State and Regional Land Use Planning: The Evolving Role of the State

James C. Nicholas

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol73/iss4/4

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
STATE AND REGIONAL LAND USE PLANNING: THE EVOLVING ROLE OF THE STATE

JAMES C. NICHOLAS*

I. THE PRE-QUIET REVOLUTION ROLE OF THE STATE

A. The Traditional Structure of Land Development Regulatory Authority

Although the states had full authority to regulate the development and use of land, the traditional approach was to delegate such regulatory authority to local jurisdictions.¹ Land use control was believed to be a neighborhood issue, making local governments best suited for such issues.² Many local jurisdictions, however, have ignored this regulatory authority.³

Regulating development through planning is thought to be a relatively new concept, however, today’s urban planning has been practiced in the United States since before the founding of the republic.⁴ Planning has historically been perceived as a luxury,

---

* Professor of Urban & Regional Planning, Affiliate Professor of Law, and Associate Director of Environmental and Land Use Law Program at the University of Florida, Gainesville, Florida. B.A., 1965, M.A. 1967, University of Miami, Ph.D., 1970, University of Illinois.

¹ See ROBERT G. HEALY, LAND USE AND THE STATES 2 (1976) (“[I]n the past the states have delegated most land use powers to local government.”).

² See Adler v. Deegan, 167 N.E. 705, 711 (N.Y. 1929) (Cardozo, C.J., concurring) (“A Zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values.”); 83 AM. JUR. 2D Zoning and Planning § 6 (1992) (“[T]he legislatures of the several states traditionally have regarded control of land development as a matter of primary local concern . . . .”); 1 ROBERT N. ANDERSON, AMERICAN LAW OF ZONING § 2.01, at 29 (discussing how states have traditionally delegated land development to local governmental entities).

³ See HEALY, supra note 1, at 5–6 (discussing the reasons for the shortcomings of land use when controlled locally).

⁴ See generally James G. Coke, Antecedents of Local Planning, in PRINCIPLES AND PRACTICE OF URBAN PLANNING 7 (William Goodman & Eric C. Freund eds., 4th ed. 1968) (setting forth a history of planning in the United States beginning with
however, as American villages grew into large cities, the necessity of planning became readily apparent. New York City, being the first to experience urban problems, enacted legislation concerning tenements in 1867. Throughout the second half of the nineteenth century, larger cities followed New York's example by enacting sanitation and building codes for new construction. These regulations focused on building construction and infrastructure. These regulations failed to recognize location and use as important construction issues. Such concerns would not be addressed until 1916 when New York City adopted its zoning ordinance. Unlike prior enactments, the ordinance addressed the type, location, and use of a building to be constructed. With the adoption of the New York City zoning ordinance, land development control in America underwent a significant evolution. Zoning marked the beginning of the end for the laissez-faire approach to urban planning. Prior to zoning, community plans simply expressed the desires of the community, however, the individual property owner was free to reject these desires. Community plans would now be expressed in the negative through zoning.

colonial times). For example, in 1681 William Pitt commissioned a plan for Philadelphia. See id. at 9. In 1695, the plan for Annapolis was devised. See id. at 10–11. Later in 1699, a plan for Williamsburg was completed. See id. at 7. James Oglethorpe devised the plan for Savannah in 1733. See id. at 9–10. Additionally, Pierre L'Enfant was commissioned to present a plan for Washington, D.C. in 1791. See id. at 11.

5 See 1 ANDERSON, supra note 2, § 1.04, at 11 (discussing the actions of the New York City government in response to problems including poor housing and disease).

6 See id. § 1.05, at 11–12 (explaining how New York City's legislation caused other municipalities to pass similar enactments).

7 See id. § 1.04, at 11 ("[The] tenement law . . . regulated sewage disposal, yard space, and minimum elevation of first floors.").


9 See 15 WARREN'S WEED, supra note 8, § 1.03[1], at 7–8 (discussing the types of districts created by the New York City Building Zone Resolution of 1916).

10 See 1 ANDERSON, supra note 2, § 1.14, at 22 ("[New York City Zoning Ordinance] appeared to be a reasonable response to an urgent need to arrest the overcrowding, blight, and dislocation of use which was threatening to spoil urban communities. Accordingly, similar regulations were adopted almost immediately by hundreds of municipalities.").

11 See 15 WARREN'S WEED, supra note 8, § 1.03[1], at 7 (discussing how the New York City Zoning Ordinance gave the municipality the power to exclude uses and types of buildings from certain areas).
The Fourteenth Census of the United States, taken in 1920, found that approximately fifty-one percent of the population lived in urban areas.\textsuperscript{12} Since then, the urban percentage has risen to 75.2 percent.\textsuperscript{13} As Americans urbanized, they began living closer to one another, following industrial rather than agricultural pursuits. Land and land use concerns naturally turned from a frontier-agricultural setting to an urban-industrial setting.

These developments led the United States Supreme Court to issue three monumental decisions in the 1920s. The Court held in 1926 that the regulation of land use per se was constitutional.\textsuperscript{14} In 1928, the Court found that the authority to undertake land use regulation was itself subject to restrictions and limitations.\textsuperscript{15} The Court also applied the constitutional prohibition against the taking of private property without just compensation to land use regulation.\textsuperscript{16} The urban-industrial setting presented new problems concerning public health, safety, and welfare. The response to these concerns came in the form of land use regulations.

