded to DNR for final action. The DNR could not deny permits, but was empowered to attach conditions to fulfill waterway protection requirements. A condition could be imposed if a wetland was judged as "essential to public or private water supply or to proper flood control."¹¹⁷ A typical condition required that any fill activity within a wetland must be "clean."¹¹⁸

One of the Hatch Act's limitations, as with the Jones Act, was that the DNR could not deny permits. The imposition of conditions, therefore, was the only vehicle which could affect development. Strict conditions often were not imposed because it was "difficult for the Department (of Natural Resources) to find sufficient reasons to prohibit an individual owner from filling or dredging, because in its judgment the ill effects on the environment from the one project involved are negligible."¹¹⁹ Although DNR apparently recognized the possibility of cumulative effects, it nevertheless has not pursued stricter controls.

The Inland Wetlands Act of 1968¹²⁰ required the issuance of protective orders affecting development in inland wetland areas (except for

¹¹⁵Massachusetts, 131 Mass. Gen. Laws Ann., sec. 40 (Supp. 1971).

¹¹⁶Bosselman and Callies, p. 217.

¹¹⁷Ibid.

¹¹⁸Ibid., p. 219.

¹¹⁹Ibid.

¹²⁰Massachusetts, 131 Mass. Gen. Laws Ann., sec. 40 (Supp. 1971).

agricultural lands and meadows). The criteria which subjected wetlands to protective orders were practically identical to those in coastal areas, but did not address seasonal flooding (meadows regulation), even though flood plain management was within the scope of the Act. In addition, lands contiguous to inland wetlands were not subject to control under the inland provisions as compared to coastal regulations.

If a landowner objected to the DNR's protective order, he could negate the regulation simply by notifying DNR to that effect. If DNR was unable to revise the order to the landowner's satisfaction, the agency was to either purchase the land at a fair market price, or appropriate the land by eminent domain upon the governor's approval. As Bosselman and Callies observed:

Thus the Inland Wetlands Act appears in reality to be little more than an authorization to the Department (of Natural Resources) to negotiate with landowners for a voluntary relinquishment of development rights to their property, or a sale of such rights to the state.¹²¹

One difficulty in executing the Act has been the inherent inaccuracy in delineating the geographical extent of the inland wetland areas. Another obstacle impeding effective central administration is the multiplicity of local governments in contact with DNR, as the numerous wetland areas subject to DNR regulation are widely scattered throughout the commonwealth. It has also been noted that the regulatory process has been hampered by vague permit requirements. In comparison, "coastal protective orders have been somewhat more effective."¹²² Perhaps the possibility of resorting to the use of eminent domain has stifled the overall success of the inland wetlands regulatory process.

Bosselman and Callies noted that the Massachusetts courts have tended to be "generally sympathetic to full protection of wetland areas."¹²³ In Commissioner of Natural Resources v. S. Volpe and Company,¹²⁴ the Massachusetts

¹²¹Bosselman and Callies, p. 222.

¹²²Ibid., p. 225.

¹²³Ibid., p. 215.

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

Supreme Judicial Court reviewed the trial judge's decision which determined that the "condition" imposed in the protective order was not an unlawful taking without just compensation. The evidence indicated that the regulations appeared to advance the public benefit, thus questioning the propriety of police power application. Although the high court did note that the protective order was designed to protect marine fisheries, it remanded the issue to the lower court for "further factual findings."¹²⁵

The distinction between regulation and appropriation was raised again in MacGibbon v. Board of Appeals of Duxbury.¹²⁶ A local wetland zoning by-law was held invalid because the Board's refusal to permit MacGibbon to fill was "for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose . . ." ¹²⁷ (emphasis added) In contrast, the Court determined in Golden v. Board of Selectmen of Falmouth¹²⁸ that "protecting the town's natural resources along its coastal areas" through the permit system was an acceptable application of the police power.¹²⁹

The Florida Environmental Land
and Water Management Act of 1972

Florida has experienced increasing developmental pressures in recent years, as exemplified by reports citing that one-seventh of all new home starts in the United States occurred within the state in 1973. Its appealing climate has drawn especially the retirement-aged and second-home markets from all areas of the country. Likewise, Florida's tourist industry has prospered, with new attractions such as "Walt Disney World" near Orlando catering to millions of visitors each year.¹³⁰

The major thrust of Florida's growth has taken place in the southern

¹²⁵Fred Bosselman, et al, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control, (Washington: U.S. Government Printing Office, 1973), p. 217.

¹²⁶356 Mass. 696, 255 N.E. 2d 347 (1970).

¹²⁷255 N.E. 2d at 351.

¹²⁸265 N.E. 2d 573 (Mass. 1970).

¹²⁹265 N.E. 2d at 575.

¹³⁰Healy, p. 104.

half of the state-- the only region within the 48 contiguous states where tropical flora and fauna abundantly occur in nature. The intensifying growth pressures have seriously endangered the integrity of this unique habitat, as a factor contributing to a severe drought in 1971 was scientifically attributed to the "widespread destruction, through drainage, dredging, and filling, of the state's wetlands, . . . necessary for recharging the groundwater aquifer."¹³¹

In response to these intensifying concerns, the state legislature enacted several environmental-related laws, including the Environmental Land and Water Management Act of 1972,¹³² which focused its attention to "areas of critical state concern" and "developments of regional impact". The provisions of the Act were to be implemented by an "Administration Commission," comprised of the governor and six independently-elected cabinet members.

An "area of critical state concern" was defined as:

- a. An area containing or having a significant impact upon environmental, historical, natural, or archeological resources of regional or statewide importance;
- b. An area significantly affected by or having a significant effect upon an existing or proposed major public facility or other area of major public investment; or
- c. A proposed area of major development potential, which may include a proposed site of a new community designated in the state land development plan.¹³³

The Florida Division of State Planning (DSP) encouraged local governments, regional councils, and interested groups and individuals to nominate areas for potential designation. After reviewing proposals, the DSP then was to submit its recommendations to the Administration Commission for final selection. The DSP's recommendations were contained within a "critical area report" outlining:

¹³¹ Natural Resources Defense Council, p. 283.

¹³² 14 Florida Statutes Annotated, secs. 380.012 et seq.

¹³³ Ibid., sec. 380.05.

- a. The boundaries of the proposed area;
- b. The reasons why the proposed area is of critical concern to the state or region;
- c. The dangers that would result from uncontrolled or inadequate development of the area;
- d. The advantages that would be achieved from the development of the area in a coordinated manner; and
- e. Specific recommended principles for guiding development in the area.¹³⁴

If an area was approved for designation by the Administration Commission, the applicable local government was to formulate land development regulations for that area, in accordance with state guidelines. If a locality failed to submit regulations within six months after designation, the DSP was required to prepare the developmental laws. The local unit of government also was charged with enforcing the regulations. If it failed to do so, the state was permitted to initiate legal action.¹³⁵ An amendment to the law in 1974 enabled the Administration Commission to impose interim development principles as local governments were preparing the final regulations.¹³⁶

The law placed two restrictions upon the Commission: (1) The state could not designate more than 500,000 acres as critical areas during the Act's first year of implementation, and no more than five percent of the state's total land area, and (2) Areas designated for environmental purposes required the approval of a \$200 million bond issue for their purchase.¹³⁷ This was necessary in that the implementation of regulations alone would probably render the property useless in terms of an economic return to the owner.

Areas established thusfar include portions of the Big Cypress Swamp,¹³⁸

¹³⁴American Institute of Planners, p. 156.

¹³⁵Natural Resources Defense Council, p. 284.

¹³⁶American Institute of Planners, pp. 156-157.

¹³⁷Ibid.

¹³⁸This designation "bypassed" the "five percent" requirement, as the area was afforded protection by a special legislative act, thus exempting it from the rule.

the Green Swamp, and the Florida Keys.¹³⁹ The Appalachian River Basin, Lake Jackson and Sanibel-Captiva Island have also been considered for designation.¹⁴⁰

A "development of regional impact" (DRI) was defined as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."¹⁴¹ The Division of State Planning established guidelines and standards for the identification of DRIs. Types of development which have been classified within this category include: airports, attractions and recreational facilities, electrical generating facilities and transmission lines, hospitals, industrial parks, petroleum storage facilities, residential developments, schools, and shopping centers.¹⁴²

If a proposed development qualified as a DRI, the developer was to make application with the appropriate local government, regional planning agency and the DSP. The application sought information regarding the anticipated effects of the project on water supply, water quality, air quality, noise levels, sedimentation, erosion, animal life, sewage disposal, solid waste management, power supply, schools, transportation, employment, taxes, and housing.¹⁴³

Upon approval of the application, the local government was granted the authority to issue a permit, or "development order." If a DRI project did not lie within the jurisdiction of a locality, the state was to administer the regulatory process. The final decision of the locality, if deemed unfavorable by the regional commission or the DSP, could be appealed to the Administration Commission.¹⁴⁴

An example of a DRI is Doral Park, a proposed luxury, golf-oriented planned unit development (PUD), located in western Dade County at the edge of the Everglades. The developer proposed a chain of lakes which were judged to

¹³⁹Natural Resources Defense Council, p. 285.

¹⁴⁰American Institute of Planners, p. 157.

¹⁴¹Natural Resources Defense Council, p. 285.

¹⁴²American Institute of Planners, p. 158.

¹⁴³Natural Resources Defense Council, p. 285.

¹⁴⁴Healy, p. 121.

potentially damage the aquifer and adversely affect the natural purification process. Although the professional staff of the South Florida Regional Planning Council recommended a denial of the development order, the Council voted to proceed with the stipulation that the permitted density be decreased.¹⁴⁵

Perhaps the most significant deficiency in the critical areas program is the five percent limitation on the amount of total land area which can qualify for designation. Since it is conceivable that more than five percent of the state's lands could qualify, this arbitrary parameter could subject "excess" lands to developmental jeopardy. However, the legislature could bypass this restriction by acquiring or regulating these lands through the enactment of special legislation, as was undertaken to protect the Big Cypress Swamp.

The DRI regulatory provisions also have been criticized. Permits for DRIs have been issued by local governments even though projects potentially could influence an area wider than the local jurisdiction. Since decisions rendered by the regional planning councils and the DSP are only advisory in nature, the local governments are not bound by them. Although a local decision could be appealed, "allegiance" problems could arise when local sentiments were not congruent with the regional goals, as the regional council members--a committee of elected local officials--are directly accountable to a local constituency.

Many developers have sidestepped the law's provisions merely by proposing projects smaller than the size qualifying them as DRIs. In addition, problems with adequate enforcement of the DRI provisions have been encountered, as no staff has been assigned to ensure that developers of DRI projects were adhering to the application requirements.¹⁴⁶

The Adirondack Park Agency

The six million-acre Adirondack Park, a wilderness area extending through parts of 13 counties in upstate New York, has long been an attractive

¹⁴⁵Ibid., pp. 125-126.

¹⁴⁶Ibid., pp. 128-132.

vacation area. Its wilderness quality has been preserved since a 1915 amendment to the state constitution mandated that lands in the Park remain "forever wild."¹⁴⁷ The Park's unusual feature is that it comprises an interspersion of lands in mixed ownership: 3.7 million acres as private holdings and 2.3 million acres as state-owned forest preserve lands.¹⁴⁸

Improvements in access resulting from the completion of an Interstate highway from Albany to the Canadian border brought the Park to within a day's drive of 55 million people.¹⁴⁹ Although by 1970 no development pressures were threatening the Park, factors had emerged which were believed to potentially encourage future intensive development, including:

- a. A substantial share (3/4) of landowners in 1971 held property classified as "seasonal residence";
- b. The attractiveness of the Park was increasing the developmental interest of individual and corporate landowners;
- c. Over one million acres were in nonresident ownership; and
- d. The use of land in the Park was largely unrestricted.¹⁵⁰

In the early 1970s, two proposed housing developments in the Park area--4,000 units on 18,000 acres and 9,000 units on 24,000 acres--aroused the apprehension of the area's local governments and citizenry.¹⁵¹ Amid fears that the natural qualities of the Park could be endangered in the future, the Adirondack Park Agency was established by the state legislature in 1971,¹⁵² to be "responsible for development of a comprehensive plan to guide the future use of public and private lands within Adirondack Park, and to establish interim safeguards against 'improvident uses' of land within the park."¹⁵³

¹⁴⁷Healy, p. 14.

¹⁴⁸Natural Resources Defense Council, p. 310.

¹⁴⁹New York, New York State Constitution, Article XIV, sec. 1.

¹⁵⁰Bosselman and Callies, p. 296.

¹⁵¹Healy, pp. 11, 151.

¹⁵²New York, McKinney's Revised Statutes of New York, Article 27, secs. 800-810.

¹⁵³Bosselman and Callies, p. 295.

The Agency was charged with three tasks:

- a. To prepare a master plan for the state-owned Park lands;
- b. To prepare a land use and development plan for private lands within the Park; and
- c. To institute interim measures over development in private lands within the Park until the approval of the land use and development plan.¹⁵⁴

The Agency's objective was to divide the Park into specific districts, with strict controls being imposed in non-urban areas.¹⁵⁵ Until the plan was approved, the Agency was to enforce interim measures to prohibit the initiation of any development which would place "substantial and lasting adverse impact" upon the Park which was not in "substantial conformity" with the policies of the Act.¹⁵⁶

The master plan for the state-owned park lands was approved by the governor in July, 1972. Public lands were classified, with restrictions, as follows:

- a. Wilderness: Most activities not permitted.
- b. Primitive: Limited activity permitted.
- c. Canoe: Certain water and fishery management activities permitted.
- d. Wild Forest: Limited recreation uses (such as snowmobiling) permitted.
- e. Intensive Use: Recreational uses (such as campgrounds, beaches and ski centers) permitted.
- f. Wild, Scenic and Recreational Rivers: Permitted uses stipulated on and near 180 miles of waterways.
- g. Travel Corridors: Highways and auxiliary uses permitted in designated rights-of-way.¹⁵⁷

¹⁵⁴American Institute of Planners, p. 75.

¹⁵⁵Healy, p. 141.

¹⁵⁶New York, McKinney's Rev. Stat. of New York, Article 27, sec. 806.

¹⁵⁷Linowes and Allensworth, p. 144.

In 1973, the state legislature approved stringent state-administered controls over private property within the Park, asserting that the state possessed an "obligation" to recognize "not only matters of local concern, but also those of regional concern."¹⁵⁸ Six land-use categories were established: Hamlet, Industrial, Moderate Intensity, Low Intensity, Rural Use, and Resource Management. For each of the six "land use areas," the plan designated an "overall intensity guideline" which essentially delimited the density of "principal buildings" per square mile. "Primary" and "Secondary" uses were identified for each area. Primary uses were defined as "those which are generally suitable anywhere in a given land use area, as long as they are in keeping with the overall intensity guideline," while secondary uses were those "suitable only if they are appropriately located."¹⁵⁹

For each land-use category, some permitted activities necessitated no prior special approval, while others required an Agency permit. The Agency was empowered to impose other restrictions such as setback distances from shorelines and vegetation-removal criteria.¹⁶⁰

Projected growth was to occur in "hamlet" areas adjacent to existing municipalities, and in widely-scattered low-density clusters. The "resource management" area was to absorb some of the growth, but at a density of one building per 42 acres.¹⁶¹

Most development proposals were to acquire prior approval from the Agency. "Class A Regional Projects," defined as "large-scale or potentially more intrusive or disruptive projects to be located in sensitive areas" (e.g., extensive subdivisions, high-rise structures, or airports), were to be directly controlled by the Agency.¹⁶² The "less critical," "Class B Regional Projects" were controlled by the local governments which had

¹⁵⁸Healy, p. 140.

¹⁵⁹Natural Resources Defense Council, p. 310.

