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Coastal Zoning

James H. Ewalt

Robert H. Deaderick

COASTAL ZONING*

In today's atmosphere of environmental awareness, protection of the coastal wetlands seems appropriate for many reasons. The wetlands include much of the most aesthetically pleasing areas in the United States, while also being a source of recreation and enjoyment. Man has long had an economic interest in the valuable natural resources, minerals and fish which the wetlands yield.[1] The result is a conglomerate of conflicting demands upon the wetlands. The situation begs for definition and control of these interests so that the full potential of the coast can be realized.

Zoning has often been suggested as a means to protect the coastal wetlands.[2] Many states have passed "enabling legislation" authorizing cities and towns to regulate the use of land through zoning.[3] Certainly coastal zoning would appear to be more economically feasible than other methods of control such as condemnation.

While attempts to employ coastal zoning are relatively new, many of the older problems first met by inland zoning reoccur. The major restrictions on zoning appear to be that zonal boundaries must not be unreasonable, arbitrary, or discriminatory. Zoning regulations must be constitutional, with particular emphasis placed on the due process, equal protection and supremacy clauses in the examination of the regulations.[4] Justice Holmes sounded the warning in 1922

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* See Headnotes

1. See generally U. S. FISH AND WILDLIFE SERVICE CIRC., WETLANDS OF THE UNITED STATES 39 (1956).

2. See generally VIRGINIA INSTITUTE OF MARINE SCIENCE, COASTAL WETLANDS OF VIRGINIA (1969).

3. See generally C. RATHKOPF, THE LAW OF ZONING AND PLANNING 51-106 (3d ed. 1956); E. YOKELY, ZONING LAW AND PRACTICE § 25.47-51 (3d ed. 1965); U.S. DEP'T. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926) is the original model used by many states.

4. Dunham, Flood Control via the Police Powers, 107 U.Pa.L. Rev. 1098 (1959).

by saying

> [w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change. [5]

While these problems are important, there are other problems faced by coastal zoning which are perhaps unique. Coastlines are elusive and difficult to determine. They are subject to both natural and man-made changes. They may change from hour to hour, making it virtually impossible to use them as a baseline for zoning.[6] It should also be noted that the proximity of wetlands to navigable waters presents certain problems.

Statutes as well as case law indicate that states have the power to authorize coastal zoning.[7] The United States Supreme Court held in 1916 that states reserve the right to establish for themselves such property rules as may be deemed necessary with respect to water and land within their boundaries.[8] In 1924 a Florida court went further and held that title to marshlands which were subject to tidal overflow and shoal waters of bays and inland waterways was vested in the respective states, and that the states' control was subject only to the federal government's supremacy over

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5. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

6. City of Rye v. Boardman, 11 Misc. 2d 293, 171 N.Y.S.2d 885 (1958) held that no permit was required from the city to install a system of floats and piles for mooring boats where the zoning map showed that the boundary terminated at the shoreline.

7. See 43 U.S.C.A. §§ 1301, 1311; 33 U.S.C.A. § 403 bestowing to States the rights and ownership of the lands beneath navigable waters extending three miles from the coastline, subject to the Federal Government's supremacy over navigation.

8. United States v. Cress, 243 U.S. 316 (1916).

navigation.[9] Indeed, today wetland zoning has been tried in no less than ten coastal states[10] and various local communities.[11] Most of these attempts have met with failure because of Constitutional defects in the proposed statutes.[12]

The power to zone coastal wetlands is potentially much greater than the power to zone the inlands. When use of the coastlands is restricted, access to the coastal waters is also restricted.

In 1967 Maine passed the Wetlands Act, which required permission from the Board before any alteration of the coastline would be allowed. The Board had the power to withhold its permission if the proposed action "would threaten the public safety, health or welfare, would adversely affect the value or enjoyment of the property of abutting owners, would be damaging to the conservation of public or private water supplies or of wildlife or freshwater estuarine or marine fisheries."[13] Just three years later, however, the Board's denial of permission to fill coastal salt marshes which were considered a valuable natural resource was held to be a taking of private land.[14]

Massachusetts has experienced similar difficulties in protecting its coastal wetlands. When a real estate developer was denied permission to fill coastal marshland for a building

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9. State v. City of Tampa, 88 Fla. 196, 102 So. 336 (1924).

10. Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Virginia, North Carolina, Texas, California and Washington have attempted to use some form of zoning legislation to protect their coastal wetlands.

11. It was held in McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954), that localities which have shorelines may protect them by restricting their use, provided that they do not deny land owners all profitable use of their property. The use of the police power to restrict the use of beach land was upheld.

12. Cases cited notes 14-18 infra, and accompanying text.

13. Wetlands Act 12 ME. REV. STAT. ANN. § 4702 (1967).

14. State v. Johnson, 265 A.2d 711 (Me. 1970).

project the court again recalled the warning of Holmes and held that "an unrecognized taking in the guise of regulation is worse than confiscation."[15]

The primary purposes of a zoning ordinance passed by a township in New Jersey restricting the use of swampland were the retention of land in its natural state, the creation of a flood water detention basin, and the preservation of wetland wildlife sanctuaries. Application of the ordinance was held to be an unconstitutional taking.[16]

The court in MacGibbon v. Board of Appeals of Duxbury said,

> . . . 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 Zoning Enabling Act.[17]

By dicta it added that other methods should be used to preserve the wetlands.

In Dooley v. Town Zoning Commission[18] the town of Fairfield, Connecticut made a flood plain zone of an area previously designated for residential use. The new regulation was held to be so unreasonable and confiscatory as to be an unconstitutional taking of private property for public use.[19] The typical judicial approach to zoning cases is exemplified in Associate Justice Shea's opinion. This argument is that all property is held by individuals subject to the limited police power of the state to regulate the use of such property in a rational manner and within

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15. Comm'r of Natural Resources v. Volpe, 349 Mass. 104, 206 N.E.2d 666 (1965).

16. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

17. MacGibbon v. Bd. of Appeals of Duxbury, 255 N.E.2d 347, 351 (1970).

18. Dooley v. Town Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964).

19. Id.

constitutional limits. However, when this police power is used in a sufficiently broad manner it becomes, in effect, an exercise of the power of eminent domain, which should require payment of compensation to the owner. Associate Justice Shea goes on to conclude:

> The important question to be decided then is whether the situation is one which allows regulation through the process of zoning under the exercise of police power or whether the regulations adopted are so unreasonable and confiscatory as to constitute for all practical purposes a taking of private property for public use. . . .Relevant to this determination is the extent to which property values are diminished by the zoning change and its relationship to the health, safety and welfare of the community.[20]

Upon completing the analysis of Fairfield's zoning ordinance, the court concluded that plaintiff's realty had been rendered useless, and the ordinance therefore was unreasonable and confiscatory in violation of the Fourteenth Amendment.[21] The ordinance[22] had attempted to zone a flood plain by restricting it to uses such as parks, playgrounds, marinas, boathouses, docks, clubhouses, wildlife sanctuaries, and farming which, with respect to plaintiff's land, were impractical and greatly reduced its value.[23]

A zoning act regulating land use to fulfill a public purpose will not for that reason alone be declared valid.[24] In reviewing problems involving private land zoning, most courts show a concern for the balance between reduction in value of the individual's land and the interest which the general welfare has gained.[25] Other cases, however,

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20. Id. at 772.
21. U. S. CONST. amend. XIV.
22. Fairfield, Conn., Ordinance for Flood Plain Zoning, Sept. 1960.
23. Dooley, 151 Conn. 304, 197 A.2d 770 (1964).
24. Pennsylvania Coal, 260 U.S. 393 (1922).
25. City of Little Rock v. Parker, 241 Ark. 381, 407 S.W.2d 921 (1966); Urann v. Hinsdale, 30 Ill.2d 170, 195 N.E.2d

reject the balancing technique and hold that exclusive application of this approach does not yield sufficient grounds to determine the outcome of zoning litigation.[26]