As individual states became more urbanized, land development and use regulations became acceptable methods for resolving conflicts. Metropolitan areas, such as New York, Boston, Cleveland, and Los Angeles, were the first to face the land use controversies that accompanied urban growth. At that time, local authority over land use control was conducted on a case by case and piecemeal basis. The result was a hodgepodge of developmental regulatory policies, programs, ordinances, and resolutions that numbed the mind and destroyed coherent approaches.

\textsuperscript{12} See 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES 79 (1920) (stating in table 20 that the urban population was 54.3 million and the rural population was 51.4 million).

\textsuperscript{13} See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 46 (1998) (stating in table 46 that the urban population was 187.1 million and the rural population was 61.6 million in 1990).

\textsuperscript{14} See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that a zoning ordinance is unconstitutional only if it is "clearly arbitrary and unreasonable" and it has "no substantial relation to the public health, safety, morals, or general welfare").

\textsuperscript{15} See Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928) (finding that a zoning ordinance was unconstitutional under the 14th Amendment since it deprived the plaintiff of his property without due process of law).

\textsuperscript{16} See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("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.").
to community planning. This confusing situation led to the Standard State Zoning Enabling Act (SSZE).\textsuperscript{17}

B. The Standard State Zoning Enabling Act of 1924

As land development regulations spread, then Secretary of Commerce Herbert Hoover appointed an advisory committee to develop a standard state zoning enabling act. The objective of the SSZE was to provide order to this rapidly evolving practice. The model act was eventually adopted by all fifty states\textsuperscript{18} and is still relied upon by many states.\textsuperscript{19} The Act's key provisions\textsuperscript{20} are that municipalities may regulate structures and land "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community,"\textsuperscript{21} and that

\[\text{such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.}\textsuperscript{22}

Following the adoption of the SSZE, there was no question about the authority of local governments to regulate land. The SSZEA confined the states to regulating only narrow and specific state interests, such as highway systems. The basic assumption of this model of development regulation is that there is a relationship between the relevant decision-making entity—the local government—and the area that was to receive benefits and incur costs—the local community. Frequently, this is not the case.

\textsuperscript{17} See 9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53B.01, at 53B-2 to 53B-13 (Eric D. Kelley, ed., 1999) (providing the full text of, and commentary on, the SSZE).

\textsuperscript{18} See 1 ANDERSON, supra note 2, § 2.21, at 71.

\textsuperscript{19} See id. at 72.

\textsuperscript{20} See ROHAN, supra note 17, at 53B-2.

\textsuperscript{21} Id. at 53B-4 to 54B-5 (footnotes omitted).

\textsuperscript{22} Id. at 53B-7 (footnotes omitted).
II. THE QUIET REVOLUTION IN LAND USE CONTROL

A. The Problem of Externalities

The purpose of the land development regulatory system is to limit the effects that particular land uses may have on neighboring properties. The objective of land development controls is to limit land use options to those consistent with public health, safety, and welfare. The local control model allows local communities to identify the issues and regulate land use accordingly. Unfortunately, the impacts of land development are frequently shifted from one community to another. The problem of externalities exists when the second group is unable to participate in the decisions that are negatively affecting it.

A classic example of an externality is smoke travelling from one jurisdiction to another. The host jurisdiction would have little incentive to enact or enforce relevant regulations, for it benefits directly from the plant or factory creating the emissions, while the recipient jurisdiction must cope with the costs. The recipient jurisdiction has no authority and is, therefore, unable to influence the host's regulatory decisions. The recipient jurisdiction would need to turn to the state or the federal government for relief.

B. The New Mood

Passage of the National Environmental Policy Act in 1969 was a harbinger of a change in the public's willingness to accept the costs associated with growth and progress.

William Reiley hearkened in a new era of environmental and land use concern in 1973:

There is a new mood in America. Increasingly, citizens are asking what urban growth will add to the quality of their lives.

---

23 See Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926)
24 See Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc., 500 F. Supp. 984, 1025 (D. Or. 1980) (holding that "punitive damages should be awarded in an amount that will deter this and other companies from attempting to impose a portion of their costs of production upon their neighbors").
25 See Southwest Livestock & Trucking Co. v. Texas Air Control Bd., 579 S.W.2d 549, 552 (Tex. Civ. App. 1979) (holding that Texas Air Control Board had jurisdiction under Texas Clean Air Act when it entered its order to control and abate the emissions of odors as air contaminants).
They are questioning the way relatively unconstrained, piece-meal urbanization is changing their communities and are rebelling against the traditional processes of government and the marketplace which, they believe, have inadequately guided development in the past. They are measuring new development proposals by the extent to which environmental criteria are satisfied—by what new housing or business will generate in terms of additional traffic, pollution of air and water, erosion, and scenic disturbance.27

This “new mood” was another facet of the quiet revolution. In fact, it could be argued that the new mood was the cause of the quiet revolution. The rebellion against the traditional development regulatory processes led to a search for some type of land use or environmental arbiter to oversee those processes and, where it was deemed needed, to create new processes that would reflect the “new mood.”