¹⁶⁰Linowes and Allensworth, pp. 144-145.

¹⁶¹Healy, p. 151.

¹⁶²Healy, p. 159; and Natural Resources Defense Council, p. 311.

submitted acceptable land-use plans to the Agency. If no land-use plan existed, the Agency was to retain jurisdiction.¹⁶³ Six months after the state law was enacted, over half of the localities in the Park area had indicated an intent to initiate local land-use programs, of which 90 percent of the costs incurred could be reimbursed by the state and federal governments.¹⁶⁴

Although it may be too early to evaluate the success of the program, its overall intent has been debated. Visitors to the area were concerned over the possibility that the second-home construction "boom" would damage the Park's wilderness qualities. Conversely, some area residents felt that the regulations would preserve the land "for the benefit of the high income vacationers."¹⁶⁵ Since the per capita income of the area has been \$500 to \$1,500 below the statewide average,¹⁶⁶ perhaps a construction boom would be welcomed, as development may provide a stimulus to the area's lagging economy. However, the spirit of the law was directed to environmental preservation, with apparent disregard to economic improvement.

The Maine Site Location Law

Maine is one of the few states in the nation (e.g., Florida and Vermont, among others) which has enacted regulations requiring developers to seek state approval before initiating any commercial or industrial construction activity.¹⁶⁷ This resulted in part from the increased developmental pressures besetting the state. As with many other states, Maine has emerged as a mecca for tourists as highway improvements have fostered access from New England's southern urban areas to Maine's numerous amenities. In addition, deepwater areas along the state's coastline have enhanced the state's attractiveness as a port center for large tankers bringing oil to

¹⁶³Ibid.

¹⁶⁴Healy, p. 159.

¹⁶⁵Ibid., p. 9.

¹⁶⁶Ibid., p. 14.

¹⁶⁷Hagman, p. 597.

the United States. This in turn has encouraged the oil-refining industry to locate production facilities nearby.

The contemplated "by-products" of this potential economic boom led to the 1970 enactment of Maine's Site Location Law¹⁶⁸ which required developers of proposed extensive commercial and industrial projects to seek approval from the 10-member Maine Environmental Improvement Commission (EIC). The EIC was granted authority "to control the location of . . . developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings."¹⁶⁹

Developments subject to regulatory control included:

. . . any commercial or industrial development which requires a license (from EIC under its pollution-control powers), or which occupies a land area in excess of 20 acres, or which contemplates drilling for or excavating natural resources . . . , or which occupies on a single parcel a structure or structures in excess of a total floor area of 60,000 square feet.¹⁷⁰

The Law applied only to private developers, as public agencies were exempt from regulation.

Although the language of the Act appeared to exclude residential activity, the EIC believed that large-scale residential subdivisions warranted control and thus were defined under the guise of commercial activity:

. . . "commercial" developments have been defined by the (EIC) to encompass residential subdivisions in excess of 20 acres, or residential developments which would require a pollution permit from the Environmental Improvement Commission. The position of the (EIC) is that the subdivision of land for the purpose of selling lots is obviously "commercial" activity, and that the word "residential" was dropped from the original bill merely because it was redundant . . .¹⁷¹

¹⁶⁸Maine, 38 Maine Revised Statutes Annotated, secs. 481-488 (Supp. 1970).

¹⁶⁹Ibid., sec. 481.

¹⁷⁰Ibid., sec. 482(2).

¹⁷¹Bosselman and Callies, p. 189.

The permit application process required a statement of intent from the applicant to be filed with the EIC. The Commission was to determine within 14 days whether to approve the proposed location or to schedule a hearing. If EIC warranted a hearing, the developer was to demonstrate that the proposal would not "substantially adversely affect the environment or pose a threat to the public health, safety or general welfare."¹⁷²

The EIC's decisions were to be based upon the following criteria:

- a. Financial capacity. A proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supply.
- b. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.
- c. No adverse effect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.
- d. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking.¹⁷³

The EIC could attach conditions to the permit, which were usually based upon the recommendations from other state agencies. A typical condition required the construction of central sewage systems in residential development proposals. Other conditions could stipulate an adequate supply of "good quality" water and improved roads and traffic circulation patterns.¹⁷⁴

Even though EIC's budget has been minimal, the Commission generally has received praise for its effectiveness. One deficiency in the program has been the lack of "follow-up" procedures to ensure that the regulations were being enforced, due in part to the lack of an adequate staff.¹⁷⁵

¹⁷²Bosselman, Callies, and Banta, p. 221.

¹⁷³Maine, 38 Me. Rev. Stat. Ann., sec. 484 (Rev. 1970).

¹⁷⁴Bosselman and Callies, p. 193.

¹⁷⁵Ibid., p. 196.

Another problem could arise when developers attempt to exempt projects from the provisions of the Law with proposals smaller than 20 acres in size (e.g., 19.5).

In In the Matter of Spring Valley Development,¹⁷⁶ the Court determined that the Law was a reasonable application of the state's police power, as it was designed to protect the public health and welfare.¹⁷⁷ Lakesites, Inc., was "clearing and grading" portions of its 92-acre property to be sold for the construction of year-around/seasonal homes. The EIC directed Lakesites to stop activity until a permit to build was issued. Lakesites maintained that it only was preparing the land for development and was neither building the homes nor providing utilities. Lakesites then appealed EIC's decision to the Supreme Judicial Court of Maine, contending that the denial to proceed was an improper use of the police power. The Court responded:

We see no merit to the Lakesites' contention that the application of the Act to it is an unconstitutional taking of its land without compensation. Nothing in the record indicates that the Act as applied constitutes such an unreasonable burden upon the property as would equal an uncompensated taking. [citations] In fact, the record demonstrates only that the Appellant's land cannot be sold for residential purposes while subdivided to the extent and in the manner Lakesites originally planned.¹⁷⁸

The Court further stated that environmental preservation was within the realm of the police power:

We consider it indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power.¹⁷⁹

¹⁷⁶ 300 A. 2d 736 (Me. 1973).

¹⁷⁷ Linowes and Allensworth, p. 182.

¹⁷⁸ 300 A. 2d, at 749.

¹⁷⁹ 300 A. 2d at 748.

The Court then concluded by distinguishing the "crucial relationship"¹⁸⁰ of environmental protection with the application of the police power:

The Act recognizes the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration, the Legislature used terms capable of being understood in the context of the entire bill. The Legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose.¹⁸¹

Other Protective Mechanisms
Instituted at the State Level

Although not exhaustive, this section shall take a cursory examination of other state action which has reflected the national trend toward increasing land-use control at the state level. A general overview of wetland, coastal zone, shoreland, critical area, and "wall-to-wall" legislation will be discussed in turn.

By February, 1976, 22 states had enacted legislation which either permitted state agencies to plan or review local plans, or granted the state direct land-use control in wetland areas.¹⁸² The Connecticut Department of Environmental Protection (DEP) was required to regulate construction and dredging in tidal, coastal, and navigable waters, and to formulate a permit system regulating land-use in coastal wetlands. Inland wetlands were to be regulated by local governments within guidelines and criteria as established by the DEP. Activities subject to such control included the "removal or deposit of material or the alteration, construction, or pollution of wetlands."¹⁸³

¹⁸⁰ Bosselman, et al, p. 224.

¹⁸¹ 300 A. 2d at 751.

¹⁸² U.S. Department of Housing and Urban Development, 1976 Report on National Growth and Development: The Changing Issues for National Growth, February 1976, Pubn. No. HUD-386-2-CPD, May 1976, pp. 131-132.

¹⁸³ American Institute of Planners, p. 4.

If the DEP denied an application to develop, the assessed value of the affected property would be re-evaluated to reflect the diminution in value resulting from the imposition of regulations.¹⁸⁴

In Delaware, landowners were to obtain permits from the state Department of Natural Resources to "dredge, drain, fill, or alter wetlands."¹⁸⁵ The Department possessed permit authority over the following areas:

- a. Any lands above the mean low-water mark which are capable of supporting vegetation; and
- b. Those lands not in agricultural production which contain 200 or more acres of contiguous non-tidal lands which significantly affect groundwater recharge and require artificial drainage for agricultural purposes.¹⁸⁶
(emphasis added)

Rhode Island has required both state and local approval for the alteration of wetlands. The State Coastal Resources Management Council has permit authority over development proposals which would alter salt marshes, and activities such as power generation, chemical processing, mineral extraction and sewage treatment/disposal in coastal areas.¹⁸⁷

Thirty states have implemented coastal zone management regulations¹⁸⁸ to qualify for Federal financial assistance as provided by the Coastal Zone Management Act of 1972.¹⁸⁹ In addition, five states have authorized shore-land regulations for significant inland water bodies.¹⁹⁰

The Washington (state) Legislature established protective regulations for "shorelines of state significance," defined as lakes and reservoirs exceeding 20 acres in size, streams, wetland areas and associated floodways, flood plains, swamps, river deltas, and bays. This designation included

¹⁸⁴Ibid.

¹⁸⁵Ibid., p. 84

¹⁸⁶Ibid.

¹⁸⁷Ibid., pp. 40-41.

¹⁸⁸U.S. Department of Housing and Urban Development, pp. 131-132.

¹⁸⁹¹⁶ U.S.C.A. sec. 1451 et seq.

¹⁹⁰U.S. Department of Housing and Urban Development, pp. 131-132.

the state's entire Pacific shore, certain portions of the Columbia River, 93 other rivers, and 62 lakes of a size of 1,000 acres or more. Localities were charged with administering the regulations, with review authority retained by the state Department of Ecology to insure compliance. If the local government failed to properly administer the regulations, the state was to intervene.¹⁹¹

North Carolina's Coastal Area Management Act placed greater regulatory initiative at the local level. The state was to designate areas of environmental concern, establish developmental guidelines for these areas, and review the local programs developed for their management. Areas subject to control included dunes, beaches, historic sites, recreation areas, wildlife management areas, tidal marshes, coastal inlets, flood hazard areas, public water supply areas, and riverine floodways.

The local plan served as the basis for issuing or denying permits to develop within the coastal zone. The county was charged with implementing the program but could, at its option, delegate its responsibilities to municipalities, regional organizations, or the North Carolina Coastal Resources Commission.¹⁹²

The Minnesota Shoreland Management Act required the state Department of Natural Resources to formulate zoning standards and criteria for all lands within 1,000 feet of the "normal high water mark" of a lake or pond, and within 300 feet of rivers and streams. The legislation applied to both incorporated and unincorporated areas, and was to be enforced at the county level. In addition, a coastal protection program has been under preparation, aimed toward the eventual regulation of land-use activities within five miles of Lake Superior.¹⁹³

Texas enacted a comprehensive coastal management program in 1973 which established substantial state control over the state's coastal areas. The legislation's main features required:

- a. The preservation of dunes by vesting local governments with permit authority, subject to state review, for those activities which would threaten dunes or natural vegetation;

¹⁹¹American Institute of Planners, pp. 508-509.

¹⁹²Ibid., pp. 198-201.

¹⁹³Ibid., p. 261.

- b. The regulation of ground water withdrawal and well locations in coastal zones, to alleviate surface subsidence;
- c. The strengthening of regulatory activity over coastal zone industrial activity to mitigate environmental damage to estuaries;
- d. The development of a coastal zone management plan; and
- e. The state funding of coastal-related research programs.¹⁹⁴

The 17-member Rhode Island Coastal Resources Management Council (CRMC) has been granted responsibility of directing the planning and management of the state's coastal areas. The CRMC was charged with the approval, modification, establishment of conditions, or rejection of coastal area development proposals. The Council also was to regulate the design, location, construction, alteration, and operation of activities related to a "water area", including: power generating plants; water-desalinization facilities; mineral extraction; chemical or petroleum processing, transfer, or storage; shoreline protection facilities and physiographic features; intertidal salt marshes; and sewage treatment and disposal.¹⁹⁵

Coastal regulation in Delaware has been acclaimed as one of the more stringent of programs with similar goals. Heavy industry and port or dock facility construction within two miles of the shoreline has been prohibited since 1971. The State Planning Office was granted permit authority over other manufacturing activity or applications to expand existing industrial facilities in the coastal area. The permit review process required consideration of the following factors: environmental impact, economic and aesthetic effects, effect on adjacent land-uses, and the relationship to county and municipal comprehensive plans for development and/or conservation of coastal areas.¹⁹⁶

In beach areas, the state was granted review powers over construction proposals on lands up to 1,000 feet above the low-water mark, including the authority to prohibit all construction seaward of dunes. Local governments

¹⁹⁴Ibid., pp. 329-330.

¹⁹⁵Ibid., p. 40.

¹⁹⁶Ibid., p. 83.

retained regulatory control inland from the dunes.¹⁹⁷

Thirteen states have designated or are designating "areas of critical state concern" and concomitant protective regulations. Compared to other state programs, critical area protection has involved a wider array of land-use issues, from environmentally-fragile areas to sites of historical significance.¹⁹⁸

The Maryland Department of State Planning (DSP) was charged with establishing "areas of critical state concern" upon review of nominations presented by various governmental agencies, research organizations, civic groups and private individuals. After DSP designated the critical areas, localities were responsible for the implementation of regulations and/or acquisition, upon advisement by DSP. Although the state agency had no veto power, it was allowed to become a party to administrative, judicial, or other proceedings if proposed projects were of "more than local impact and of substantial state concern or interjurisdictional interest."¹⁹⁹ The criteria which qualified DSP intervention included:

- a. The project's consistency with state plans and programs;
- b. The project's impact upon major state facilities;
- c. Interjurisdictional impacts and implications of the project;
- d. The project's compatibility with local plans;
- e. The magnitude of results and impacts; and
- f. The perceived substantial economic or environmental impact.²⁰⁰

Recent legislation in Colorado concluded that the state held an interest in "any development within certain areas (including) natural hazard areas, mineral resource areas, archeological resource areas, historical and natural areas."²⁰¹ The state also declared an interest in those activities which potentially have a greater than local impact, including airports, mass transit facilities, highways, new community development,

¹⁹⁷Ibid.

¹⁹⁸U.S. Department of Housing and Urban Development, pp. 131-132.

¹⁹⁹American Institute of Planners, p. 97.

²⁰⁰Ibid., p. 98.

²⁰¹Ibid., p. 380.

and water and sewer facilities.

Local governments were authorized to designate areas and activities of state interest within their jurisdiction, pursuant to guidelines set forth by the Colorado Land Use Commission (CLUC). Localities were empowered to adopt regulations for designated areas and held permit authority over developmental proposals. Although no mandatory state review was required by law, the CLUC could seek gubernatorial permission to issue a cease and desist order, if the project could pose "a danger of injury, loss or damage of serious or major proportions to the public."²⁰²

Minnesota's critical areas designation process resembled that of Colorado, except that the state possessed a stronger review function. The state Environmental Quality Council (EQC) was to recommend to the governor those areas deemed worthy of protection from the "potential adverse environmental effects of uncontrolled development."²⁰³ Critical areas, in this instance, were defined as "geographic areas which are affected by or have a significant effect on an existing or proposed major government development, or which contain or have significant impact on historic, natural, scientific, or cultural resources of regional or statewide importance."²⁰⁴

Local governments were required to develop plans and regulations to "protect regional or statewide interest in the area." Local actions were subject to mandatory review by a regional development commission and the EQC, the latter of which was to supervise implementation. In addition, the governor was empowered to declare a moratorium on developmental activity within a designated area.²⁰⁵

In New Jersey, the Hackensack Meadowlands Development Commission was granted broad land-use control authority over approximately 20,000 acres of undeveloped salt-water lowlands extending through 14 municipalities. The Commission possessed the power to develop and implement a master plan, and to adopt and enforce codes in the plan's implementation. The Commission also

²⁰²Ibid.

