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# CREEPING INCREMENTALISM AND CUMULATIVE SYNERGISM: NEW JERSEY'S APPROACH TO STATEWIDE AND REGIONAL PLANNING AND CONTROL OF DEVELOPMENT\*

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## I. INTRODUCTION

Much attention has been given to the programs of statewide and regional planning and development control adopted by Hawaii,<sup>1</sup> Oregon,<sup>2</sup> Florida,<sup>3</sup> Vermont,<sup>4</sup> and other states.<sup>5</sup> These states adopted planning and development control legislation in a sudden and bold

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This article is part of a larger work on statewide and regional planning being prepared by the author.

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1. HAW. REV. STAT. §§ 205-1 to -37 (1985). See Lowry, *Evaluating State Land Use Control: Perspectives and Hawaii Case Study*, 18 URB. L. ANN. 85 (1980).

2. Act of May 29, 1973, ch. 80, 1973 Or. Laws 127, OR. REV. STAT. §§ 197.005-850 (1985) (as amended); see Macpherson & Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 WILLIAMETTE L.J. 414 (1974); Morgan & Shonkwiler, *Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues*, 11 THE URB. LAW. 1 (1979); Morgan & Shonkwiler, *Urban Development and Statewide Planning: Challenge of the 1980s*, 61 OR. L. REV. 351 (1982).

3. Florida State Comprehensive Planning Act of 1972, ch. 72-295, 1972 Fla. Laws 1072, FLA. STAT. ANN. §§ 186.001-911 (West 1987).

4. Vermont Land Use Law, 10 VT. STAT. ANN. tit. 10, §§ 6001 to 6092 (1985) (as

move. Abrupt and instantaneous reform tends to attract national attention and comment. By comparison, New Jersey has adopted, in a relatively quiet, systematic process, a series of individual laws. Taken together, these laws put New Jersey in the forefront of statewide and regional planning and development control. New Jersey's creeping incrementalism enactment process obscured the far-reaching consequences of its legislation.

The New Jersey legislature enacted the planning legislation piece by piece over several decades. The legislation includes a State Planning Act, a Fair Housing Act, a Municipal Land Use Law, numerous environmental protection statutes including a Freshwater Wetlands Protection Act, three statewide regional planning and development programs, and a proposed "transplan" legislation that, if enacted, would strengthen the state's role in regional planning and control of developing.

This article first describes the major components of New Jersey's planning statutes, including the proposed Transplan Program. The article then examines the impact of the synergistic effect of this aggregation of planning legislation. Finally, the article analyzes the omissions and limitations of New Jersey's programs.

## II. CREEPING INCREMENTALISM OF PLANNING LEGISLATION

### A. *The State Planning Act*

New Jersey's State Planning Act<sup>6</sup> became effective in January 1986. The State Planning Act was one of two statutes<sup>7</sup> adopted by the state legislature in response to the state supreme court's decision in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*.<sup>8</sup> In that landmark decision, the court noted the importance of "principles of

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amended); see Daniels and Lapping, *Has Vermont's Land Use Control Program Failed?*, 50 J. AM. PLAN. A. 502 (1984).

5. For a general discussion of state legislation on statewide and regional planning, see F. BOSSELMAN AND D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972); MANDELKER, *ENVIRONMENTAL AND LAND CONTROLS LEGISLATION* (1976); HEALY & ROSENBERG, *LAND USE AND THE STATES* (1979); *THE PRACTICE OF STATE AND REGIONAL PLANNING* (F. So, I. Hand & B. McDowell eds. 1986).

6. N.J. STAT. ANN. §§ 52:18A-196 to -207 (West Supp. 1987); see Wolf & Goldshore, *Key Elements of The State Planning Act*, N.J. MUNICIPALITIES 19 (Feb. 1986).

7. The other statute is the New Jersey Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1987). For an analysis of this statute, see *infra* note 26 and accompanying text.

8. 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter *Mount Laurel II*].

sound planning"<sup>9</sup> and relied on the State Development Guide Plan<sup>10</sup> as a basis for determining the fair share obligations of defendant municipalities to provide affordable housing. The court emphasized that the periodic revision of the State Development Guide Plan would be necessary for this purpose.<sup>11</sup>

The legislative findings of the State Planning Act do not specifically refer to this suggestion of the state supreme court in *Mount Laurel II*. These findings, however, declare independently that the state needs sound and integrated statewide planning and the coordination of statewide planning with local and regional planning. The legislature declared that statewide planning is necessary to conserve natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and public services while promoting economic growth.<sup>12</sup> The legislature also found that an adequate response to judicial mandates respecting housing for low and moderate income persons requires sound planning to prevent sprawl and to promote suitable use of land.<sup>13</sup>

The legislative findings respond to the dilemma created by the State Planning Act. On one hand, the political realities of the state make it necessary to direct attention to the state's land use planning and development review, which occurs primarily at the *municipal* level.<sup>14</sup> On the other hand, the findings also disclose the legislature's decision to limit the powers of municipalities by creating a "cooperative planning process" requiring consideration of state, county, and regional plans and planning criteria.<sup>15</sup>

The State Planning Act has three major provisions. It creates a State Planning Commission, requires the Commission to prepare and adopt (and revise every three years) a State Development and Redevelopment Plan, and creates an Office of State Planning.