C. An Evolving Role for the State

As developmental impacts became regional, the need to incorporate external effects into local land development could no longer be ignored. A forum was needed to create a degree of coincidence between the area of impact and the jurisdictional authority of the decision makers.

i. Hawaii

Two years after statehood, Hawaii passed its Land Use Law in 196128 and became the first state to assume this role. During that time Hawaii, was experiencing a boom; primarily in tourism and pineapples.29 The inevitable outcome of this joint boom was land use conflicts. The Honolulu urban area was expanding into pineapple lands, thus threatening a very important industry.30 The industry, along with a concerned citizenry, turned to the legislature for assistance.31 The legislature responded with a land use law that vested an unheard of degree of authority in the

30 See id. at 8; see also DEGROVE, supra note 28, at 11.
State Land Use Commission.\textsuperscript{32} The appointed commission divided the state into four districts: urban, rural, agricultural, and conservation.

The State Land Use Commission regulates the use of lands in the rural and agricultural districts. The five counties\textsuperscript{33} control the use of land in the urban district, but it is the State Land Use Commission that controls the expansion of the urban districts.\textsuperscript{34} Land uses in the conservation districts are under the exclusive authority of the State Department of Land and Natural Resources.\textsuperscript{35} The net result is that both the state and the counties regulate development in urban districts.

This division of authority excluded local governments from decision-making with regard to rural, agricultural, and conservation districts.\textsuperscript{36} The local governments' ability to approve any development that would be contrary to the state's interest in agricultural land preservation is circumscribed. The State Land Use Commission has classified the lands within the state as:

- Agricultural ........................................................................ 48%
- Conservation ........................................................................ 48%
- Urban .................................................................................. 4%
- Rural ................................................................................... <1%\textsuperscript{37}

In effect, the local governments have been removed from the land use decision-making process insofar as basic classifications are concerned. The state government saw a great public interest that could not be addressed by the counties. Thus, the state redirected the decision-making authority on such matters from the counties to the state.\textsuperscript{38}

Since the passage of the Land Use Law the economics of Hawaii have changed.\textsuperscript{39} Pineapples and sugar cane are no longer

\textsuperscript{32} See HAW. REV. STAT. § 205-1 (1993); see also BOSSELMAN & CALLIES, supra note 29, at 6.
\textsuperscript{33} Hawaii does not have any incorporated municipalities. The five counties constitute the local governments of the state.
\textsuperscript{34} See BOSSELMAN & CALLIES, supra note 29, at 8.
\textsuperscript{35} See id. at 10.
\textsuperscript{36} See id. at 8–10 (discussing the regulations imposed by the Land use Commission in rural, agricultural, conservation districts).
\textsuperscript{37} DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 690 (3d ed. 1999).
\textsuperscript{38} See BOSSELMAN & CALLIES, supra note 29, at 6.
\textsuperscript{39} See id. at 13 (noting that agriculture declined in importance and was replaced by tourism as the major source of income).
The growing and processing of these two historically important crops have been relocated to lower cost areas of the world. Today, there is no need to protect those lands from urban intrusion, yet the Land Use Law lives on, virtually unchanged since 1961.

ii. Oregon

The State of Oregon entered the land use arena in 1969 with the passage of Senate Bill 10. This act required all Oregon cities and counties to adopt land use plans, but failed to require the consideration of any particular state or regional issues. The local jurisdictions were, therefore, left to assess planning matters according to local interests. Senate Bill 10 was generally deemed a failure. Those jurisdictions that wanted to engage in planning did so, and those that did not went through a meaningless exercise. The importance of Senate Bill 10 is that it led to the 1973 passage of Senate Bill 100, the Oregon Land Use Act.

Oregon adopted nineteen state land use goals and required all state, regional, and local plans to conform to those goals. The State would maintain authority over all local land use decisions until the local government developed a plan that satisfied the nineteen goals. This, in effect, nullified the delegation of land regulatory powers until the state goals were incorporated into local plans. When it was found that a local goal was in conformity with the state goals, the plan was acknowledged and the state re-delegated land regulation powers to the jurisdiction.

---

40 See id. at 13–18; see also George de Lama, Sugar King No More in Hawaii; At Plantations, Jobs, Way of Life Melting Away, CHI. TRIB., June 19, 1994, at C1 (describing the human and economic implications of Hawaii's waning sugar industry), available in Lexis, Newspaper Stories, Combined Papers.

41 See BOSSELMAN & CALLIES, supra note 29, at 15 (noting that "heavy investments were made in pineapple plantations in Taiwan, Malaya and other African and oceanic countries").

42 See DEGROVE, supra note 28, at 238.


44 See DEGROVE, supra note 28 at 238.

45 See id.

46 See KNAAP & NELSON, supra note 43, at 25; See also CALLIES ET AL., supra note 37, at 691.

47 See KNAAP & NELSON, supra note 43, at 23.

48 See id.
The best known component of the Oregon planning system is the Urban Growth Boundary (UGB) which follows Goal 14. The UGB separates urbanizable land from rural land in order to accommodate an orderly and efficient transition from rural to urban land use. In addition, the Land Conservation and Development Commission (LCDC) was created by statute and was vested with the authority to develop the state land use goals and then to review plans to determine conformity with those goals. In 1979, the Land Use Board of Appeals (LUBA) was created and authorized to hear appeals of land use decisions. Rulings by the LUBA are taken directly to the appellate courts.