²⁰³Ibid., p. 263.

²⁰⁴Ibid., p. 264

²⁰⁵Ibid., pp. 263-264.

was authorized to levy taxes throughout the meadowlands area and to distribute economic gains through a tax-base sharing formula for the reduction of "pressures for development in jurisdictions which may not be suited environmentally for development."²⁰⁶

The attainment and maintenance of river and stream quality also has been subject to state regulatory control. In Kentucky, the state Department of Water Quality holds permit authority over the construction of new facilities or the extension of existing facilities that discharge wastes into state waters. In addition to other capabilities, the state was allowed to file suit for fish and wildlife injury or destruction resulting from pollution.²⁰⁷

The Arkansas legislature permitted the extraterritorial zoning powers of municipalities to extend along navigable streamcourses up to five miles beyond local corporate limits.²⁰⁸ In Michigan, however, the state assumed the enforcement of protective zoning regulations on private lands adjoining natural rivers.²⁰⁹ A similar state-level program in Indiana did not permit the application of the police power, as the state was only authorized to acquire scenic easements for protective purposes.²¹⁰ Implementing both regulatory and acquisition techniques, Louisiana declared 31 of its streams as natural and scenic preservation areas, and prohibited channelization, clearing, snagging, dredging and reservoir construction activity within or near these watercourses. Owners of private property adjacent to designated streams were "encouraged" to grant protective easements to the state.²¹¹

Some states have exerted a more comprehensive approach in statewide land-use control. The Oregon legislature enacted a state land-use law, the 1973 Land Conservation and Development Act,²¹² to fulfill the following

²⁰⁶Ibid., p. 65.

²⁰⁷Ibid., p. 179.

²⁰⁸Ibid., p. 298.

²⁰⁹Ibid., p. 252.

²¹⁰Ibid., p. 242.

²¹¹Ibid., p. 303.

²¹²Oregon, Oregon Revised Statutes, Chapter 197.

purposes:

- a. Establish statewide planning goals and guidelines;
- b. Administer a permit system for activities of statewide significance;
- c. Review local plans, zoning ordinances and subdivision regulations for conformance with state goals and guidelines;
- d. Coordinate state agency planning efforts and assure conformance with goals; and
- e. Insure widespread citizen participation in the planning process.²¹³

Cities and counties were required to adopt comprehensive plans, zoning ordinances and subdivision regulations in compliance with state goals and policies. Counties were granted a pre-eminent role, as they were charged with coordinating the planning activities of cities, special districts, state agencies and federal agencies within their jurisdiction. If the counties so desired, the coordinative function could be assumed by an area-wide body.

Activities of statewide significance included the planning and siting of:

- a. Public transportation facilities;
- b. Public sewage facilities;
- c. Water supply systems;
- d. Solid waste disposal facilities;
- e. Public schools; and
- f. Certain "priority" areas such as freeway interchange development and flood plains.²¹⁴

Permits were required from the state Land Conservation and Development Commission before activities of statewide significance were allowed to proceed.²¹⁵

²¹³American Institute of Planners, p. 496.

²¹⁴Linowes and Allensworth, p. 95.

²¹⁵American Institute of Planners, p. 501.

Increasing developmental pressures and citizen concern led to the 1970 enactment of the Land Use and Development Control Law²¹⁶ (popularly known as "Act 250") in Vermont. The many contributing factors which led to the legislation included:

- a. The realization by the state's citizens that land is a finite resource which, if not properly managed, will be exploited;
- b. The ten-year history of land misuse in the state;
- c. The rapid conversion of agricultural lands to nonfarm usage and the resulting disruption;
- d. The expansion of the Interstate Highway System into and within the state;
- e. The popularity of the state's outdoor recreational resources; and
- f. An environment in Vermont which the state's citizens wanted protected.²¹⁷

In essence, the Act established regulations for subdivisions of more than ten units and commercial or industrial developments of more than ten acres in towns which were not enforcing zoning and subdivision regulations. In other areas not subject to local land-use regulations (i.e., rural areas), the state regulations applied to residential subdivisions of more than one acre. In addition, state permit authority applied to all developmental activity, regardless of size, above an elevation of 2,500 feet.

The legislation established nine district commissions and a State Environmental Board charged with permit authority over projects which met the criteria cited above. Permit approval was subject to the following conditions:

- a. The project will not result in undue water or air pollution.
- b. The project has a sufficient water supply available for its reasonable foreseeable needs;

²¹⁶Vermont, 10 Vermont Statutes Annotated, secs. 6001 et seq.

²¹⁷Linowes and Allensworth, pp. 79-80.

- c. The project will not place an unreasonable burden on an existing water supply, if one is to be utilized;
- d. The project will not contribute to unreasonable soil erosion or reduction in capacity of the land to hold water;
- e. The project will not contribute to unreasonable highway congestion or unsafe conditions;
- f. The project will not place an unreasonable burden on educational facilities and services provided by the local school districts;
- g. The project will not place an unreasonable burden on the ability of the locality to provide governmental services;
- h. The project will not pose an undue adverse effect upon the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas;
- i. The project is in conformance with certain statewide plans, which Act 250 required to be prepared; and
- j. The project is in conformance with a duly adopted local or regional plan.²¹⁸

Although the state legislature failed to approve the statewide land-use plan in 1974, it did enact an "innovative" tax assessment measure on capital gains realized through land speculation. Taxes were to be assessed on all gains received through the sale or exchange of land, regardless of physical improvements. Permanent residents were favored, as a taxpayer's principal residence up to one acre in size was exempted from the tax provisions.

Properties were assessed according to three basic criteria:

(1) percentage gain realized; (2) length of time the seller has held the land; and (3) percentage of owner's income. Properties under single ownership for longer periods of time would be taxed less for capital gains. As Healy explained, ". . . the typical farmer, who usually has held his land for a very long period, will be unaffected by the tax when he sells. The

²¹⁸Healy, pp. 59-40.

subdivider, on the other hand, who depends on rapid turnover, will be subject to a relatively high rate of tax."²¹⁹

To discourage the "second-home" market, a tax-credit scheme for state residents was devised which linked property taxes on the "principal dwelling" to the owner's income. For a principal dwelling and up to two acres of adjacent land, taxes were limited to four percent of the owner's annual income, if less than \$4,000; and up to six percent for incomes exceeding \$16,000. The tax credit, however, could not surpass \$500 per household.²²⁰

Although Act 250 has distinguished itself as a leading example of statewide ("wall-to-wall") land-use legislation, its effects have been subject to criticism. The law apparently has not effectively mitigated "strip" development, as most individual enterprises of this type comprise less than ten acres. In addition, the law has exempted from regulation residential lots which exceed ten acres, resulting in the development of many residential areas of extreme low density.

On the positive side, developers have devoted greater attention to environmental issues, as potential problems with water supply and sewage disposal have been considered relatively earlier in the project planning stages. Healy summarized: "The consensus among state officials and other observers is that so far Act 250 has done little to reduce the absolute amount of growth in Vermont but has significantly improved the quality of development."²²¹

Since 1961, Hawaii has implemented statewide land-use planning and zoning, facilitated in part by its historical public acceptance of centralized land-use control (the "Polynesian influence") and concentrated land-ownership. An interesting feature of the Hawaiian approach is the congruence of the "plan" with the zoning:

The State Land Use Plan may be identified at any moment with the district boundaries established under the provisions of the Land Use Law. These boundaries and the rationale behind their

²¹⁹Healy, p. 57.

²²⁰Ibid., p. 59.

²²¹Ibid., p. 46.

formulation set forth the State's policies and guidelines for future land use . . . Changes in the State Land Use Plan, in effect, are made upon legal approval of boundary changes upon petition of property owners or through the periodic reviews mandated by law.²²²

Linowes and Allensworth observed: "Zoning is put on the books with no plan to guide it, and when authorities are questioned about it, they simply respond by saying that the zoning is the plan."²²³

Four statewide land-use classes were created:

- a. Urban Zone: developed land, or land that is substantially developed, or land that can be expected to be developed within the next ten years;
- b. Rural Zone: land in relative low-density uses or that contains smaller farms and land holdings. Quasi-public uses, such as utility buildings and private educational institutions, are permitted;
- c. Agricultural Zone: land under intensive cultivation or is capable of such farming, and that is developed or planned in residential use of one acre or more ("estates"); and
- d. Conservation Zone: state-owned forest and water reserve districts, and privately-owned areas, which included mountainous areas and other property with significant scenic and environmental value.²²⁴

The statewide land-use controls are administered by the state Land-Use Commission (LUC), comprising seven lay-members appointed by the governor, and the Directors of the Department of Planning and Economic Development and the Department of Land and Natural Resources. The LUC was charged with establishing boundaries for all zoning districts.²²⁵ The permitted uses in the Conservation Zone were determined exclusively by the Hawaii Board of Land and Natural Resources. The LUC's authority and

²²²Hawaii, Department of Planning and Development, General Plan Revision Program, Part 1, (1967), p. 40.

²²³Linowes and Allensworth, p. 64.

²²⁴Ibid.

²²⁵Ibid., p. 66.

implementation powers applied to the three other zones. Uses in the Urban Zone were to be determined jointly by the LUC and the counties. The state established basic criteria for permitted uses in the Urban Zone, while counties were allowed to determine more specific standards. The counties also have the authority to issue "use permits" in the agricultural zone, subject to the approval of the LUC.²²⁶

One of the Hawaiian system's major criticisms has been its adverse effect on the market value of housing. Although Oahu's Urban Zone is purportedly capable of absorbing growth for at least another 15 years, Linowes and Allensworth noted that housing prices have increased sharply since the law's enactment in 1961.²²⁷

While the "wall-to-wall" regulations appear to have preempted local responsibility and governance, Linowes and Allensworth suggested that the localities have retained a strong influence in the decision-making process:

The facts . . . suggest that where the state has retained exclusive control (as in the Conservation Zone), state planning and zoning are by no means unqualified successes and that where it has shared powers with local governments, it is local control and local views that have tended to prevail.²²⁸

²²⁶Ibid.

²²⁷Ibid., pp. 67, 69.

²²⁸Ibid., p. 71.

CHAPTER IV

"INNOVATIVE" PROTECTIVE MECHANISMS

An examination of the various techniques implemented to protect environmental resources reveals that most efforts have entailed the application of eminent domain¹ and/or the police powers.² Some "innovative" mechanisms, which either "sidestep" or utilize facets of the "traditional" land-use control methods, have been proposed and even applied to preserve open space and protect environmentally-fragile areas.

Compensable Regulations

Krasnowiecki and Strong³ proposed a technique known as "compensable regulations" which was designed to utilize characteristics of both the police power and eminent domain in preserving open space areas. The mechanism's identifying features include (1) the establishment of provisions that prohibited further development activity near designated areas, particularly farmland, and (2) a guarantee from the appropriate governing body that subsequent sale of a regulated property would yield a price at least equal to its market value at the time regulations were imposed. The local unit of government was to implement the mechanism, with desired ends as described by Krasnowiecki and Strong:

¹The legal regulation of private property, without compensation, for the protection of the public health, safety, welfare, and morals.

²Governmental acquisition (i.e., to appropriate with compensation) of some or all of the rights attached to private property, for public benefit.

³Jan Krasnowiecki and Ann Louise Strong, "Compensable Regulations for Open Space: A Means of Controlling Urban Growth," in No Land is an Island, ed. Benjamin F. Bobo, et al, (San Francisco: Institute for Contemporary Studies, 1975), pp. 141-156.

Creating a privately owned, publicly controlled land bank⁴ on the urban fringe will make it possible to time development to coincide with the availability of schools, utilities, and transportation, to hold parcels for special uses such as industry, parks, and schools until they are needed, to relate community growth to the ecological balance of the area, and to determine the form of the community by location of permanent open space.⁵ (emphasis added)

The landowner's property would be assessed at its market value at the time the regulations became effective. The assessed valuation would thus become the guaranteed amount due the landowner upon subsequent sale of the property. The amount of guarantee was to be reduced by each payment of compensation and would continue to be available to succeeding owners of the property. Two clarifying examples follow:

- a. A property was valued at \$50,000 upon the imposition of regulations. Some time later, the land was sold for \$55,000. No compensation was due the seller, since he received payment which exceeded his guaranteed price.
- b. A property was valued at \$50,000 upon regulation and was subsequently sold for \$45,000. Since the seller was guaranteed a price of \$50,000, a compensation of \$5,000 was to be paid. The new landowner's guaranteed price would be \$45,000--the price which he paid, reflecting the value at the time of sale.

A degree of flexibility was introduced to reflect changes in the value of the dollar. During inflationary periods, the guaranteed price would be adjusted upward as the value of the dollar decreased, and also would be adjusted to reflect changes in the market conditions of agricultural production. In essence,

. . . the farmer has lost the chance of any future increment in the value of his property for development--since development is prohibited. He and his successors in interest are restricted to farming and related use, but he is paid nothing on account of this restriction until he is willing to sell his property on the open market.⁶

⁴A technique involving governmental acquisition of land prior to actual need, so that the location and rate of development can be controlled, and to mitigate speculative effects.

⁵Krasnowiecki and Strong, p. 143.

⁶Ibid., p. 151.

Taxes would be assessed on the regulated value of the property (i.e., the current selling price), not on the guarantee. Krasnowiecki and Strong observed: "The guarantee represents deferred compensation in a cash amount and the state has no right to levy a real estate tax on cash."⁷ Thus, for this form of preferential tax-assessment to be equitable and consistent with the guaranteed price, property values would need to be reassessed continuously, which could be administratively and economically unfeasible.

Krasnowiecki and Strong justified the payment of compensation upon sale and expected such action to be upheld by the courts since:

- a. The owner is placed in no worse position than if his land had been condemned outright and leased or sold to someone else subject to the regulations;
- b. The owner is given the right to choose whether he will stay or move and, if he stays, he is guaranteed the amount which would have been paid to him in outright condemnation--a guarantee which is good not only against loss occasioned by the regulations but also by any market conditions;
- c. The owner retains the right to sell his property at full value as regulated, and, if this should rise above the guarantee, he keeps the full purchase price; and
- d. The guaranteed amount is adjusted to reflect changes in the value of the dollar.⁸

When comparing compensable regulations to development right or easement acquisition, a potential problem with the latter tool's compensation provisions becomes quite graphic. As proposed in Krasnowiecki and Strong's mechanism, if landowners were to be awarded compensation, the remuneration would reflect the property's market value at the time of sale. In comparison, compensation for the outright purchase of easements or development rights would be based upon values at the time the interests were acquired, with no consideration for future increases in value. Therefore, although development rights would be purchased at a set price, their "worth" could actually increase while no additional compensation would be awarded

⁷Ibid., p. 151.

⁸Ibid., pp. 149, 150.

the landowner to reflect this increase. In addition, the value of the land without the development rights attached could actually decrease if surrounding land-use patterns render the land's restricted use as unprofitable.⁹

Although the scheme as proposed by Krasnowiecki and Strong has attempted to avoid the legal intricacies associated with the issue of "just" compensation, it appears to lend itself to administrative problems. While outright acquisition of property rights would allow for expenditures at a specific time pursuant to an approved budget, compensable regulation payments would be effectuated upon sale of the regulated properties at a time unforeseen by the local government. This potentially could result in a massive depletion of local coffers if widespread land sales occurred within a short time period. To avoid potential budgetary deficits, the local government could establish a reserve account for such contingencies. In any event, the provision of such a fund could draw essential financial resources away from other needs of the community.

The Accommodation Power

In most states, the application of eminent domain required "just compensation" to be awarded according to the "highest and best use" standard. Since acquisition costs dictated by this criterion are often prohibitive, Costonis¹⁰ has introduced a concept known as the "accommodation power," which grants a "fair compensation" according to a "reasonable beneficial use" measure.