When an individual's land has been rendered useless the ordinance will be held unreasonable and confiscatory,[27] as in Dooley, and the state is faced with a dilemma. The law may be held to be void and unconstitutional and therefore not effectively achieve the objectives of wetland protection through environmental control of plaintiff's land. Yet the resultant taking through eminent domain, which is essential to the accomplishment of the purposes under the ordinance, requires just compensation to the property owner.[28] Should the municipality choose to pursue its program further through eminent domain, the treasury may well be depleted and funds allocated. Substantially increased costs would tend to bring about political conflicts from interest groups and to negate the benefits of using the police power to afford protection for coastal areas. Therefore, the effort to control the land-sea interface through zoning without the cost burden of eminent domain requires the construction and implimentation of local ordinances sufficient for the purposes intended, free from constitutional prohibitions, and acceptable within the judicial doctrines of the times.

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643 (1964); La Salle Nat'l Bank v. Chicago, 5 Ill.2d 344, 125 N.E.2d 609 (1955); Shepard v. Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949); Kanefield v. Skokie, 56 Ill. App.2d 472, 206 N.E.2d 447 (1965); Udell v. McFadyen, 40 Misc. 2d 265, 243 N.Y.S.2d 156 (1963).

26. Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963); Vernon Park Realty, Inc. v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Schwartz v. Lee, 50 Misc. 2d 533, 270 N.Y.S.2d 855 (1966).

27. See also Duclos v. Zoning Bd. of Review, 101 R.I. 537, 225 A.2d 520 (1967); Dubois v. Zoning Bd. of Review, 101 R.I. 461, 224 A.2d 606 (1966); Fryer v. City of New Albany, 135 Ind. App. 454, 194 N.E.2d 417 (1963).

28. U.S. CONST. amend. V.

The objectives of these programs can be adopted by federal, state and local authorities after comprehensive study through appointed agencies.[29] The legal implimentation of policies pursuing these agreed upon goals then becomes the province of law study groups and legislative bodies. Their quest is for a form of zoning ordinance which can withstand constitutional examination.

It is from the enabling act that the localtiy gains the power to control coastal land use by zoning,[30] but this power is necessarily subject to certain limitations and restrictions.[31] The state law usually gives the purposes and reasons for which localities may adopt ordinances. These laws may provide for variances within zoning ordinances and at the same time delegate the authority to make exceptions through permits, upon review and hearing of individual applicants. A variance is an authorization of a land use which is prohibited by a zoning ordinance.[32] It is "designed as an escape hatch from the literal terms of the ordinances which if strictly applied would deny a property owner all beneficial use of his land and amount to a confiscation."[33] This has been upehld as a means of accomplishing the desired objectives where a unique case of practical difficulty or unnecessary hardship occurs.[34]

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29. In Virginia an example of such is the Virginia Institute of Marine Science, directed by House Joint Resolution 69 of the 1968 General Assembly ". . . to make a study and report on all marshlands and wetlands in the State. . .

30. McCarthy, 41 Cal. 2d 879, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954).

31. For example, a state is not amenable to the zoning ordinances of its political subdivisions, Town of Bloomfield v. N.J. Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955).

32. See generally Reed v. Bd. of Standards and Appeals, 255 N.Y. 126, 174 N.E. 301 (1931); Foland v. Zoning Bd. of Appeals, 26 Misc. 2d 1093, 207 N.Y.S.2d 607 (1960).

33. Lincourt v. Zoning Bd. of Review, 98 R.I. 305, 201 A.2d 482, 483 (1964).

34. Stacy v. Montgomery County, 239 Md. 189, 210 A.2d 540 (1965).

This approach to zoning employs the local administrative agency to pass upon variances and is extremely important to the effectiveness of coastal zoning. The advantage is evident. The entire land-sea interface, by whatever definition, encompasses a highly volitile, continually changing area. The effects of botanic mutation, tides, chemical changes, and "acts of God" require that the conventional approaches to static land zoning be replaced by more responsive and sensitive arrangements. This calls for administrators and agencies at local levels to review policy decisions, to receive and decide upon application for variances, and to issue special permits. The local bodies afford a closer scrutiny of the problems, are more aware of the environmental needs, and are better able to define immediate objectives.