Development within the UGB is largely free of state (LCDC) oversight, while development decisions outside of the UGB are carefully reviewed by the LCDC and are appealable to the LUBA. In this manner, the state goals have been injected into local planning and development permitting. The role of the state has been to articulate the broader goals, assure conformity to those goals in local plans and provide an appellate route for local land use decisions that allegedly conflict with the nineteen goals.

Oregon’s Land Use Act has been the subject of continuous controversy. There have been two referenda and an almost successful initiative seeking to repeal the act. Although these efforts have failed, the opposition to Oregon’s land use management system is large enough to continue the debate on the basic merits of the system, and thus the efforts to repeal continue.

---

49 See CALLIES ET AL., supra note 37, at 691.
50 See id.
51 OR. REV. STAT. § 197.825 (1997). Originally the LCDC dealt with appeals. The LUBA was created in order to provide a more impartial appellate process. Prior to 1983, LUBA rulings were reviewed by the LCDC. However, Act of Aug. 9, 1983, ch. 827, § 30, 1983 Or. Laws 1607, 1624 (codified as amended at OR. REV. STAT. § 197.825 (1997)), dropped LCDC review of LUBA rulings, giving the appellate process its present form.
52 OR. REV. STAT. § 197.324 (1997).
53 See KNAPP & NELSON, supra note 43, at 22.
54 See id. at 32.
55 See DEGROVE, supra note 28, at 288–90.
iii. Florida and the ALI Code

Florida was the last state to adopt the Standard State Zoning Enabling Act in 1969. By 1972, Florida had evolved from a vast, unpopulated state that was hostile to land use regulation, to one receptive to such regulations. The new public mood, as reflected through the Florida legislature, was suspicious of the ability and willingness of local governments to take the steps necessary to protect the state's fragile natural environment. It is more likely that the public was more concerned with the abilities and willingness of neighboring jurisdictions rather than their own city or county. Regardless, this suspicion led to a search for land development regulatory approaches that would supplement local planning resources and provided a route to appeal the approval of certain ill-advised developments to a tribunal that maintained more than a local perspective.

Florida is a large and very diverse state. Much of its coastal areas are experiencing rapid development, while most of the interior areas are experiencing little growth pressure—Orlando being a noted exception to this general pattern. After the existing models of state planning were deemed inapplicable, the state turned to the ALI-ABA Model Land Development Code as a means of addressing its land regulatory dilemmas.

D. The Environmental Land and Water Management Act of 1972

The two key provisions of the ALI-ABA Model are the "area of critical state concern" and the "development of regional im-

---

56 FLA. STAT. ch. 163 II (1969). When this statute was repealed in 1985 as being superfluous, the title 163 II was given to the Local Government Comprehensive Planning and Land Development Regulation Act. This latter statute is commonly referred to as the Growth Management Act.

57 See DEGROVE, supra note 28, at 103 (discussing certain environmental events that led to a new attitude toward growth management). In 1974, however, only 29 of Florida's 67 counties had zoning ordinances. See id. at 162.

58 See id. at 161 (stating that at that time "local governments were ill-prepared to cope with land- and growth-management problems").

59 See id. at 103-08 (describing the series of problematic public construction projects which galvanized environmentalists and spurred state land use legislation).

60 See Thomas R. McKeon, Comment, State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine, and Florida, 19 B.C. ENVTL. AFF. L. REV. 385, 410 ("Florida is the only state to adopt substantially all the provisions of the Model Code."); DEGROVE, supra note 28, at 109 (describing the appeal of the ALI model to Florida law makers).

61 MODEL LAND DEV. CODE § 7-201 (1976).
These two provisions were incorporated as the primary components of Florida’s Environmental Land and Water Management Act.63

E. Area of Critical State Concern (ACSC)

This process allows the state to designate certain areas of the state as being of critical concern. The relevant areas of the state would be proposed for designation by the state land planning agency.64 The Governor and Cabinet,65 sitting as the Administration Commission, would decide whether or not to designate an area. In the nomination, the agency must submit “principles for guiding development,”66 which are, in effect, an interim plan and interim development regulations.