The "highest and best use" criterion, as utilized in eminent domain, is based upon "both the land's value under existing land use restrictions and the premium that the market places on it in anticipation of future zoning changes that will increase its value."¹¹ Costonis noted the potential inflationary effects arising from this provision which in effect sanctions

⁹Ibid., pp. 146-147.

¹⁰John J. Costonis, "Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," in Land Use: Planning, Politics, and Policy, ed. Richard Cowart, (Berkeley: University of California, Berkeley, 1976), pp. 98-124.

¹¹Ibid., p. 107.

speculation, yet does not address the opposite effects: "(T)he condemnee receives a windfall for prospective upzoning, but this award is not discounted when, instead, downzoning is imminent."¹²

Costonis also proposed the application of a "reasonable beneficial use standard", defined as "an intensity of development potential which affords a sufficient economic return on private land to escape validation on confiscation grounds."¹³ If a land-use restriction did not permit this "sufficient economic return," the accommodation power would then be implemented to provide "fair compensation" to the landowner, to be determined as follows:

A. The difference between the property's economic return as restricted, and that within the reasonable beneficial use standard. Under eminent domain, "just compensation" usually has approximated the difference between the restricted return and the highest and best use standard within "existing land use controls."

B. Fair compensation could include both monetary and non-monetary considerations, such as allowing the owner a higher density on portions of land not affected by the challenged regulation. In comparison, eminent domain requires monetary compensation only. Thus, if governmental coffers held limited funds, the regulatory objectives could still be achieved if the accommodation power was implemented.¹⁴

Since effective implementation of this technique requires a determination of that level of regulation which would constitute a "taking," a quasi-judicial body would be required to administer the process. Such a concept might encounter opposition, as some existing agencies may claim usurpation of their functions, along with an argument that the "separation of powers" (i.e., executive-judicial, or legislative-judicial) may have been violated.

¹²Ibid.

¹³Ibid., p. 110.

¹⁴Ibid., pp. 110-111.

Transferable Development Rights

Another "innovative" technique--the transferable development rights (TDR) mechanism--not only is intended to preserve the integrity of open space areas, but also endeavors to recoup the value of economic uses foregone upon the imposition of regulations that prohibit development. The TDR concept provided a basis for the establishment of the British Town and Country Act of 1947 which enabled the British government to acquire the development rights of all undeveloped land in the country, with the landowners retaining the vestigial rights.¹⁵ In the United States, the TDR system usually has been directed toward preserving agricultural lands, ecologically-sensitive areas and historic building districts threatened by developmental pressures.

The technique separates the right to develop the property from the property itself. In essence, the development right is placed on the market, to be purchased from one property and applied to another, thereby increasing the latter's density of use.

Landowners in an area where open space is to be retained (the "preservation district" or "sending zone") are encouraged to sell their development rights, thus prohibiting the future occurrence of undesired construction activity on these lands. Property owners in areas where increased development is desired (the "reception district" or "receiving zone") are encouraged to purchase the development rights offered in the preservation district, thereby increasing potential land-use densities above the "normal" level as prescribed by the local zoning ordinance.¹⁶

For such a mechanism to approach feasibility, several "prerequisites" should be fulfilled. First, a "very real preservation need" must exist, such as an area's strong dependency on an agrarian economy, or the presence of a "critical" ecological area deemed worthy of protection. Agricultural lands should be of substantial size, since "(r)ecognition has been growing that agriculture can only flourish and be called viable where sufficient undisturbed acreage is devoted to it."¹⁷ The receiving zone should be of

¹⁵Melvin R. Levin, Jerome G. Rose and Joseph S. Slavet, New Approaches to State Land-Use Policies, (Lexington, Mass.: D.C. Heath and Co., 1974), pp. 55-57.

¹⁶"What is Transfer of Development Rights?," Practicing Planner 7 (March 1977): 12-13.

¹⁷"TDR: What's Happening Now," Practicing Planner 7 (March 1977): 11.

sufficient density and use to attract the application of the TDR mechanism. In addition, the physical capability of the land in this district must be adequate to absorb the desired increase in density.

Perhaps the most important consideration is a sufficient level of demand for development. Although a "suitable market" for development right transfers has been difficult to define, "(t)here has to be a market for the development rights, now or in some foreseeable future, or the system won't work."¹⁸ In addition, since TDR has been utilized as a component technique for plan implementation, it "must be based on a sound and legally justifiable plan in the first place."¹⁹

Some disagreement has arisen regarding legislative provisions for TDR implementation. Some have argued that if TDR is to be considered as a zoning technique, its utilization is sanctioned by the state enabling legislation that delegated zoning authority to localities. In contrast, others have believed that the TDR mechanism is "so revolutionary and subject to possible litigation," therefore requiring the enactment of specific state enabling legislation to establish its legitimacy.²⁰

Although there have been a few legal tests which considered "site specific" issues, the constitutionality of TDR's intent and effect has not been addressed directly.²¹ Costonis, however, has justified the principles of TDR on the basis of economic criteria, concluding that the mechanism would overcome the "government's failure to recoup in the public interest an appropriate measure of the values that it creates in privately held land."²² This point referred to the inflation in values of property subject to developmental pressures, due in part to the expansion of utilities and other services as provided by the government.

Costonis cited another characteristic of the TDR scheme which addressed the concept of externalities:

¹⁸ Ibid.

¹⁹ Ibid., p. 12.

²⁰ Ibid.

²¹ Ibid.

²² John J. Costonis, "Development Rights Transfer: Description and Perspectives for a Critique," in Management and Control of Growth, ed. Randall W. Scott, vol. 3, (Washington: Urban Land Institute, 1975), p. 96.

One function of the law is to return the cost of an externality to its creator when the harm is deemed sufficiently grave in its societal impact. Development rights transfer serves this end admirably because it 'closes the externalities loop' by charging the land development process with costs that formerly, and improperly, fell upon the community in the form of environmental depredation--or of expensive remedial programs to overcome it.²³

Costonis also believed that TDR implementation would recover the windfalls of increased land values in scenic areas, by transferring speculative potential to areas more compatible with potential development activity.²⁴

TDR became an increasingly popular tool during the late 1960s and early 1970s, as it was applied mainly in suburban and exurban areas to preserve agricultural land and environmental amenities. The mechanism was incorporated into the municipal laws of Eden, New York, a town of approximately 8,200 people located 20 miles southwest of the Buffalo-Niagara Falls area. Basically rural in character and oriented to agricultural production, the town is situated "in a peripheral ring of suburban and rural communities around Buffalo that undoubtedly will be affected as the central urban area's population decentralizes."²⁵

The Eden system, designed to preserve its agricultural character, provided for three preservation or transfer districts--conservation, agricultural, and agricultural preservation overlay--"because of their intrinsic agricultural, conservation and scenic value."²⁶ The development districts or receiving areas--rural residential, suburban residential, and hamlet residential--were differentiated "on the basis of location, prospective utility service and density of development."²⁷

²³ Ibid., p. 97.

²⁴ Ibid., p. 96.

²⁵ Manuel S. Emanuel, "Rural Town of Eden Uses TDR to Save Agricultural Land," Practicing Planner 7 (March 1977): 15.

²⁶ Ibid., p. 16.

²⁷ Ibid.

Various density limits in receiving areas were predetermined, with and without development rights transferred in. Development rights already transferred could not be subsequently transferred to other receiving districts, nor could they be transferred back to preservation districts. However, development rights in preservation districts could be transferred to like areas that had already relinquished their development rights.

Emanuel cited the potential benefits of the Eden system:

To the owners of property in areas where economic groupings are desirable, the additional development rights will add to the viability of a project by lowering per unit development costs and thereby raising the prospective return on the project. To the landowner who transfers his property rights away, the benefits are also economic; the development rights are marketable in the same way that land can be sold . . .

(Another) benefit to the landowner who transfers the development rights is reduced taxes. Because the assessments on land are partially based on its potential future uses, the reduction in those future uses requires a corresponding decrease in the assessed valuation of the land, which the Eden system provides for. Because the reduction in assessments on the land from which the rights are transferred is more than matched by increasing assessments on the land being developed, the total tax base for the town would be preserved and even increased . . .²⁸

In New York City, owners of historic "landmark" buildings threatened with developmental pressures were permitted to sell the "authorized but unused floor area" of their structures to adjacent lot owners.²⁹ In effect, the incentive to demolish the old structures would be diminished because the potential for constructing a high rise structure on the lot was negated when additional floor area development rights were transferred to the adjoining property.

In Chicago, the TDR mechanism was not confined to a transaction involving adjoining properties, but pertained to any property within specially-created "development rights transfer districts" for the preservation of historic structures. Landowners were compensated for retaining

²⁸Ibid., p. 17.

²⁹Levin, et al, p. 60.

these buildings as the city allowed up to 100 percent of the floor area ratio to be transferred. In addition, historic properties were eligible for special municipal subsidies and reductions in real estate taxes.³⁰

In New Jersey, a TDR bill was approved by the lower house of the state's legislature, but was narrowly defeated in the senate in 1975.³¹ However, the New Jersey towns of Hillsborough and Chesterfield implemented a variation of TDR known as "transfer of development credits" (TDC). Under this system, the "sending" property, the "receiving" property, and all associated development rights were to be under single ownership throughout the duration of the transfer process. Once the developer had transferred credits from one property to another, he was free to deed, sell, or lease the land from which the rights were taken. This system could be described as a cluster zone or planned unit development concept (without the usual characteristic of land contiguity), which was authorized by New Jersey law.³²

The following discussion outlines a proposed model for state TDR enabling legislation, completed through a joint effort of Rutgers University and the New Jersey Department of Community Affairs:³³

1. Grant of Power to Local Government. Initially, local units of government would be granted power by the state to create open space districts. Uses within such areas could be restricted to agriculture, conservation, recreation, or a combination thereof.

2. Creation of Open Space Districts. The locality would then designate open space districts according to the following criteria: (a) the areas must be substantially undeveloped, with at least 60 percent of the total land area constituting farmland, woodland, or a combination thereof; (b) the location of open space areas must be consistent with the provisions of the locally-adopted comprehensive plan; (c) the aggregate size of the open space district must bear a reasonable relationship to the present population level and anticipated future growth; and (d) land in each district

³⁰Ibid.

³¹"TDR: What's Happening Now," pp. 13-14.

³²Ibid.

³³Levin, et al, pp. 107-119.

was not to contain less than 25 contiguous acres.

Other stipulations provided that land zoned exclusively for commercial, industrial or other non-residential uses could not be included within the open space districts; non-conforming uses would be allowed to continue; proposals for construction or enlargement of structures within the district were to be approved by the local governing body; land could be subdivided for residential use with minimum lot sizes of 25 acres; and allowances were permitted for uses necessary to protect the public health and safety, or where no practical alternate site was available for the proposed use.

3. Certificates of Development Rights. The locality then was to establish and issue certificates of development rights to landowners in the open space district. The sale and transfer to development rights were to be regulated and recorded in the same manner as the sale and transfer of real property.

4. Establishment of Development Rights. Upon presentation by the planning board, the local governing body was to establish a specific number of development right certificates to be distributed to landowners in the open space district. The number of development rights issued was to represent the total unregulated residential development potential of the open space area above and beyond that which was permitted by the zoning ordinance.

5. Distribution of Development Rights. Certificates of development rights were to be distributed to a landowner at an amount representing the proportion of the total potential development value of his property to that of the entire open space zone.

6. Marketability of Residential Development Rights. Receiving districts for the transfer process were to be established. Provisions were to be set for the maximum allowable density in these districts as attained by the transfer.

7. Taxation. Development rights were to be taxed as real property. Lands devoid of development rights were to be assessed at the value of agricultural, conservation, recreational, or other open space use.

Since the application of the TDR concept is still in its infancy, its intent and provisions may be difficult to assess at this time.

Schnidman, however, has raised some issues for consideration in the implementation of such a scheme. Those which appear to address the concerns of this paper included:

- a. Could up-zoning be done by the political body so that a landowner would not have to purchase development rights?
- b. What would happen to land values of parcels near the transfer zones?
- c. Could development rights be severed, but their transfer restricted for a set period of time to phase development?
- d. Is TDR adequate to anticipate future needs so that potential problems are resolved before they happen?
- e. Will development rights ever be worthless?
- f. Will the courts accept the development rights as "just compensation" for the use restrictions placed upon the land?
- g. Do "carrying capacity" studies play any role in a TDR ordinance?
- h. Would TDR be inflationary?³⁴

³⁴Frank Schnidman, "Transfer of Development Rights: Questions and Bibliography," in Management and Control of Growth, ed. Randall W. Scott, vol. 3, (Washington: Urban Land Institute, 1975), pp. 127-132.

CHAPTER V

THE COURTS: A REVIEW OF PERTINENT LITIGATION

Introduction

Throughout this nation's history, the American judicial system has developed a rationale delimiting the proper application of the police power to control private land-uses. But not until recently has the judicial arena expanded the scope of the regulatory sphere to deal with environmental issues. This chapter will investigate the prevailing attitudes of the American judiciary concerning those topics which likely will be considered if and when Nebraska intends to institute land-use control measures near state-managed public use areas.

The "Taking" Issue

The Fifth Amendment to the United States Constitution set a cornerstone for American land-use litigation in stating: ". . . nor shall private property be taken for public use without just compensation."¹ American courts have long debated the interpretation of this precept as it relates to the proper application of the police power and eminent domain. Often, subtle differences in delimiting these techniques have arisen when attempting to determine the propriety of their implementation.

In Beverly Oil Co. v. City of Los Angeles,² the Court addressed the issue of public usurpation of private rights:

. . . the very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation,

¹U.S., Constitution, Amendment V.

²40 Cal. 2d 552, 254 P. 2d 865 (1953).

once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law.³

In Batten v. United States,⁴ the Court ruled that "(t)here can be a taking by a physical invasion or use or by a substantial interference by government, where the property owner is deprived of all or most of the beneficial use."⁵

The definition of a "taking," as alluded to in Beverly Oil and clarified in Batten, applied not only to a physical appropriation of the land itself, but also could be presumed when regulatory restrictions were so severe that a landowner would be prevented from enjoying a reasonable and profitable use upon his property. The Supreme Court dictum which proclaimed this rationale was established by the opinion of Justice Oliver Wendell Holmes, Jr., in Pennsylvania Coal v. Mahon.⁶ The oft-quoted "Holmes' Rule" stated that:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. . . .

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.⁷

This "rule" has provided the basis for several court decisions which have addressed the issue of diminution in property values as a result of regulation. Seven years prior to Pennsylvania Coal, the U.S. Supreme Court

³40 Cal. 2d, at 557-558; 254 P. 2d, at 867.

⁴306 F. 2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

⁵Hagman, p. 320.

⁶260 U.S. 393 (1922).

⁷Ibid., at 413, 415.

sustained a regulation which had devalued a property by over 90 percent.⁸ However, in the years following the Holmes decision, the courts have appeared to render greater scrutiny to this uncertain issue. In Dooley v. Town Plan and Zone Commission of Town of Fairfield,⁹ the Connecticut Court held that a flood plain regulation had depreciated the value of a particular property by 75 percent, and declared the law as "unreasonable and invalid."¹⁰

An examination of recent case law has indicated a general, often tenuous, rationale in establishing conditions wherein a "taking" has occurred. In Goldblatt v. Town of Hempstead,¹¹ the Court noted that "(a)n otherwise valid exercise of the police power is not unconstitutional merely because it deprives property of its most beneficial uses,"¹² indicating that land may possess value for purposes other than those which were affected by the regulation.