The use of administrative agencies to impliment zoning restrictions has been widely advocated, but in the case of coastal zoning, where a wide latitude of discretion is required, an additional legal complexity develops--namely, the encouragement of litigation which results from a vesting of such power in an administrative body. This thorn, and the demand for preset regulations, can be related in part to the fact that current enabling legislation adheres to a division between legislative and administrative functions.[35] Such a division at the local level is not dictated by any consitutional requirement.[36]

Any delegation of a quasi-judicial power to a municipal administrative body must include guidelines for the use of its discretion. The adherence to separation of powers, enshrined in much of today's enabling legislation, must be changed in order to pass the necessary power of discretion to administrative boards and realize effective environmental programs. This would require a substantially different attitude from that found in conventional zoning statutes. There would be no distinct boundaries and no fixed zoning map, but rather the enabling act would set forth a comprehensive plan expressed

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35. KRASNOWLECKI, THE CHALLENGE OF PLANNED UNIT DEVELOPMENT, (Regional Plan Association Zoning Bull. No. 114 Feb. 1965).

36. Madnelker, Delegation of Power and Function in Zoning Administration, 1963 WASH. U.L.Q. 60.

in terms of environmental zones. Definitions would be in graphis form and in statements of development and conservation objectives. Other guidelines for discretionary action would relate to the public good as a rule of conduct and the adoption of performance standards for wetlands use rather than rigid specifications. Employing guidelines expressed in terms of explicit objectives would be sufficient to limit discretion and at the same time provide for a more efficient approach by localities to their programs.[37]

This concept of adequate standards is applied in part to several recent items of federal legislation.[38] A trend

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37. Paper presented at the 1964 ASPO National Planning Conference, American Society of Planning Officials.

38. The Wild and Scenic Rivers Act, 16 U.S.C.A. § 1277(c) (1968) says,

> In order to carry out the provisions of this subsection the appropriate Secretary shall issue guidelines, specifying standards for local zoning ordinances, which are consistent with the purposes of this chapter. The standards specified in such guidelines shall have the object of (A) prohibiting new commercial or industrial uses which are consistent with the purposes of the chapter and (B) the protection of the banklands by means of acreage, frontage and setback requirements on development.

The Wilderness Act, 16 U.S.C.A. § 1133(b) (1964) says,

> Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation and historical use.

toward the use of performance standards can be deduced from these acts. Unfortunately, case law has had little time to develop, and the question of judicial approval remains to be determined. Possibly an aid in reaching conclusions favorable to local ordinances will be found in the dicta of older zoning cases such as Burnham v. Board of Appeals of Gloucester, where the court said, . . ."[t]he degree of certainty with which standards for the exercise of discretion are set up must necessarily depend on the subject matter and the circumstances."[39]

The problem of ineffective drafting is exemplified by Dooley.[40] A confiscatory taking resulted from the inability of the private owner to find a reasonable use for his land from among those authorized by the statute. A drafting failure here could easily have been eliminated to retain the effectiveness of the statute. One writer has noted in reference to the case,

> The point to be made is that the drafters of the ordinance did not sufficiently enumerate permitted profitable uses. Possible additional uses for this area might have been golf courses, picnic grounds, skeet shooting ranges, transient amusement enterprises, storage yards for scrap metal, roadside stands for the sale of food or fishing bait, riding stables, etc. It is not enough for the municipality to say that a variance probably would be granted if application were made for such a use. As here, a court may strike

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The Federal Water Pollution Control Act 33 U.S.C.A. § 1160 (c) (3) (1970) provides that,

> Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. In establishing such standards the [agency] shall take into consideration their use value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other legitimate uses.

Although these Acts are not zoning ordinances per se, they do delegate to agencies the guidelines for the administration of environmental legislation.