Once an area is designated, the local government is expected to develop a comprehensive plan, and implement development regulations, which are consistent with the principles for guiding development.67 When such a plan is adopted and approved by the Administration Commission, the area is to be de-designated.68

Only four areas have been designated Areas of Critical State Concern: The Big Cypress Swamp (1973),69 the Green Swamp (1974),70 the Florida Keys (1976),71 and Apalachicola Bay

---

62 Id. § 7-301.
63 FLA. STAT. ch. 380 (1999). The area of critical state concern is contained within § 380.05 and the development of regional impact is in § 380.06.
64 This agency is now the Florida Department of Community Affairs. In 1972 the state land planning agency was the Division of State Planning.
65 Florida has an elected cabinet that shares executive powers with the governor.
66 FLA. STAT. ch. 380.05(1)(a) (1999).
67 See ch. 380.05(1)(a).
68 See ch. 380.05(1)(b).
69 See ch. 380.055; see also DEGROVE, supra note 28, at 131–32 (describing the state-protected area).
70 See ch. 380.0551; see also DEGROVE, supra note 28, at 133 (describing the area as a critical water recharge area).
71 See ch. 380.0552. The Florida Keys are made up of a 100-mile long archipelago running from the southern tip of mainland Florida to Key West. The City of Key West was included in the original designation but was deleted in 1982 when it adopted a plan that was consistent with the principles for guiding development. The City of Key West is the only critical area that has been de-designated.
(1979). The host local governments and property owners strenuously opposed the critical area designations. The fighting was especially heated in the Florida Keys. The local governments were insulted by this challenge to their competency as well as their authority. The intergovernmental wrangling was so prevalent that it commonly overshadowed the goals of the designation. Property owners saw designation as a step toward limiting, if not totally eliminating, their developmental rights and property values.

The critical area process was to function as a cooperative process with an emphasis on the state assisting the local jurisdiction in achieving state goals. This theory was far from the resulting reality of critical area management. Local governments saw designation as their worst nightmare. Their dislike for the program was so great that a threat of designation spurred action. An alternative to designation grew out of the passions that surrounded the ACSC. This alternative was “resource planning and management committees.” These committees include local elected officials as well as property owners and are charged with the task of organizing “a voluntary, cooperative resource planning and management program to resolve existing, and prevent future, problems which may endanger those resources, facilities, and areas . . . .” No area has been designated an ACSC since 1979, now twenty years ago. There have been several re-

72 See ch. 380.0555. A bay of the Gulf of Mexico in Florida’s “Big Bend,” roughly due south of Tallahassee. This area is noted for abundant shellfish beds that were being threatened by mainland run-off.
73 See DEGROVE, supra note 28, at 131–36 (discussing the reactions of various groups to the critical area designations).
74 See id. at 136.
75 See id. at 136–51.
76 See id. at 116–17 (describing the opposition’s characterization of the legislation as “far reaching and devastating”).
77 See FLA. STAT. ch. 380.021 (1999).
78 See DEGROVE, supra note 28, at 131 (characterizing the response to each critical area designation as a “political firestorm”).
79 Chapter 380.045 incorporated the alternative to designation into the statute, which it now exists as a formal alternative to critical area designation. This chapter now requires resource planning and management committees as a prerequisite to critical area nomination.
80 See ch. 380.045(1).
source planning and management committees (RPMC). This alternative process was used to devise mutually acceptable development regulations for Charlotte Harbor, Hutchison Island, and the Suwannee River. While the RPMC process proved to be a better alternative, it is no longer used. With the 1985 passage of the Growth Management Act, the state assumed the authority to review and accept local comprehensive plans. This review afforded the state land planning agency the opportunity to require “consistency” between state and regional

---

81 These include the Green Swamp Resource Planning and Management Committee; the Northwest Florida Coast Resource Planning and Management Committee; the Santa Rosa Coast Resource and Management Committee; the Kissimmee River Resource Planning and Management Committee; the Suwannee River Resource Planning and Management Committee; and the Florida Keys Resource Planning and Management Committee.

82 Charlotte Harbor is a river estuary in southwest Florida that flows into the Gulf of Mexico. It is “one of the most productive sea nurseries in the state,” but it is threatened by the flow of harmful algae from the Peace River which causes a condition known as Red Tide. See Victor Hull, Fixing Environmental Mistakes; State to Recreate Lost Wetlands at Headwaters of Peace River, SARASOTA HERALD TRIBUNE, June 29, 1999, at 1A, available in Lexis, Newspaper Stories, Combined Papers; Tom Palmer, Lakes Group Tours Harbor; Organization Learns the Impact of Peace River Beyond the Polk County Line, LEDGER (Lakeland, Fla.), June 13, 1999, at B1, available in Lexis, Newspaper Stories, Combined Papers. The build-up of algae is the result of water stagnating in abandoned phosphate mines. See Hull, supra.

83 Hutchinson Island is a barrier island along the Atlantic coast of Florida, north of Palm Beach. The Hutchinson Island community is currently embroiled in a battle to prevent the construction of a bridge that would link Port St. Lucie with the Island. The proposed bridge would cut through a nine-hundred and fifty acre environmental preserve. See Andy Reid, Environmental Waters Trouble Proposed Bridge Route, PRESS JOURNAL (Vero Beach, Fla.), June 20, 1999, at A8, available in Lexis, Newspaper Stories, Combined Papers. The build-up of algae is the result of water stagnating in abandoned phosphate mines. See Hull, supra.

84 See Sam Miller, Development Threatens Sleepy Suwannee, UNITED PRESS INT'L, Oct. 26, 1981, available in LEXIS, Fla. News Sources File. (“The Suwannee, immortalized in song by Stephen Foster, flows some 230 miles from the Okefenokee Swamp across north Florida into the Gulf of Mexico, making for some of the state’s most pristine settings.”). Some of the proposals by the Suwannee’s RCMP include: (1) Restricting the density of subdivisions along the river; (2) Prohibiting septic tanks in flood areas; and (3) Restricting the natural vegetation that can be destroyed along the river. See id.