In Keystone Associates v. Moerdler,¹³ the Court approached a definition for "beneficial use":

All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.¹⁴

As in Goldblatt, the Keystone case tangentially indicated that a plurality of uses may be available to a landowner, but only when a person is "deprived" of earning a return on his land has a "taking" actually occurred. In Mayor and Council of Rockville v. Raymond F. Stone et al,¹⁵ the Court set

⁸Hadacheck v. Sebastian, 239 U.S. 394 (1915).

⁹151 Conn. 304, 197 A. 2d 770 (1964).

¹⁰Bosselman, Callies, and Banta, p. 150.

¹¹360 U.S. 590 (1962).

¹²ibid., at 592.

¹³19 N.Y. 2d 78, 278 N.Y.S. 2d 185 (1966).

¹⁴278 N.Y.S. 2d at 189.

¹⁵Written Opinion of the Court of Appeals of Maryland, No. 198 (September term, 1973), filed May 22, 1974.

such a parameter for "deprivation," indicating that a "taking" had occurred when a property was devalued by at least two-thirds through the regulatory process.¹⁶

Anderson examined case law history to determine the "dividing line" in property devaluation which would determine those instances wherein eminent domain or police power would be utilized. Although, as indicated in Rockville, a two-thirds diminution has been considered as a benchmark, Anderson noted:

No basis for precise prediction can be found in the dollars-and-cents evidence reported by the courts in the constitutional cases . . . Moreover, the loss in use value in the cases where the ordinances were upheld was about the same as the loss proved in the cases where an opposite result was reached. If any conclusion is warranted . . . , it is that financial loss is a relevant consideration, but not a single or decisive one. (emphasis added)¹⁷

Since Anderson has noted that devaluation in use-value may be an inadequate test of this issue, Hagman¹⁸ noted two specific criteria which have been utilized to assess the appropriate application of land-use controls:

1. The "balancing" test. Closely related to the "fairness" test which "determines whether the public weal is furthered too much at the expense of particular individuals,"¹⁹ the "balancing" test suggests that if a regulation produced great public gain with little resulting private harm, the use of police power would probably be justified. In Nectow v. Cambridge,²⁰ a landowner had been under contract to sell his property for industrial use, but a local regulation stipulated that a portion of that land was to be used for residential purposes. The owner claimed that the regulation rendered the portion designated for residential use as valueless for that purpose, due in part to its proximity to industrial use. The Court noted that "the loss in

¹⁶Linowes and Allensworth, p. 192.

¹⁷Robert Anderson, American Law of Zoning, (San Francisco: Bancroft-Whitney Co., 1968), vol. 1, p. 101.

¹⁸Hagman, p. 325.

¹⁹Ibid., p. 325.

²⁰277 U.S. 183 (1928).

value to the property owner outweighed the value to the community," and thus declared the residential classification invalid.²¹

In upholding a state-initiated shoreline protection law, the Court, in Just v. Marinette County,²² declared:

In the 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 the landowner ought not to bear a 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 transferred to the government so as to be a taking in the traditional sense.²³

In this instance, the regulation was designed to prevent harm to the public by preserving the natural condition of the environment. The Court determined, through lengthy discourse, that since such action was to preserve, rather than create, a public benefit, the application of the police power was justified:

In the instant case we have a restriction on the use of a citizens' (sic) property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment . . .

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. We think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses . . .

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which

²¹Bosselman, Callies, and Banta, p. 137.

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

²³201 N.W. 2d, at 767.

is not indigenous to a swamp . . .

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling . . .

The shoreland zoning ordinance preserves nature, the environment, and the natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.²⁴

Citing Just, the New Hampshire Supreme Court, in Sibson v. State of New Hampshire,²⁵ reiterated the Wisconsin Court's findings, in upholding a local ordinance prohibiting landowners from filling their salt marshland:

. . . the rights of the plaintiffs in this case do not have the substantial character of a current use. The denial of the permit by the board did not depreciate the value of the marshland or cause it to become "of practically no pecuniary value." Its value was the same after the denial of the permit as before and it remained as it had been for milleniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit.²⁶

2. The other test cited by Hagman is the consideration of whether the intent of a land-use control was to benefit the public rather than to prevent harm. A flood plain zoning law was declared invalid in Dooley v.

²⁴ 56 Wis. 2d 7, 201 N.W. 2d, at 767-768, 770, 771.

²⁵ 336 A. 2d 239

²⁶ 336 A. 2d, at 243.

Town Plan and Zone Commission of Town of Fairfield²⁷ because regulations basically limited permitted uses in the zone to publicly-oriented uses (e.g., parks, playgrounds, wildlife sanctuaries). In addition to noting the diminution in property values resulting from the regulation, the Court observed that the publicly-oriented uses restricted "potential buyers of the property to town or governmental uses."²⁸

In Morris County Land and Improvement Company v. Parsippany-Troy Hills Township,²⁹ regulations which limited uses in a "meadows" zone were declared as an improper use of the police power:

It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit . . .³⁰

This concept was discussed further in MacGibbon v. Board of Appeals of Duxbury:³¹

The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the (Massachusetts) Zoning Enabling Act.³²

Haar³³ formulated a guideline incorporating various court decisions which addressed the proper utilization of the police power:

Police power measures may be utilized to control the use of land in such a manner that the land shall not harm the use of other land and in addition shall contribute to the welfare

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

²⁸197 A. 2d at 773.

²⁹40 N.J. 539, 193 A. 2d 232 (1963).

³⁰193 A. 2d, at 239.

³¹356 Mass. 696, 255 N.E. 2d 347 (1970).

³²255 N.E. 2d, at 351.

³³Charles Haar, Land Use Planning: A Casebook on the Use, Misuse, and Reuse of Urban Land, (Boston: Little, Brown and Co., 1959), pp. 544-45.

of the community, unless

- (a) The law discriminates between owners in such a manner that it denies equal rights under the law, or
- (b) The regulation reduces control of the land to the extent that it deprives the owner of property without due process of law . . .

Police power measures do not deprive the owner of property without due process of law unless the effect of the measures is to cause harm to the individual greatly in excess of the public benefits . . .

Determination of the social necessity of a particular police power measure is governed by the following factors:

- (a) The degree to which the ordinance is designed to prevent uses which may conflict with each other,
- (b) The social desirability of the ends to be achieved by the particular police power measure, and
- (c) The necessity of utilizing the police power rather than other powers of government . . .

Determination of the extent to which the application of a police power measure injures the proprietary rights of an owner depends upon the following factors:

- (a) The extent to which economic use of the land is precluded by
 - (i) The statute,
 - (ii) The physical condition of the land, and
 - (iii) Surrounding uses, and
- (b) The social desirability of the uses to which the land may economically be put.

Regionalism and the Environment

Although the Village of Euclid v. Ambler Realty Co.³⁴ decision was widely heralded as establishing the "presumption of validity" for the application of zoning through the police power, it also suggested that there might be a limit to the extent of local control in regulating those activities which may have greater than local significance. As Linowes and Allensworth pointed out, some instances may arise where the interests of the municipality "would have to give way to broader ones."³⁵

Within the past 25 years, the courts have directed greater attention to the belief that local actions affect more than just the residents of a particular city. In Borough of Cresskill v. Borough of Dumont,³⁶ a New Jersey court ruled against a local zoning decision approving the location of a new shopping center, because the action (1) was not in accordance with the town's comprehensive plan, and (2) would not be compatible with the zoning, plans and policies of the neighboring municipalities.³⁷ In Certain-Teed Products Corp. v. Paris Township,³⁸ a Michigan court, in rejecting an ordinance allowing for the construction of a large industrial facility, held that the concept of "general welfare" applied to interests broader than those of the local citizenry.³⁹

In Vickers v. Township Committee of Gloucester Township,⁴⁰ a New Jersey court upheld a municipal zoning ordinance which excluded all trailer parks within the city's jurisdiction. A dissenting opinion argued that "the general welfare transcends the 'artificial' boundaries of any locality."⁴¹

³⁴272 U.S. 365 (1926).

³⁵Linowes and Allensworth, p. 186.

³⁶15 N.J. 238, 104 A. 2d 441 (1954).

³⁷Hagman, pp. 171, 180.

³⁸351 Mich. 434, 88 N.W. 2d 705 (1958).

³⁹Linowes and Allensworth, pp. 188-189.

⁴⁰37 N.J. 232, 181 A. 2d 129 (1962).

⁴¹Linowes and Allensworth, pp. 188-189.

The decision in another New Jersey case, Kunzler v. Hoffman,⁴² overruled a local government's denial to permit construction of a "facility of region-wide benefit," stating that the general welfare included more than just local interests. A Michigan court extended this philosophy in Bristow v. City of Woodhaven,⁴³ concluding that communities had often misused the general welfare concept in avoiding "responsibility for land uses of substantial benefit to wider areas and populations."⁴⁴

Increasing state usurpation of those land-use mechanisms which traditionally have been administered at the local level has generated concern over whether home rule provisions have been violated. A precedent for judicial attitudes concerning this issue was set through the opinion of John F. Dillon, Chief Justice of the Iowa Supreme Court, in City of Clinton v. the Cedar Rapids and Missouri River Railroad Co.⁴⁵ The "Dillon Rule" held that municipalities were creatures of the state, and that those powers granted to localities by the state could likewise be retracted. The contrary view was that local government was of absolute right, thus dampening the success of the state in usurping local controls. The U.S. Supreme Court, however, has tended to align itself with the Dillon rationale.⁴⁶

In Potomac Sand and Gravel Co. v. Governor of Maryland, the Court, in citing previous U.S. Supreme Court decisions,⁴⁸ stated those conditions necessary to justify the exercise of state authority on behalf of the public:

- a. that the interests of the public generally, distinguished from those of a particular class, require such interference;
- b. that the means are reasonably necessary for the accomplishment of the purpose; and

⁴²48 N.J. 227, 225 A. 2d 321 (1966).

⁴³35 Mich. App. 205, 192 N.W. 2d 322 (1971).

⁴⁴Linowes and Allensworth, p. 187.

⁴⁵24 Iowa 455 (1868).

⁴⁶Linowes and Allensworth, pp. 40-41.

⁴⁷226 Md. 358, 293 A. 2d 241 (1972), cert. den. 41 L.W. 3309 (Dec. 4, 1972).

⁴⁸Lawton v. Steele, 152 U.S. 133 (1844); Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962).

c. that the means are not duly oppressive upon individuals.⁴⁹

The New York Court of Appeals, in upholding a development timing ordinance in Golden v. Planning Board of Town of Ramapo,⁵⁰ indicated that many questions historically addressed at the local level have emerged as regional issues and should be considered within that context:

Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government--that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone. [citations] While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored. [citation] . . . (S)tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.⁵¹

The decision in the often-cited case of Oakwood at Madison, Inc. v. Township of Madison⁵² rejected a local ordinance which had zoned a substantial share of the township's vacant land in such a manner that would be unaffordable to many. The New Jersey Superior Court upheld an earlier opinion which stated:

In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum sizes and with such other restrictions that regional as well as local housing needs are shunted aside.⁵³

In addition to housing needs, courts have also considered the regional

⁴⁹293 A. 2d, at 249.

⁵⁰30 N.Y. 2d 359, 334 N.Y.S. 2d 138, 285 N.E. 2d 291 (1972).

⁵¹285 N.E. 2d, at 299, 300.

⁵²117 N.J. Super. 11, 320 A. 2d 233 (1974).

⁵³117 N.J. Super. 11, 283 A. 2d, at 358.

aspects of environmental issues. In Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission,⁵⁴ the Court emphasized the need for a regional approach in alleviating environmental problems in the Bay area: ". . . the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; . . . (A) regional approach is necessary to protect the public interest in the bay."⁵⁵

In People ex rel Younger v. County of El Dorado,⁵⁶ the Court upheld a regional compact that controlled land-use in the Lake Tahoe area. Noting that environmental amenities of the region know "no political boundaries," the Court observed: "Only an Agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole."⁵⁷ Other regional issues were addressed by the courts in Southern Burlington County NAACP v. Township of Mount Laurel⁵⁸ and Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore.⁵⁹ In Mount Laurel, the Court adopted the principle which directed localities to meet their "fair share" of low- and moderate-income housing needs within a regional context. The Livermore decision reiterated recent litigation regarding the regional scope of the "general welfare." The Court noted that:

. . . the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare. For the guidance of the trial court we point out that if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.⁶⁰

⁵⁴ 11 Cal. App. 2d, 89 Cal. Rptr. 897 (1970).

⁵⁵ 89 Cal. Rptr., at 905.

⁵⁶ 5 Cal. 3d 480, 487 P. 2d 1193, 96 Cal. Rptr. 553 (1971).

⁵⁷ 5 Cal. 3d, at 493-494.

⁵⁸ 119 N.J. Super. 164, 290 A. 2d 465 (1972), 336 A. 2d 713 (1975).

⁵⁹ 18 Cal. 3d 582 (1976).

⁶⁰ 18 Cal. 3d, at 601.

State involvement in environmental issues was justified in In the Matter of Spring Valley Development:⁶¹

It seems self-evident in these times of increased awareness of the relationship of the environment to human health and welfare that the state may act--if it acts properly--to conserve the quality of air, soil and water. To do so the State may justifiably limit the use which some owners may make of their property . . .

We consider it undisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction of the quality of air, soil and water for the protection of the public welfare is within the police power.⁶²

Consistent with the Just, Sibson and Spring Valley decisions as cited above, the Court justified the application of the police power to preserve the environment in Potomac Sand.⁶³ The Court examined a statute that prohibited dredging in wetland areas and concluded that the regulation did not constitute a taking but was a "valid exercise of the police powers . . . for the State to preserve its exhaustable natural resources."⁶⁴ And in Spring Valley, the Court reaffirmed the principle that environmental protection was a matter of public right:

The legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose.⁶⁵

Aesthetics and Scenic Values

Among the various criteria used to uphold the application of the police power, the concept of aesthetics has always assumed a questionable stature when utilized as the single determining factor in justifying regulatory motives. Court decisions have appeared to follow no definite pattern, and often have contradicted one another.

⁶¹ 300 A. 2d 736 (Me. 1973).

⁶² 300 A. 2d, at 746-748.

⁶³ 266 Md. 358, 293 A. 2d 241, cert. den., 41 L.W. 3309.

⁶⁴ 293 A. 2d, at 248.

⁶⁵ 300 A. 2d, at 751.

The U.S. Supreme Court decision in Berman v. Parker⁶⁶ addressed the intent and effect of Washington D.C.'s urban renewal program, which directed major emphasis to "city beautification." The Court observed that:

Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . .

The concept of the public welfare is broad and inclusive. [citation] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.⁶⁷

Hagman noted that the Berman decision "has encouraged legislatures to pass and courts to approve police power regulations based substantially on aesthetic grounds."⁶⁸

In People v. Stover,⁶⁹ the Court upheld an ordinance which prohibited front yard clotheslines. Directed more toward the administration of the ordinance than to the issue of aesthetics, the Court stated:

. . . whether such a statute or ordinance should be voided should depend upon whether the restriction was an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community--and not upon whether the objectives were primarily aesthetic . . . And, indeed, this view finds support in an ever-increasing number of cases from other jurisdictions which recognize that aesthetic considerations alone may warrant an exercise of the police power. (emphasis added)⁷⁰

⁶⁶348 U.S. 26 (1954).

⁶⁷348 U.S., at 32, 33.

⁶⁸Hagman, p. 70.

⁶⁹12 N.Y. 2d 462, 191 N.E. 2d 272 (1963).

⁷⁰191 N.E. 2d, at 275.