39. Burnham v. Bd. of Appeals of Gloucester, 333 Mass. 114, 118, 128 N.E.2d 772, 775 (1955).

40. Dooley, 151 Conn. 304, 197 A.2d 770 (1964).

the ordinance as a whole if the listed permitted uses are inadequate.[41]

Massachusetts has successfully avoided the coastal zoning dilemma faced by the Connecticut Commissioner by incorporating into the enabling statute--(a) the right to purchase the parcel declared subject to an unreasonable exercise of police power and (b) the limitation that any such finding shall not affect any other land than that of the petitioner.[42] This allows the municipality to purchase through eminent domain and to hold the land for the purposes of the act. Although this requires an expenditure, the objectives of the environmental program are not frustrated by a striking of the statute.

Using this technique does not, however, insure the success of the coastal protection program. A new problem becomes manifest when local subdivisions are faced with a choice between retaining their broad tax base afforded by industry and, on the other hand, authorizing condemnation expenditures necessary to implement the zoning plan. Even in New York, where the state provides 50% of the funding,[43] cities have not responded favorably when forced to choose between control over revenue-producing entities and over conserved wetlands.[44]

Pennsylvania has a sound approach to the problem. In the event that coastal zoning fails because of a violation of due process, the resulting costs are distributed among the public through the issuance of public conservation bonds. In order to reduce the expense, the property may be offered for resale subject to conservation easements or restrictive use covenants.[45] Realty use then conforms within the purposes of the zoning ordinance, expense has been minimized, and because the public bonds have placed the burden upon the population, the municipality is partially relieved of its financial

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41. Beuchert, Recent Natural Resources Cases, 4 NATURAL RESOURCES J. 445, 447 (1965).

42. MASS. GEN. LAWS ANN. ch. 130, § 105 (1971).

43. Long Island Wetland Bill, N. Y. CONSERV. L. § 394 (McKinney 1967).

44. J. CLARK, CONFLICT IN THE ATLANTIC ESTUARIES, (Am. Littorial Soc. Publications No. 5 1967).

45. PA. STAT. ANN. tit. 32, §§ 5007-13 (1968).

dilemma. The public's resolve and interest in the conservation effort can be measured directly by their willingness to sustain such a bond market.

The Pennsylvania approach to the fiscal problems of conservation zoning may have substantially different effects from state to state, especially when applied to coastal areas. This may occur where powerful private groups exist and seek interests in vast lengths of the coast line. Delaware and New Jersey naturally expect opposition from oil and chemical companies which own large portions of the land-sea interface. In Delaware approximately 40,000 acres along the coast are owned by these corporations. Of the 75,000 remaining, approximately 60,000 now belong to conservation groups, including the state.[46] Zoning to effect future dredging, filling, and shipping functions will create problems. The implimentation of successful coastal zoning in these states will require programs that encourage the direct intervention of private interests pursuing the same objectives as those set out in the zoning program. Policies favoring conservation groups that may acquire lands will counterbalance the efforts of organized non-conforming users. Restrictionsmay not, however, be imposed upon land owners primarily for the purpose of depressing the value of their realty so that it may be purchased later at a modest price. This type of zoning is clearly confiscatory and invalid.[47] Individual and private conservation groups must be stimulated by programs complimentary to coastal zoning in order to achieve the greatest possible results.

Wetland zoning is still in its infancy and, literally, has many rivers yet to cross. It may be that judicial attitudes will, in the end, play the largest part. The call for regulation and the seriousness of the alternatives require that new approaches to zoning be welcomed. Perhaps the words of Chief Judge John R. Brown in Zabel v. Tabb[48] are a

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46. G. SPINNER, A PLAN FOR THE MARINE RESOURCES OF THE ATLANTIC COASTAL ZONE 49 (1969).

47. Morris County, 40 N.J. 539, 193 A.2d 232 (1963).

48. Zabel v. Tabb, 430 F.2d 199, 201 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3356 (1971).

premonitory sign:

> [t]he 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.