85 See Fla. STAT. ch. 163.3184 (1999).

86 See ch. 163.3184(8)(a) (“The state land planning agency, upon receipt of a local government’s adopted comprehensive plan or plan amendment, shall have 45 days for review and to determine if the plan or plan amendment is in compliance with this act.”); Board of County Comm’rs v. Snyder, 627 So. 2d 469, 476 (Fla. 1993) (stating that the purpose of such a review process is not to “preclude development but only to insure that it proceed in an orderly manner”).
planning goals.\textsuperscript{87} This process has succeeded in providing a means for achieving state and regional goals. The result has been no further use of either the Area of Critical State Concern or the Resource Planning and Management Committee processes.\textsuperscript{88} Both of these processes, however, are still in the statute and remain available for use, or threat of use.

\textbf{F. Developments of Regional Impact}

This second essential component of the ALI-ABA code allows the state to identify certain types of developments as Developments of Regional Impact (DRI), and to require a special review by Regional Planning Councils pursuant to criteria promulgated by the state.\textsuperscript{89} The state land-planning agency may participate in the process.\textsuperscript{90}

A DRI is defined as a development that, "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."\textsuperscript{91} Florida's implementing rules identified developments presumed to be DRIs based on their size as measured by the number of dwelling units, floor area or acreage.\textsuperscript{92}

\begin{itemize}
\item \textsuperscript{87} See ch. 163.3177(10)(a).
\item [F]or the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan, a local plan shall be consistent with such plans if the local plan is 'compatible with' and 'furthers' such plans. The term 'compatible with' means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term 'furthers' means to take action in the direction of realizing goals or policies of the state or regional plan.
\item \textsuperscript{88} The Suwannee River Resource Planning and Management Committee, the last one empanelled, submitted its final report in September 1982. See John L. Shoemyen, A Success Story: The Suwannee River Resource Planning and Management Committee, FLA. ENVTL. & URB. ISSUES, Apr. 1983, at 22.
\item \textsuperscript{89} See FLA. STAT. ch. 380.06(2) (1999) (listing the criteria that the councils are to consider including: the extent to which the development would create or alleviate environmental problems; the increase in vehicular and pedestrian traffic; the number of residents and employees present in the development area; the size of the development site; the likelihood of additional or subsidiary development; the impact on energy demand; and unique qualities of the area.).
\item \textsuperscript{90} See ch. 380.06(23)(a)–(c).
\item \textsuperscript{91} See ch. 380.06(1).
\item \textsuperscript{92} See FLA. ADMIN. CODE ANN. r. 28-24.010 (1999) (formerly r. 22f:2.10). The rules contain precise criteria for DRI designation. These criteria vary by the size of the population of the county in which the DRI will be located. In addition, the rules
\end{itemize}
The DRI developer must file an Application for Development Approval\(^9\) (ADA) with the local government, the Regional Planning Council (RPC), and a number of other local, regional, and state agencies.\(^9\) The RPC must submit a report to the local government addressing whether, and to what extent:

1) The development will have a favorable or unfavorable impact on state or regional resources or facilities;
2) The development will significantly impact adjacent jurisdictions;
3) The development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment.\(^9\)

The DRI is a controversial means of managing development. It is an expensive and lengthy process, drawing frequent developer complaints.\(^9\) The DRI process routinely takes two years or more to complete\(^9\) and can cost millions.\(^9\) Additionally, it subjects developments and developers to high public scrutiny, making them "targets" for various anti-development groups. Another shortcoming of the DRI is that more than ninety percent of new development did not go through the process.\(^9\) Nevertheless, the evidence is overwhelming that DRI developments are better

---

\(^9\) See r. 9J-2.022(1).

\(^9\) See id.

\(^9\) See § 380.06(12)(a)(1)-(3).

\(^9\) Cf. JAMES C. NICHOLAS, STATE REGULATION/HOUSING PRICES, 82-84 (1982) (discussing causes of the problems with the DRI process and making recommendations for its improvement).

\(^9\) See R. Michael Anderson, OK Given Builder to Start Work; Centex Plan: 3,790 Homes, 2,100 Acres, FLORIDA TIMES-UNION (Jacksonville), Feb. 28, 1998, at 1, available in Lexis, Newspaper Stories, Combined Papers. Much of the time is devoted to what are in effect negotiations, usually involving road improvements to be made or paid for by the developer. For instance, the developers of the Flemming Island Plantation in the Jacksonville area, recently agreed to spend close to eight million dollars on improvements to highway U.S. 17 before getting final approval under a DRI from the Northeast Florida Regional Planning Council. See id. A previous developer had abandoned the DRI plan in the late 1980s, and more than ten years passed before this final approval. See id.