In Oregon City v. Hartke,⁷¹ the Court upheld a local zoning ordinance which prohibited automobile wrecking yards. Addressing the issue of aesthetics, the Court concluded:

The preventing of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more than the predominant interest of others in the community.⁷²

Some court cases since Berman have challenged the sufficiency of aesthetics as the sole criterion in upholding the police power. In United Advertising v. Borough of Metuchen,⁷³ the Court stated that "while aesthetics alone is not a sufficient rationale, aesthetics plus some other police power is."⁷⁴ The New York Court in Cromwell v. Ferrier⁷⁵ concluded that aesthetics could be a determining factor "if aesthetics bear substantially on the economic, social, and cultural patterns of a community."⁷⁶ In People v. Goodman,⁷⁷ the New York Court of Appeals determined that "there be a substantial relationship between the regulation (of aesthetics) and the economic, social, and cultural patterns of the community . . ."⁷⁸

Thus, while Berman appeared to justify the use of aesthetics alone in applying the police power, subsequent lower court decisions have not been as anxious to accept this view, and in some instances (e.g., United Advertising and Goodman), have required the aesthetics issue to be substantially linked to the protection of the public health, safety, welfare, and morals. Hagman concluded:

⁷¹240 Or. 35, 400 P. 2d 255 (1965).

⁷²400 P. 2d, at 263.

⁷³42 N.J. 1, 198 A. 2d 447 (1964).

⁷⁴Hagman, pp. 141-142.

⁷⁵19 N.Y. 2d 263, 279 N.Y.S. 2d 22, 225 N.E. 2d 749 (1967).

⁷⁶Hagman, p. 95.

⁷⁷31 N.Y. 2d 262, 338 N.Y.S. 2d 97 (1972).

⁷⁸Linowes and Allensworth, p. 193.

Generally . . . a zoning ordinance can be sustained for several reasons, and unless the attorneys submit the case on an aesthetics alone basis, or the court chooses to limit its decision to that basis, it is perhaps never necessary to decide the issue on that ground alone.⁷⁹

Recent court decisions have concluded that regulation directed toward the preservation of "quiet seclusion," "family values" and the like constitute a proper exercise of the police power. In Village of Belle Terre v. Boraas,⁸⁰ the Supreme Court reiterated the Berman decision and extended its philosophy to encompass human values:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.⁸¹

Citing both Berman and Belle Terre, the Kansas Supreme Court upheld the application of the police power to preserve an area's character in Houston v. Board of City Commissioners:⁸²

The zoning here, of course, is not "aesthetic" in the sense that it purports to control the appearance of plaintiffs' property. The objective sought is the exclusion of commercial uses from a residential area. Any "aesthetic" effect is purely incidental and entirely permissible. [citations] We hold that preserving the residential character of the neighborhood was a legitimate purpose of the zoning ordinance.⁸³

A concept closely related to aesthetics, but perhaps more concretely definable, is that of scenic value. The courts have tended to recognize the importance of preserving such a characteristic, frequently considering it only in conjunction with other issues. Responding to questions of constitutionality regarding the purposes of the Maine Site Location Law,⁸⁴ the Court, in

⁷⁹Hagman, p. 94.

⁸⁰416 U.S. 1 (1974).

⁸¹416 U.S., at 9.

⁸²218 Kan. 323, 543 P. 2d 1010.

⁸³218 Kan., at 329.

⁸⁴38 M.R.S.A., secs. 481-488.

In the Matter of Spring Valley Development,⁸⁵ discussed the relationship between scenic value preservation and the scope of the police power:

The Act recognizes the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration . . . (T)he Legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land . . .⁸⁶ (emphasis added)

In Steel Hill Development, Inc., v. Town of Sanbornton,⁸⁷ the Federal Circuit Court stated:

We recognize, as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for tides of weekend 'visitors' who would own second homes . . . Many environmental and social values are involved in a determination of how land would best be used in the public interest . . .⁸⁸ (emphasis added)

Recognizing the emerging values associated with swamps and wetlands, once thought as "wasteland, undesirable, and not picturesque," the Court noted, in Just v. Marinette County,⁸⁹ that through the increasing public awareness of environmental issues, "(s)wamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature."⁹⁰ The New Hampshire Supreme Court expressed and extended this view in upholding wetland regulations in Sibson v. State of New Hampshire:⁹¹

⁸⁵300 A. 2d 736 (Me. 1973).

⁸⁶300 A. 2d, at 751.

⁸⁷469 F. 2d 956 (2d Cir. 1972).

⁸⁸469 F. 2d, at 961.

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

⁹⁰201 N.W. 2d, at 769.

⁹¹115 N.H. 124, 336 A. 2d 239 (1975).

The evidence in the case overwhelmingly supported the referee's findings on the importance of preserving saltmarshes "as one of the most productive areas of nutrient per acre to be found anywhere." . . . (I)t is "for the public good and welfare of this state to protect and preserve its submerged lands and its wetlands . . . from despoilation and unregulated alteration." . . .

We hold that the denial of the permit to fill the saltmarsh of the plaintiffs was a valid exercise of the police power proscribing future activities that would be harmful to the public and that, therefore, there was no taking under the eminent domain clause.⁹²

Thus, while both aesthetics and scenic values have been deemed as relevant purposes for police power application, as a general rule, their stature must be linked with some other police power determinant(s) in order to be considered as viable criteria.

Enhanced Value

In Chapter I it was observed that property values near the Salt Valley reservoirs have been escalating in recent years, presumably since residential attractiveness near the lakes has been intensified by the immediate availability of many amenities associated with the public use areas, such as superb access, scenery, and recreational opportunities. An issue thus arises regarding the diminutive effect in values resulting from the introduction of protective regulations upon these adjacent properties: In evaluating the applicability of the police power or eminent domain, should consideration be given to a property's "normal" market value, or that value "enhanced" by recreational proximity?

The general rule, as expressed by the U.S. Supreme Court in United States v. Cors,⁹³ is that an owner of property appropriated for a public purpose "is not entitled to the enhanced value that the need of the government for his property has created."⁹⁴ However, certain instances have warranted

⁹² 336 A. 2d, at 240-241, 243.

⁹³ 337 U.S. 325 (1949).

⁹⁴ Hagman, p. 334.

additional consideration, as suggested by the U.S. Supreme Court in United States v. Miller:⁹⁵

If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts, but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.⁹⁶

The "scope-of-the-project" issue was raised again in United States v. Reynolds,⁹⁷ wherein the U.S. Supreme Court considered additional land acquisition for reservoir-related recreational facilities. The Court noted:

. . . if the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was outside the original scope of the project, its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property.⁹⁸

The Court went on to clarify the "scope-of-the-project" test it presented in Miller:

⁹⁵317 U.S. 369 (1943).

⁹⁶317 U.S., at 376-377.

⁹⁷397 U.S. 14 (1970).

⁹⁸397 U.S., at 18.

The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use. (emphasis added)⁹⁹

The decision did not specify if the "course of the planning" could refer to subsequent planning activity undertaken after the facility had been completed.

It is difficult to determine whether the enhanced value of properties near the Salt Valley public use areas would qualify for consideration, even though actual implementation of the state's use-value tax assessment provisions would mitigate some uncertainty. Although the cases noted above dealt with eminent domain, the implications pointed to concerns raised in the "taking" issue. It would appear that, with the preeminence of environmental awareness, the enhanced property values near the lakes would not be permitted to withstand when considering "just compensation," since ecological integrity, regardless of its attainment, was an original objective within the "scope-of-the-project."

Pertinent Litigation in Nebraska

A review of land-use adjudication in Nebraska reveals that there is no substantial precedent which could provide direction in evaluating the legality of mechanisms protective of state public use areas. However, an examination of three "tangential" cases and one pending case may provide a limited insight of the Nebraska judiciary's attitude regarding this emerging issue.

In 1938, the Nebraska Supreme Court addressed use-value assessment of agricultural lands in Schulz v. Dixon County.¹⁰⁰ The Court indicated that, barring exemptions expressly indicated within the statutes, farmlands were to be assessed and taxed at actual cash value, which was defined by statute through the following parameters:

- a. Earning capacity;
- b. Location;
- c. Desirability and functional use;

⁹⁹ 397 U.S., at 21.

¹⁰⁰ 134 Neb. 549, 279 N.W. (1938).

- d. Reproduction cost less depreciation;
- e. Comparison with other properties of known or recognized values; and
- f. Market value in ordinary course of trade.¹⁰¹

The Court also stated that taxation provisions must be applied uniformly rather than by considering the circumstances surrounding individual cases. As indicated previously, the Nebraska Attorney General ruled that the 1974 use-value assessment law¹⁰² could not be implemented since local ordinances did not provide for exclusive agricultural districts, as required by state law. Therefore, until the law is rendered operative, the Schulz decision apparently does nothing to reduce speculative pressures.

The Court addressed "just compensation" in State v. Platte Valley Public Power and Irrigation District.¹⁰³ Recognizing the practice of "separate valuation" under eminent domain proceedings, the Court stated that, when appropriated, school lands under lease must be assessed at fair market value, "less the value of the mineral rights, if any, and less the value of the reverter, if any."¹⁰⁴ Extending this concept to the potential purchase of development rights or scenic easements, it appears that such less-than-fee acquisition also would result in a separate valuation of the land and interests taken, therefore affecting fair market value much in the same way as intended by the currently inoperative agricultural assessment provisions.

Aesthetic considerations were addressed by the Court in City of Milford v. Schmidt.¹⁰⁵ Holding that a mobile home could not be declared as a nuisance, the Court reiterated decisions rendered by many state courts throughout the nation, in that the police power may not be exercised on aesthetic grounds alone.

The Omaha City Council unanimously approved a growth policy on

¹⁰¹Nebraska, R.R.S. 1943, 1977 Cum. Supp., 77-112 (Laws 1903, c. 73, sec. 12, p. 390).

¹⁰²Ibid., 77-1343 through 77-1348 (Laws 1974, L.B. 359).

¹⁰³147 Neb. 289, 23 N.W. 2d 300 (1946).

¹⁰⁴Nebraska, State Office of Planning and Programming, Impact of Decisions on Land Development Laws, (Lincoln: October, 1975), pp. 37, 114.

¹⁰⁵175 Neb. 12, 120 N.W. 2d 262 (1963).

March 29, 1977, directed toward rehabilitating older areas within the city, and, at the same time to "almost eliminate leapfrog development."¹⁰⁶ A major provision of the policy was the creation of a "no growth zone" designated for agriculture, outside of the city limits but within Omaha's three-mile extraterritorial zoning jurisdiction. The growth policy stated that residential subdivisions would be discouraged in the no growth zone, due to the absence of both adjacent development and adequate infrastructure.

On July 26, 1977, the City Council disapproved a proposed exception to the policy which would have permitted the development of a \$35 million subdivision in the no growth zone.¹⁰⁷ "Whispering Pines" was to comprise one square mile, containing 1,200 mixed density dwelling units and a 27-hole golf course. The Omaha Planning Department earlier had cited the following characteristics of the proposal which would pose potential problems:

- a. The proposed subdivision is two miles distant from existing development;
- b. There would be high costs associated with extending and providing infrastructure services;
- c. Existing park and recreation facilities were judged as inadequate. No additional facilities were provided in the subdivision plan;
- d. Existing streets were judged as inadequate;
- e. Existing schools were judged as inadequate. No additional facilities were provided in the subdivision plan;
- f. Proposed sewage treatment facilities were judged to be inadequate; and
- g. The improvement costs to be assessed on the individual properties within the subdivision were judged as potentially high.¹⁰⁸

On August 24, 1977, the developer filed a lawsuit which challenged the city's authority to restrict its outward growth. The suit was based upon the following premises:

¹⁰⁶ Omaha World-Herald, 30 March 1977.

¹⁰⁷ Ibid., 25 August 1977.

¹⁰⁸ Ibid.

- a. Plans for the subdivision were initiated before the City Council approved the growth policy;
- b. The growth policy violates the Fourteenth Amendment to the U.S. Constitution, because it did not provide equal protection under the law;
- c. The growth policy fails to provide for the public health, safety, and general welfare;
- d. The growth policy is exclusionary; and
- e. The value of the affected property was higher prior to the passage of the growth policy, than afterwards, thus addressing the "taking" issue.¹⁰⁹

In response, the City Legal Department indicated that due to the presence of similar if not stronger policies throughout the country which have been upheld by the courts, the policy would be deemed as an acceptable exercise of the police power. Regardless of the Court's decision, the outcome undoubtedly will clarify judicial attitudes concerning land-use controls not only in Nebraska, but throughout the nation as well.

Summary and Conclusions

The preceding examination of the various issues addressed by the courts has yielded at least seven decisional trends which may be applicable for consideration when proposing land-use control measures on lands adjoining Nebraska's state-managed public use areas:

A. The application of the police power has been justified in efforts to preserve or conserve the environment, since the courts have determined that such action constitutes protecting the public from harm rather than providing a public benefit;

B. Preservation or conservation of the environment has been judged to be a public benefit as of right. Therefore, any attempts to maintain the status quo would fall within the scope of the police power.

C. Environmental issues often "spill-over" into many political jurisdictions, thus justifying the involvement of a higher level of government (in Nebraska, the State) to "internalize" the "externalities";

D. The use of the police power will be upheld as long as some beneficial use is retained by the property owner;

¹⁰⁹ Ibid.

E. Although the Berman case established a precedent which implied that the police power could be invoked solely on an aesthetics basis, recent court cases, including a Nebraska decision, have indicated that aesthetic issues must be linked to the public health, safety and welfare criteria in order for the exercise of regulatory control to be held valid;

F. The preservation of "human values" (e.g., quiet seclusion, family values) has been judged to be within the scope of the police power; and

G. Tax measures relating to land-use have been judged to be acceptable, especially if applied uniformly.

Thus, the history of court litigation would appear to justify the implementation of environmentally-related police power regulations, instituted at the state level, for those lands adjacent to the Salt Valley public use areas. However, other alternative land-use control measures may be equally effective as well as legally acceptable. These potential mechanisms, which may merit application in Nebraska, will be the subject of discussion in the final chapter.

CHAPTER VI

AN APPROACH FOR NEBRASKA

Setting the Stage: A Review

Many states and localities have utilized a variety of techniques in an attempt to deal effectively with environmental issues, "critical areas," "developments of regional impact," and the like, as discussed in Chapters III and IV. Some states, exemplified by Hawaii and Vermont, have implemented "wall-to-wall" regulatory mechanisms, entrusting most of the land-use policy-making and implementation responsibility at the state level. Others have instituted "specialized" controls, wherein the state has instituted direct action toward specific land-use issues, as in the Massachusetts Wetlands Protection Program and the Maine Site Location Law.

An emerging emphasis focuses on shared implementation responsibility between the state and the local unit of government. As Isberg noted, a joint approach might ease friction arising in those instances of total state responsibility in which localities might claim that "home rule" had been unduly usurped:

This splitting of authority has the advantage of unifying land control policies on an areawide basis while leaving enforcement of ordinances at the local level. For this reason the approach is more feasible politically than the broadscale transfer of authority to a higher level of government.¹

This approach has been utilized in formulating Nebraska's State Capitol Environs Protection and Improvement Act, floodway/flood plain regulations, and the currently-inoperative use-value assessment measures for agricultural land. As of yet, no apparent public or administrative dissatisfaction has arisen in the shared implementation of these mechanisms,

¹Gunnar Isberg, "Controlling Growth: In the Urban Fringe," in Management and Control of Growth, ed. Randall W. Scott, vol. 3, (Washington: Urban Land Institute, 1975), p. 37.

which might indicate that such a method of protecting the Salt Valley public use areas might be a politically "safe" approach.

Even though the immediate scope of this thesis is directed toward the formulation of measures to protect the viability of the 12 state-managed public use areas in the Salt Valley, the state's investment in recreational facilities is not limited to just this region, but extends throughout the state. The Nebraska Game and Parks Commission manages over 200 such areas for the public benefit. Most of these areas currently are not threatened by developmental pressures, as they are generally located within the more sparsely-populated, truly "rural" areas. However, due to the history of court decisions which have declared that regulatory techniques be non-discriminatory, reasonable, uniform and non-arbitrary, the promulgation of a mechanism to protect the state's recreational investments in the Salt Valley must be extended to like investments throughout the state as well.

This statewide application suggests an additional consideration, in that a proposed regulatory mechanism should be applicable in areas where developmental pressures exist, as well as in locations which are virtually "isolated." In addition, the formulation of a land-use control device should recognize that since development per se may not be an acceptable use to coexist with recreation areas, the historical use--agriculture--should be judged as compatible, and thus be allowed and encouraged to continue. Healy concluded:

. . . Agriculture on the urban fringe not only produces crops, but provides valuable open space. In many cases a landscape of well-tended farms is more attractive visually than even a completely natural scene. For reasons deep in the American psyche, farming . . . is considered a virtuous kind of enterprise. Thus the loss of farmlands on the urban fringe might be considered a social loss, even aside from the loss of the fruits of the land . . .²

Although court decisions have reflected a trend toward accepting the use of regulatory mechanisms for environmental protection, uncertainty regarding the use of the police power to control residential development near the lakes could be attributed to results of the bacteriological tests conducted

² Healy, p. 18.

in the early 1970s. The studies indicated that water quality problems in the Salt Valley lakes arose from agricultural runoff and public use area visitors. The absence of evidence to indicate that nearby dwelling units also contributed to the degradation of water quality might precipitate an argument claiming that any proposed exclusion of residential development would be based solely on aesthetics--a criteria which might meet with disapproval in the courts.

As indicated by studies conducted in the Lake Tahoe vicinity, however, the effects of residential development can be substantially detrimental to the environment. Pending an updated survey of Nebraska's lakes, it can only be speculated that continued development near the public use areas would adversely affect the water quality.

This uncertainty regarding the appropriate application of the police power lends to the consideration of eminent domain as a land-use control mechanism. Since it appears desirable to retain lands adjacent to the public use areas in a relatively undeveloped state, acquisition of fee simple property interests would not necessarily be required to prohibit residential activity, since most of the adjacent lands are not developed (i.e., are in agricultural use) at the present time. Thus, less than fee simple acquisition, such as the purchase of scenic easements or development rights, poses possible consideration.

Davis listed some important criteria for the "success" of easements to be realized: "The first is that all parties concerned must thoroughly understand the nature and purpose of easements and believe in them and that the easement agreement be clearly and accurately executed."³ The speculative landowner might not immediately accept the proposition to grant easements or development rights until development pressures inflate the market value of his property to an "acceptable" price. Thus, "understanding" and "belief" may be tied to financial considerations. In addition, if easements are not acquired at a sufficient areal scale, the profitability of open space uses requiring extensive contiguous holdings of land (e.g., farming) may not be realized.

³Davis, p. 80.

The second criterion is that, for the most part, the lands should be of relatively low market value and the easement should be essentially negative.⁴ In large degree the easement consequently requires only continuation of what the owner has been doing with the land and the situation of the landowner is little affected.

The third condition is that the rights actually needed for land-use controls can be obtained through easements for much less cost than buying all the rights and responsibilities that go with full title and land ownership.⁵

Since the opinion of the Nebraska Attorney General rendered the agricultural use-value assessment statutes as currently inoperative, the escalating values of properties adjacent to the public use areas have not been effectively curbed. Table 2 indicated that the 1970 average price per acre of farms in eastern Lancaster County, where development pressures were practically non-existent, was approximately \$230.⁶ Although farmsteads of like size (75 or more acres) near the public use areas were similarly valued (\$243 per acre), the price of smaller properties nearby peaked at \$1,317 per acre. If development is permitted to continue near the public use areas, it is likely that the growth pressures will be reflected in the higher valuation of adjacent farmsteads, which may be revealed upon completion of current reassessment operations.

These cursory statistics could be used to estimate simplistically the value of development rights or scenic easements as a proportion of total property value. Assuming that the agricultural productivity of the land is uniform, it can be estimated that the agricultural use-value of properties near the public use areas approximate \$250, according to the survey. Land values of smaller properties in rural non-farm use averaged over \$1,300 per acre. An estimate of the development "worth" of properties in this category could be determined by subtracting the agricultural use-value of the land (\$250) from the development value (\$1,300), thus equalling \$1,050. This tenuous estimate suggests that the acquisition of development rights or scenic easements could be rather expensive.

⁴Negative easements may be defined as, "those which merely preclude the owner of land subject to the easement from doing that which, if no easement existed, he would be entitled to do." Hagman, p. 298.

⁵Davis, p. 80.

⁶Values reported account for the value of the land only, i.e., no consideration is given to the improvements.

Considering the apparent fact that development rights constitute a significant portion of the fee simple value, a massive expenditure would be required to purchase such rights near the 12 Salt Valley public use areas. Applying this mechanism on a statewide basis appears quite prohibitive. Even if the state could afford to acquire development rights in narrow bands surrounding the public use areas, it is unlikely that such action would be fully effective, especially if the encompassing watersheds are relatively extensive.

An alternative to governmental purchase and retention of development rights is a system that allows for the "transfer" of development rights from one property to another. The "TDR" concept, as discussed in Chapter IV, appears to be an economically "acceptable" mechanism whereby development potential is not "lost" but is merely shifted to those areas where continued development is deemed as "desirable." Even though the application of the TDR concept is still in its infancy, an already identifiable "prerequisite" for the mechanism's success is that ". . . the scheme will not work unless the demand for land is greater than the supply; otherwise the development rights will be worthless."⁷ Although the Salt Valley lakes have been an attractive haven for exurban developmental activity, demand for new housing near the public use areas cannot be attributed to the absence of developable land in or adjacent to Lincoln or other municipalities, but to the recreational or scenic attributes which "spill-over" from the recreational facilities, thus enhancing developmental aspirations. In other words, this residential demand probably would not have been present if the public use areas had not been provided.

The future land-use plan for Lancaster County presumed an abundance of developable space near Lincoln to fulfill the city's needs in the year 2000, without necessary expansion into lands surrounding the public use areas. It appears, therefore, that an actual need for developable space near the Salt Valley lakes will not be imminent for at least 25 years.

⁷Donald G. Hagman, "A New Deal: Windfalls for Wipeouts," in No Land is an Island, ed. Benjamin F. Bobo, et al, (San Francisco: Institute for Contemporary Studies, 1975), p. 184.

For cities such as Lincoln which have been experiencing growth pressures, Schnidman suggested that "up-zoning"⁸ could be utilized as an alternative to the TDR concept in directing growth.⁹ Those areas designated as TDR "receiving" zones could be up-zoned to allow a greater density of use, eliminating the need to acquire development rights to accomplish the same purpose. Schnidman's argument appears to be reasonable, as an up-zoning request normally must be accompanied by substantiation that the existing or planned infrastructure and adjacent land-uses will accommodate the increased density. With the TDR approach, the effectuation of the actual transfer would be contingent upon the willingness of the buyer and the seller. The moment at which a transfer is consummated may be difficult to predict. This may tend to complicate the efficient provision of capital facilities in the "receiving" zone, as a potential underutilization of the improved infrastructure could arise if the TDR mechanism failed to increase the desired density in areas where city services were strengthened to fulfill the anticipated level of need.

Consideration also must be given to the size of the "sending" zone. Although not addressed within this thesis, the "optimal" size of an individual farm should be studied in delineating the "sending" zones, in order to allow the efficient continuance of agricultural production. Attention also must be directed toward land-uses adjoining the "sending" zones to assure that the conduct of farming would not be disrupted.

Although the intent of the TDR concept seems plausible as a growth control mechanism, it would be effective only when applied to ease demand pressures resulting from a shortage of developable space. When considering TDR's applicability in protecting the state's recreational resources, it is obvious that developmental pressures near most public use areas are not attributable to the lack of developable space elsewhere, but to the home-buyer desirous of being close to amenity.

The conclusions presented thus far have indicated that growth control mechanisms, when applied singly, might not produce the desired ends and potentially could instigate additional unforeseen problems. Isberg observed:

⁸Allowing a higher density of use than previously permitted.

⁹Frank Schnidman, "Transfer of Development Rights: Questions and Bibliography," in *Management and Control of Growth*, ed. Randall W. Scott, vol. 3, (Washington: Urban Land Institute, 1975), p. 130.

Because of defects in devices and their generally uncoordinated application, it is extremely doubtful that any one device can effectively control development in the urban fringe. More likely, effective control will require coordinated use of many devices.¹⁰

William K. Riley, as quoted by Cahn, also proposed that open space preservation must involve an approach that utilizes a combination of mechanisms, but alluded to the use of police power: "The answer has to be a mix of solutions that involves primary reliance on regulations, backed by property-tax assessments that reflect present use value."¹¹ Linowes and Allensworth further suggested a means by which the implementation of a protective mechanism could be "safely" pursued at the state level:

It is almost certainly true that the least opposition is generated by two tacks: traditional specialized controls directly under the state and local controls with state standards. These are probably the best routes for the states to follow, and they are the most politically feasible. They may be the only ones that have any widespread chance of success. The state has an important role in each and no doubt should be more involved in both areas than it is at present.¹²
(emphasis added)

Protective Zoning for the Public Use Area Environs

These observations as presented by Isberg, Riley, and Linowes and Allensworth provide some foundations for formulating a proposed mechanism to alleviate environmental problems associated with increasing development near Nebraska's recreational resources. The following components of the suggested scheme include state-mandated local zoning provisions, the precedent of which was established through state enactment of floodway/flood plain regulations and the Nebraska State Capitol Environs Protection and Improvement Act. Other features include the implementation of the currently-inoperative agricultural use-value assessment statutes and increased administrative action by the Nebraska Game and Parks Commission. The proposed protective mechanism would be established and implemented through a series of stages as

¹⁰ Isberg, p. 35.

¹¹ Robert Cahn, "Where Do We Grow From Here?," in Management and Control of Growth, ed. Randall W. Scott, vol. 1, (Washington: Urban Land Institute, 1975), p. 76.

¹² Linowes and Allensworth, pp. 124-125.

outlined below:

1. ESTABLISHMENT OF "PUBLIC USE AREA ENVIRONS DISTRICTS." The state legislature, upon advisement from appropriate state and local governmental agencies (e.g., the following state agencies: Game and Parks Commission, Department of Environmental Control, Department of Water Resources, Natural Resources Commission, Department of Health, State Historical Society; and the jurisdiction with local zoning authority), should delineate the boundaries of public use area environs districts to encompass all facilities in the state managed by the Nebraska Game and Parks Commission (State Parks,¹³ State Recreation Areas, State Historical Parks,¹⁴ State Wayside Areas,¹⁵ and State Special Use Areas). The local unit of government should also be required by statute to establish district boundaries identical to those delineated by the legislature.

In order to provide for statewide uniformity and to avoid arbitrariness, the state must establish parameters for designating the district boundaries. The initial delineation should be based on the immediate watershed containing the public use area. However, if this watershed is extensive, arbitrary boundaries should then be established which would consider (a) potential runoff effects resulting from both rural and urban uses, and (b) scenic or aesthetic criteria.

To protect the interests of hunters, an additional consideration should be noted when establishing district boundaries. Since state law

¹³Those parks of substantial area with the primary value of significant statewide scenic, scientific or historic interest, having a complete development potential and, where possible, a representative portion which can be retained in a natural or relatively undisturbed state. Nebraska, R.R.S. 1943, 1977 Cum. Supp., 81-815.22. (Laws 1959, c. 436, sec. 2, p. 1464).

¹⁴Those sites which, in the opinion of competent, recognized authorities, are of notable historical significance to the State of Nebraska, of a size adequate to develop the full interpretive potential of the site, and which may be equipped with limited day-use facilities that do not detract from nor interfere with the primary purposes and values thereof. Nebraska, R.R.S. 1943, 1977 Cum. Supp., 81-815.21. (Laws 1959, c. 436, sec. 1, p. 1464).

¹⁵Those areas appropriate in size and location at strategic intervals adjacent to main traveled highways to provide safe rest and picnic stops for travelers, selected for scenic or historical interest when possible . . . Nebraska, R.R.S. 1943, 1977 Cum. Supp., 81-815.21. (Laws 1959, c. 436, sec. 1, p. 1464).

prohibits the conduct of hunting activity within 200 yards of an occupied dwelling,¹⁶ a reciprocal statute should be enacted which would prohibit the construction of dwelling units within 200 yards of a state-managed public hunting area. This would assure that the interests of hunters would not be preempted by encroaching development.

2. ESTABLISHMENT OF "EXCLUSIVE AGRICULTURAL" USES WITHIN THE DESIGNATED "PUBLIC USE AREA ENVIRONS DISTRICTS." The state legislation should define those uses within the environs district which would be compatible with recreational activity and would also permit implementation of the agricultural use-value assessment provisions.¹⁷ As with district boundary delineation, the rationale favoring state involvement in establishing use provisions is to assure uniform application throughout the state.

State action also should require localities with applicable zoning jurisdiction to formally adopt and enforce the state-designated use regulations. Non-conforming use provisions also should be established which would provide for the discontinuance of incompatible uses after a considerable period of time (e.g., 25 years).

It is proposed that the minimum size of any lot be established at ten acres. This restriction may precipitate claims of discriminatory "large-lot" zoning, which has been the subject of considerable controversy in recent years, as both critics and the courts have suggested exclusionary overtones in both its intent and effect. Isberg observed:

The theory behind large-lot zoning is that the cost of large lots tends to discourage development. Large-lot zones are considered holding areas, where development should be discouraged but eventually allowed. However, some jurisdictions concerned with protecting unique agricultural land have adopted agricultural zoning districts where only agriculture is allowed.

While the device may be effective in rural areas not subject to development pressures, it tends to be ineffective in areas under intense development pressures and may create undesirable side effects.¹⁸

¹⁶Nebraska, R.R.S. 1943, 1977 Cum. Supp., 37-526. (Laws 1967, c. 214, sec. 1, p. 575).

¹⁷An example of proposed regulations for public use area environs districts appears in the Appendix to this thesis.

¹⁸Isberg, p. 31.

Isberg's observations support the large-lot provisions when applied to the lands adjacent to Nebraska's public use areas, since it was observed previously that developmental pressures have arisen from recreational and scenic opportunities and not from unavailable developable space elsewhere. Nevertheless, Isberg noted potential shortcomings to its effective utilization:

. . . the validity of the theory behind large-lot zoning is increasingly being challenged by planning professionals. A two-acre lot in a rural area may cost less than a quarter-acre lot in an urban area. If so, large-lot zoning cannot effectively discourage development. Minimum lot sizes could be increased to 5 or 10 acres, but this may be resisted by speculative farmers, and may be open to legal challenges.¹⁹

These "legal challenges" concern the possible exclusionary intent and effect of large-lot zoning. Williams, et al, discussed the issue further:

In litigation directed against exclusionary zoning there exists a potential conflict between housing needs and environmental values. The latter are of two kinds:

*Protecting basic environmental values; as, for example, preventing any development which would upset the ecological balance of an area.

*Maintaining the amenities of a pleasant low-density residential area.

As a general principle, if there is absolutely now way to avoid a conflict between the provision of needed housing and such environmental values, the need for housing must be given preference. However, somewhat different considerations are involved between the two types of environmental values. If a conflict should arise between housing and the critically important ecological values, a really serious question would be presented . . .

As for the second type of environmental values, the protection of residential amenities involves considerations which are important, but not quite so commanding. The special amenities of low-density living--peace and quiet, freedom from heavy traffic, noise, and fumes, a rural or semi-rural appearance or "character"--depend upon the existence of a low density pattern over a substantial area. In such areas, any more intensive use, including housing, can have a decided impact upon traffic generation and the street pattern and also upon the suburban "character."