\(^9\) See NICHOLAS, supra note 96, at 65.

planned and more environmentally sound than other developments.\textsuperscript{100} Additionally, developers have found that an approved DRI vests them with more development rights than other types of approvals.\textsuperscript{101}

The vast majority of DRI applications are approved:

- Approved
  - Without conditions............................................ 9%
  - With conditions................................................ 84%
- Denied ................................................................. 7%\textsuperscript{102}

The significant statistic is that eighty-four percent of DRI applications are approved with conditions. Most developers argue that the DRI process is really a process of negotiation, with the upper hand being held by the public agencies.\textsuperscript{103} The items agreed upon in the negotiations are memorialized in the conditions accompanying the approval.

The DRI process, while being controversial, has stood the test of time. Twenty-five years after its adoption, the DRI process is still in use. DRI developments tend to be held to higher standards than the norm, but this is offset by the additional rights vesting in DRI developments.\textsuperscript{104} The statute has been amended in order to ease the burdens of the process on developers and to increase the rewards.

\textbf{G. Local Government Comprehensive Planning Act of 1975}

In 1975 the legislature passed and the Governor signed into law the Local Government Comprehensive Planning Act (LGCPA).\textsuperscript{105} The LGCPA requires all local governments to adopt comprehensive plans and implement them with appropriate land development regulations.\textsuperscript{106} Once adopted, the plan has the force

\textsuperscript{100} See id.
\textsuperscript{102} See DEGROVE, supra note 28, at 155.
\textsuperscript{103} See NICHOLAS, supra note 96, at 53, 66.
\textsuperscript{104} See Rhodes & Sellers, supra note 101, at 508–09 (discussing the requirements placed on developers to obtain development agreements and the additional rights afforded developers who enter into development agreements with municipalities).
\textsuperscript{105} See FLA. STAT. ch. 163.3161–.3211 (1999).
\textsuperscript{106} See chs. 163.3167(2), 163.3201.
THE EVOLVING ROLE OF THE STATE

While cities and counties were required to develop, adopt and implement comprehensive plans, they were not required to consider, let alone conform to, state or regional concerns. Rather, the LGCPA was based on state or regional matters being integrated into local planning through the Area of Critical State Concern. The required review of local plans by state and regional agencies was purely advisory. Simply put, the LGCPA was considered to be a failure.

A 1982 study found that many local jurisdictions had exploited loopholes in the act that resulted in:

- Frequent amendment of the plan, often proceeded by requests for development approval (rezonings, etc.);
- Adoption of loosely worded "policy plans" that provided little, if any, direction for developmental decision making;
- Lack of consideration of state and regional planning concerns;
- Failure to conform development decisions to the plan because citizens lacked standing to challenge development orders for lack of consistency with the comprehensive plan.

The acknowledged shortcomings were the beginnings of the 1985 legislation commonly known as the Growth Management Act (GMA). The State Comprehensive Plan was adopted as a

---

107 See ch. 163.3194.
108 See ch. 163.3194(1)(a) ("After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such a plan or element shall be consistent with such plan or element as adopted.").
109 See Editorial, "Super" Growth?, ST. PETERSBURG TIMES, Mar. 3, 1996, at 2D (explaining that the plans developed by cities and counties were required to be submitted to the state for review, but not enforcement, and indicating that the passage of the 1985 Growth Management Act corrected this problem by requiring state approval and enforcement of the plans), available in Lexis, Newspaper Stories, Combined Papers; see also Jon East, You Can Aid State in Growth Management, ST. PETERSBURG TIMES, Oct. 14, 1987, at 2, available in Lexis, Newspaper Stories, Combined Papers.
110 See East, supra note 109, at 2.
112 FLA. STAT. ch. 163.3177(9)(c) (1999).
These two statutes were directed at a coordinated system of state, regional, and local planning. Florida followed Oregon's example of adopting statewide goals. The State Comprehensive Plan met Oregon's nineteen goals, and added many more with greater detail. An additional import from Oregon was what became known in Florida as "consistency." All regional plans had to be consistent with the state comprehensive plan and all local plans had to be consistent with both the regional and the state plan.

III. LESSONS LEARNED

The growth of our population has created increasing environmental and land development problems. The response to these problems has been the delegation of land development authority to local jurisdictions. This authority exercised at the discretion of the local jurisdiction. Land use matters that were of local concern were responded to, while those that were not seen as being of local concern were not. This approach to the regulation of land use ignored regional and state matters. To address state or regional concerns communities needed to either establish a forum for such matters, or inject such issues into local land regulatory procedures. These two alternatives were the bases for the two general models of state and regional land use controls.

Hawaii and Oregon created new forums in which state and regional land use issues would be addressed. Both states identified a specific set of interests and required special state approvals for land developments affecting those interests. Local jurisdictions were not directly involved in these procedures, however, they were certainly interested critics. Whether by plan or coincidence, the Hawaii and Oregon systems presuppose that there will be inherent differences between the local and the state/regional interests. These new forums facilitated the injection of state/regional matters into local land development decisions.

Florida, by contrast, developed a regulatory system that presupposed that state or regional issues would be adequately ad-

---

114 See ch. 163.3177(9)(c) (authorizing the state land planning agency to determine the consistency of local plans with "the state comprehensive plan and the appropriate regional policy plan[s]").
dressed once such issues were identified. Not being totally naive, however, the Florida legislature adopted procedures that would allow the state to modify or set aside local land development decisions. In both facets of its legislation, Florida had to make use of the appeal procedures to give credibility to the state agencies in the local decision-making process. Florida resembles Hawaii and Oregon in that there is a state controlled decision-making system that can compel adherence to certain state/regional policies. In Florida, the system only comes into play after the local decision-making has been completed, while in Hawaii and Oregon it precedes the local process.