¹⁹Ibid., p. 32.

If the only way to get the needed housing is by sacrificing this second type of environmental values, they will have to be sacrificed. However, there is a good deal to be said for taking a little time to consider whether this is necessary. While there may be times when it will be, the chances are this can be avoided or minimized.²⁰

This view seems to be compatible with the rationale advocating control of growth around the state's recreational resources. The limitation of minimum lot sizes near public use areas would not appear to exclude persons from obtaining quality housing in other urban areas. As noted before, the Lincoln-Lancaster land-use plan indicated that the future contiguous expansion of Lincoln and other municipalities in Lancaster County should be capable of accommodating anticipated housing needs without providing for continued development near the public use areas. Thus, as abundant land suitable for residential and other urban uses is available in other areas, any regulations which would establish a ten-acre minimum lot size should not be perceived as exclusionary.

In Steel Hill Development, Inc. v. Town of Sanbornton,²¹ the Court addressed this conflict between preserving open space and a proposed development of seasonal homes:

We recognize, as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for the tides of weekend "visitors" who would own second homes. If the federal government itself has thought these concerns to be within the general welfare, [citations] we cannot say that Sanbornton cannot similarly consider such values and reflect them in its zoning ordinance. Though some courts may have rejected them within the suburban zoning context, [citations] or where permanent first homes are involved, [citations] we think they are persuasive in the case before us. Many environmental and social values are involved in a determination of how land would best be used in the public interest . . .

²⁰Norman Williams, Jr., Tatyana Doughty, and R. William Potter, "Exclusionary Zoning Strategies: Effective Lawsuit Goals and Criteria," in Management and Control of Growth, ed. Randall W. Scott, vol. 1, (Washington: Urban Land Institute, 1975), pp. 477-478.

²¹469 F. 2d 956 (1st Cir. 1972).

But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop-gap measure.²²

Although somewhat tenuous, the decision indicated that proposed large-lot zoning provisions, absent any "real" developmental pressures, would constitute a legitimate exercise of the police power within the realm of preserving ecological balance and rural "character."

Isberg continued with observations suggesting that large-lot zoning might pose difficulties in implementation:

There are also potential problems in strict enforcement of exclusive agricultural zoning districts. If property taxes go up as a result of nearby urbanization to a point that agricultural production becomes uneconomical, it may be impossible or illegal to enforce such a provision unless some sort of tax abatement or deferral system is authorized.²³

Isberg's concern for tax considerations to encourage the retention of agricultural uses leads to the next element of the proposed regulatory mechanism:

3. REINSTATEMENT OF THE AGRICULTURAL USE-VALUE ASSESSMENT PROVISIONS.

The permitted uses in the proposed public use area environs district should qualify affected properties for assessment and taxation at agricultural use-value. As mentioned before, use-value provisions enacted by the legislature were declared inoperative by the Nebraska Attorney General because local zoning ordinances permitted non-agricultural uses in designated agricultural zones. It is anticipated that the more restrictive definition as presented in this thesis would meet the Attorney General's approval, thus permitting the tax-break for owners of farmland. A lower tax rate in a sense would "compensate" property-holders for retaining lands in agricultural production, and might mitigate speculative pressures to sell for conversion to non-farm uses.

4. MONITOR AND IMPROVE WATER QUALITY. The effects of agricultural run-off should be reexamined, along with an assessment of waste treatment facilities serving homes adjacent to the public use areas. Since the state's

²²469 F. 2d, at 962.

²³Isberg, p. 32.

water quality plan is in the preparation stages, it is unknown at this time what steps, if any, will be proposed for statewide pollution abatement. However, since test results in the early 1970s indicated that agricultural run-off is a major factor contributing to high bacteriological counts in the Salt Valley lakes, standards should be established and enforced which would mitigate further adverse ecological effects, as well as improve water quality. It may be suitable to place these standards within the proposed state and local legislation establishing the public use area environs districts.

5. IMPROVED MAINTENANCE AND MONITORING BY THE NEBRASKA GAME AND PARKS COMMISSION. Since public use area visitors also have contributed to adverse water quality conditions, steps should be taken to upgrade waste and refuse facilities in public use areas and to encourage visitors to make better use of these facilities through improved signing and other "public relations" schemes. Increased patrolling by Commission law enforcement personnel should also be considered.

6. "NATURAL" SCREENING. The Game and Parks Commission should consider planting trees and shrubs within the public use areas near their perimeters, to provide effective "screening" from existing adjacent residential uses. This may enhance the aesthetic qualities for the benefit of the public use area visitors, as well as provide valuable habitat for wildlife.

7. MISCELLANEOUS ADMINISTRATION AND IMPLEMENTATION PROVISIONS. Since there are over 200 state-managed public use areas throughout Nebraska, a lengthy time-frame will be necessary to delineate and classify all of the public use area environs districts within the state. State legislation should require completion of the designation process within 10 years of the passage of the initial legislation. Those areas experiencing imminent developmental pressures, such as those in the Salt Valley, should be designated immediately to prevent further encroachment. Local governments in less-populated areas of the state should be encouraged to immediately initiate the designation process to facilitate state efforts upon completion of classifying other areas.

The proposal delegates authority to both the state and appropriate local units of government. To ensure adequate local participation, the proposed state legislation should provide that future changes in boundaries or use provisions be approved by both the state and the appropriate local government. Thus, a landowner seeking a zoning change, variance, exception, or the like, must seek approval from both the locality, as well as a change

in state legislation. The state and locality are therefore provided with veto power over actions of each other, which may meet with substantial favor from the local citizenry. In addition, joint action would, as many authors have indicated, lessen "parochialism" among localities, as state involvement is injected to protect the wider, greater-than-local interest.

Most of the public use area environs districts would fall within county zoning jurisdiction. However, with the continued spatial growth of urban areas, a district potentially may fall within the extraterritorial zoning control of a municipality. The state legislation should provide that the environs district be maintained under the zoning control of one local governing unit. If the extraterritorial zoning range of a municipality grows to encompass more than 50 percent of a public use area environs district, the zoning power for the entire district should be completely shifted to the municipality, but not until it has adopted zoning regulations identical to those enforced by the county, and as stipulated by state law.

This overall procedure would appear to be acceptable to the majority of interests within the state. No "brand-new" concepts were introduced, but rather existing controls were strengthened, and state precedence was utilized in the rationale to develop the mechanism's major feature characteristics.

Conclusions

Fortunately, the overall pressures of development in Nebraska are not as imminent as in many states where growth control mechanisms have been instituted as "reactionary" to the "by-products" of growth. The proposed public use area environs mechanism for implementation in Nebraska probably could be classified as "reactionary" when considering the present conditions in the Salt Valley. But when applied to public use areas in sparsely-populated areas of the state, the mechanism's role assumes a "precautionary" stature, in that problems realized elsewhere may have little chance of ever surfacing if this technique or other suitable protective schemes are implemented in the near future.

One major issue arises when considering that water quality problems in the Salt Valley lakes historically have been attributed in part to agricultural run-off with no evidence to indicate that non-rural uses have constituted a contributing factor. Indeed, it has been proposed that stricter controls be placed upon agricultural activity; but the main thrust of the

proposal emphasizes control of residential activity. Pending an updated examination indicating the effect of non-farm uses upon the water quality of the lakes, it can only be assumed that additional residential activity will impose adverse conditions.

But, although available quantitative evidence cannot attribute residential activity as degrading the public use area ecology, the principal objectives of the Nebraska outdoor recreation plan simply imply that urban land-uses are incompatible with the intentions in providing public recreation:

1. To develop a balanced state park system by providing non-urban park areas for the inspiration, recreation and enjoyment primarily of resident populations; wayside parks for picnic areas or rest stops to accommodate the traveling public; and historic parks to offer representative interpretation of the rich Nebraska historical heritage for the education and enjoyment of Nebraskans and visitors to the state.

2. To manage and preserve those areas which are primarily of value for wildlife habitat, public hunting or fishing, and natural or scenic features unique to a region . . .²⁴
(emphasis added)

These objectives seem to indicate that, upon the creation of the public use areas, uses surrounding the new recreational facilities were considered as compatible and integral components in providing recreational amenity. Although farming is not a "natural" attribute of these surrounding lands, its historical dominance has provided the region with "character," a character that is being threatened with urban encroachment. The inherent scenic "beauty" of agriculture has been expounded by many, and although to some urbanization may possess beauty in its own right, a policy objective mentioned above maintained that a non-urban setting was essential to fulfill the recreational needs of the state's citizenry. For these purposes, although somewhat esoteric, to continue the conversion of lands adjacent to the public use areas into residential use alienates one of the state's basic intents in providing recreational services. This rationale based on aesthetic considerations, however, would be strengthened with documented, quantifiable evidence indicating that ecological damage was occurring due to increased residential activity.

²⁴ Nebraska Game and Parks Commission, State Comprehensive Outdoor Recreation Plan, (Lincoln, 1973), p. 1.2.

One final point to discuss is that of public acceptance. Threatened with additional state control in a state which as experienced scattered instances of extremely unfavorable reactions to planning and land-use control, the task of educating and informing the public and its representatives in the legislature may be onerous. A landowner faced with a penalty for selling his land for handsome capital gains more than likely will object strongly that his "rights" have been violated. However, the successful implementation of the use-value assessment system may mitigate his financial pressures, thus encouraging the landowner to continue that use which he or his predecessors had initiated.

The "learning" process, of realizing the ecological dangers which could result as growth continues unchecked, may be painfully slow. The recognition that individuals acting in concert (whether to the betterment or detriment of the physical environment) can have far-reaching impacts is the fulcrum upon which the proposed mechanism's success is balanced. That fulcrum depends upon whether individuals can accept the notion that, by relinquishing some of the personal benefits they know and enjoy, society as a whole can benefit, and in turn, so can the individual.

APPENDIX

PROPOSED REGULATIONS POTENTIALLY APPLICABLE FOR THE ESTABLISHMENT OF PUBLIC USE AREA ENVIRONS DISTRICTS

AGX Exclusive Agricultural District¹

- A. Purpose. The AGX Exclusive Agricultural District is intended to provide for a full range of agricultural and horticultural uses and to protect these established uses from encroaching development which might depreciate the agricultural economy of the county. The districts are also intended to prevent premature urbanization in areas where public utilities, roads, and other public facilities are planned to meet rural needs only and where present public programs do not propose installations suitable for development at higher densities.²
- B. Permitted Principal Uses.
1. Agriculture, truck gardens, greenhouses, plant nurseries, orchards, other horticultural uses, grain storage facilities, and the usual agricultural farm buildings and structures; but excluding commercial feedlots.
 2. Farm dwellings
 3. Roadside stands offering for sale agriculture products produced on the premises.
 4. Public parks and recreation areas, playgrounds, forest and conservation areas.
 5. Public overhead and underground local distribution utilities.

¹Lincoln City-Lancaster County Planning Department. Model Zoning Ordinance for the Incorporated Villages and Cities in Lancaster County, Nebraska, Article 6 (1 February 1977). Although portions may not be appropriate for a Public Use Area Environs District, this Planning Department proposal provides for more exclusivity in permitted uses than the provisions currently enforced in agricultural or rural districts.

²Minimum lot size of 10 acres.

6. Railroads.
7. Irrigation and flood control facilities.

C. Permitted Accessory Uses.

1. Buildings and uses customarily incidental to the permitted uses.
2. Temporary buildings and uses incidental to construction work which shall be removed upon the completion or abandonment of the construction work.
- *3. General home occupations.
4. Private swimming pools, tennis courts, and other recreational facilities in conjunction with a farm residence.
5. Guest houses and living quarters for persons employed on the premises.

D. Permitted Special Uses.*

1. Churches, temples, seminaries, and convents, including residences for pastors and teachers.
2. Public and parochial schools, colleges, universities.
3. Publicly owned and operated buildings and facilities such as community centers, auditoriums, libraries, museums, fire and police stations.
4. Private recreation areas and facilities, including lakes, ponds, country clubs, golf courses, and swimming pools.
5. Hospitals, nursing homes, and eleemosynary institutions.
6. Private and commercial kennels and facilities for raising, breeding and boarding of dogs and other small animals, provided all buildings and facilities are at least one hundred (100) feet from the property line and one thousand (1,000) feet from any Residential District.
7. Extraction of natural resources.
8. Commercial feedlots which are at least one thousand (1,000) feet from any Residential District.
9. Sanitary sewage treatment facilities.

*Land-uses which may not meet the Nebraska Attorney General's definition of "exclusive" agricultural use.

10. Cemeteries, provided mausoleums, columbariums, cinerariums, cremeteries, and other similar structures shall be located at least one hundred (100) feet from all property lines.

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MECHANISMS TO PROTECT THE ECOLOGICAL
INTEGRITY OF STATE-MANAGED PUBLIC USE AREAS
NEAR LINCOLN, NEBRASKA

by

Robert Earl Burns

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Environmental issues have emerged as major factors influencing the land-use decision-making processes of governments, as typified by recent local, state, and federal legislation and court litigation. Adverse ecological effects arising from various configurations of physical development have admonished society to attune itself more sensitively to the delicate relationship between environmental quality and how that environment is utilized for man's benefit.

Exurban developmental pressures on lands adjacent to state-managed public recreational facilities (containing man-made lakes) near Lincoln, Nebraska have perpetrated both governmental and private interest in preserving these public use areas for the benefit of both wildlife and man. Since these facilities are provided and maintained by state investment and are intended to serve a usership wider than the local jurisdiction, the state should thus be the appropriate level of government to administer protective regulatory measures.

The courts have determined that higher levels of government are justified in assuming the administration of those concerns which are beyond the scope of the locality. Included within this realm are problems arising from environmental misuse, which often "spill-over" into many jurisdictions. Since the courts have determined that environmental quality is a public benefit as of right, its preservation would fall within the realm of police power application. In addition, the preservation of "family values" or "human values", as associated with the qualities of open space, are also a legitimate objective of police power utilization.

The proposed mechanism to protect the physical and social environmental characteristics of state-managed public use areas, not only near Lincoln, but throughout Nebraska, is based primarily upon the concept implemented to protect the visual integrity of the Nebraska State Capitol Building in Lincoln. Other techniques, such as the state's flood plain regulatory provisions and agricultural use-value assessment law, demonstrate the precedent of state involvement in certain land-use issues.

The mechanism, to be established by statute, would require the state and the local government with applicable zoning authority to jointly establish "Public Use Area Environs Districts" on lands adjacent to the state public use areas. Joint action would also provide for exclusive agricultural uses within these districts, to allow more equitable taxation for lands so restricted by the legislation. At the present time, Nebraska's agricultural use-value assessment provisions are not implemented, since the Nebraska Attorney General declared that local agricultural zoning regulations were "too permissive" to apply the state-mandated "exclusive" standard.

Requests for variances, zoning-changes and the like, must meet with both state and local approval. State involvement is to assure that the decision-making process would consider those interests broader than the local scale.

Little evidence has indicated that water pollution in these public lakes has been attributed to residential development, probably due to the present lack of substantial housing activity nearby. One objective of this mechanism, therefore, is to prevent adverse effects potentially arising from increased development.

However, major factors contributing to adverse water quality in the lakes have been traced to the public use area visitors and to agricultural run-off. The Nebraska Game and Parks Commission should implement programs to mitigate those problems arising from area users, while the state should enforce stricter standards applying to specific farming practices.

Many regulatory techniques utilized throughout the country have resembled "reactions" to existing, often severe, environmental problems. While the proposed mechanism may be classified as "reactionary" to conditions near Lincoln, its application could be termed "precautionary" in other areas of the state where developmental pressures near public lands are not imminent. By addressing problems before the immediate need arises, the solutions to those problems potentially can be more effectively and equitably realized.