In all three states, the state-mandated process has been controversial and commonly resented by local governments. Some states, including Georgia and Maine, have attempted to craft growth management legislation with a kinder and gentler approach. Certainly, Florida's willingness to take on locally unpopular positions was critical to achieving its objective. For example, after twenty-five years of the Green Swamp Area's being designated a Critical State Concern, the host local governments have yet to adopt development regulations consistent with the state-identified regional interests. Absent an aggressive state stance, regional issues would not have been addressed.

A. The Importance of Intergovernmental (and Interpersonal) Relationships

Hawaii, Oregon, and Florida have all experienced intergovernmental hostility. Much of this hostility is due to the perceived infringement on local government's home rule as well as their pride. Much of the hostility is also due to a perception of superior

---

115 See ch. 163.3184(4); Sylvia R. Lazos Vargas, Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks, 23 FLA. ST. U. L. REV. 315, 383 n.348 (1995) (noting that if "local comprehensive plans are not in compliance with legal requirements, the [state] is empowered to challenge the local government's comprehensive plan in administrative hearings").
116 That is, the DRI and the area of critical state concern.
117 See ch. 163.3184(4).
118 See id.
119 No attempt is being made here to contrast the relative success of Georgia and Maine with Hawaii, Oregon, or Florida.
120 Primarily Lake and Polk counties in west central Florida.
121 The Green Swamp is a primary source of potable water for the 1.5 million plus population of the Tampa-St. Petersburg metropolitan area.
attitudes on the part of state bureaucrats. Local officials frequently treated state agency representatives as enemies.

A significant portion of Florida's intergovernmental problems can be traced back to the funding and staffing of the state land-planning agency. The legislature simply did not provide adequate resources for the agency to carry out its assigned functions.\textsuperscript{122} Thus, personnel and resources were stretched. Adding to the problem of limited resources, a large proportion of the new positions were entry level, resulting in relatively inexperienced individuals attempting to implement state mandated programs within a hostile and emotionally charged environment.\textsuperscript{123} Some observers of Florida's implementation period suggest that Florida's biggest problem was failing to hire persons with local government and private sector planning experience. Employing such individuals could have avoided many of the problems confronted in implementation.

B. The Need for Clear Delineations of Authority

Hawaii created a state agency and charged it with exclusive authority over a defined set of land use decisions.\textsuperscript{124} Oregon created an independent agency and charged it with an appellate authority over a defined set of land use decisions.\textsuperscript{125} By contrast, Florida dispersed authority and decision-making among local, regional, and state agencies.\textsuperscript{126} With the exception of Areas of Critical State Concern, the distribution of authority among the participating agencies is unclear and the subject of turf battles. Clearly defining the role for state agencies could have prevented some of the more acrimonious debates and challenges.\textsuperscript{127} These

\textsuperscript{122} See DEGROVE, supra note 28; at 122–23.

\textsuperscript{123} Letter from Daniel McIntyre, Esq., County Attorney, St. Lucie County, Fla., to James C. Nicholas, Professor of Urban & Regional Planning, University of Florida, Gainesville, Fla. (Feb. 18, 2000) (on file with author).

\textsuperscript{124} See HAW. REV. STAT. § 205-1 (1993) (creating the state land use commission); see also text accompanying notes 39–41 (discussing the commission).

\textsuperscript{125} See OR. REV. STAT. § 197.810 (1979), amended by OR. REV. STAT. § 197.810 (1999) (creating the land use board of appeals).

\textsuperscript{126} See FLA. STAT. ch. 380.05 (1999) (creating the Area of Critical State Concern); § 380.06 (creating developments of regional impact); FLA. STAT. ch. 163.3161 (1999) (enacting the Local Government Planning and Land Development Regulation Act).

\textsuperscript{127} See, e.g., Board of County Comm'rs v. Snyder, 627 So. 2d 469, 476 (Fla. 1993) (defining the burdens of both the government and landowners in having property rezoned, because the Growth Management Act fails to define these burdens).
contests redirected energy away from the tasks at hand, while resulting in hard feelings that encumbered working relationships.

In Hawaii and Oregon, there are interagency dynamics, and the various agencies are frequently at odds. But, the clear delineation of state/regional authority vis-à-vis local jurisdictions has been effective in easing such conflicts. One interesting facet of the Hawaiian system is the extent of informal interactions among the various individuals—state, local, public, and private.

C. Achievements

All three states have established programs that inject state and regional issues into local land development decision-making. Each program is different and reflects the particular nature and situation of the individual state. The common characteristic is the ability of the state or regional entity to compel consideration of certain issues. Florida’s earlier efforts provided very little authority, for either state or regional agencies, to compel considerations. Rather, those agencies were largely advisory. Subsequent amendments increased and clarified primarily state authority. While the resulting exercise of that authority has been contentious, the objective of injecting state and regional issues into local comprehensive planning and land development regulations has been achieved.