Creation of the State Planning Commission denotes a major policy decision in New Jersey. The office of State and Regional Planning in

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9. *Id.* at 242-43 n.16, 456 A.2c at 433 n.16. See Rose, *New Additions To The Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 852-53 (1984) [hereinafter *Lexicon of Exclusionary Zoning Litigation*].

10. *Mount Laurel II*, 92 N.J. at 223-26, 456 A.2d at 422-23.

11. *Id.* at 242-43, 456 A.2d at 432-33.

12. N.J. STAT. ANN. § 52:18A-196(a) (West Supp. 1987).

13. N.J. STAT. ANN. § 52:18A-196(h) (West Supp. 1987).

14. N.J. STAT. ANN. § 52:18A-196(f) (West Supp. 1987).

15. N.J. STAT. ANN. § 52:18A-196(e) (West Supp. 1987).

the State Department of Community Affairs had prepared the prior State Development Guide Plan. The drafters intended it to serve as a guide for state capital improvements rather than as a basis for state-wide planning and development control.<sup>16</sup> The new State Planning Commission is an official state agency established in the Department of the Treasury. It is made up of seven state officials, four representatives of municipal and county governments, and six members of the public.<sup>17</sup>

The primary function of the State Planning Commission is to prepare, adopt, and periodically revise a State Development and Redevelopment Plan. As part of the process, the Commission must estimate and project the needs and costs of state, county, and local capital facilities, including water, sewer, transportation, solid waste drainage, flood protection, shore protection, and related capital needs.<sup>18</sup>

The State Planning Commission issued a draft, or Preliminary State Development and Redevelopment Plan, for review and comment at the end of April 1987. As required by statute, the draft plan seeks to *balance* development and conservation by protecting the State's "natural resources and qualities" while promoting development and redevelopment.<sup>19</sup> Pursuant to the statute, the draft plan identifies areas in the state for growth, limited growth, agriculture, open space conservation, and other appropriate designations.<sup>20</sup>

In preparing the State Development and Redevelopment Plan, the State Planning Commission must solicit and consider the plans together with comments and advice of county, municipal, and other local and regional agencies. The power and influence of county planning boards are greatly enhanced by the process established in the Act by which county planning boards are authorized to "negotiate plan cross-acceptance" among the local planning bodies within the county.<sup>21</sup> "Cross-acceptance" is a comparison of planning policies among governmental levels with the purpose of attaining compatibility between local, county, and state plans.<sup>22</sup> The legislature intended the process to

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16. N.J. STAT. ANN. § 13:1B-15.52 (West 1979), *repealed by* L. 1985, ch. 398, § 18 (effective Jan. 2, 1986).

17. N.J. STAT. ANN. § 52:18A-197 (West Supp. 1987).

18. N.J. STAT. ANN. § 52:18A-199 (West Supp. 1987).

19. N.J. STAT. ANN. § 52:18A-200 (West Supp. 1987).

20. N.J. STAT. ANN. § 52:18A-200(d) (West Supp. 1987).

21. N.J. STAT. ANN. § 52:18A-202 (West Supp. 1987).

22. N.J. STAT. ANN. § 52:18A-202(b) (West Supp. 1987).

culminate with a written statement specifying areas of agreement or disagreement and areas requiring modification.<sup>23</sup>

After the process of cross-acceptance, the county planning boards submit formal reports. The State Planning Commission considers these reports in the preparation of its final plan. The Commission then distributes its plan to county and municipal boards and other interested parties. It holds public hearings and, after completing necessary revisions, adopts the final State Development and Redevelopment Plan.

In addition to the State Planning Commission, the State Planning Act also creates an Office of State Planning in the State Department of the Treasury. The director of the office is appointed by and serves at the pleasure of the Governor. The director also serves as the principal executive officer of the State Planning Commission.<sup>24</sup> These provisions recognize the political implications of planning decisions and make the state planning process subject to the Governor's control.

### B. *The Fair Housing Act*

The New Jersey legislature enacted the Fair Housing Act in July 1985.<sup>25</sup> The statute was one half of the legislature's two-part response to the *Mount Laurel II* decision.<sup>26</sup> The legislature intended the Act to provide standards and procedures by which a municipality could fulfill its constitutional obligation to provide affordable housing.

The legislation provides: (1) for the creation of a Council of Affordable Housing to determine housing regions in the state and calculate regional housing needs and the municipal fair share of those needs; (2) a procedure by which municipalities may obtain "substantive certification" of their zoning ordinances; (3) a mediation and review process to hear objections to a municipality's petition for substantive review; (4) a procedure by which a municipality may propose that it meets a portion of its fair share obligation through a "regional contribution agreement"; (5) a procedure by which a defendant municipality may "phase in" its fair share obligation; (6) a program of financial assistance to help municipalities provide affordable low and moderate income housing; (7) authorization for the state Housing and Mortgage

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23. N.J. STAT. ANN. § 52:18A-202(b) (West Supp. 1987).

24. N.J. STAT. ANN. § 52:18A-201 (West Supp. 1987).

25. Fair Housing Act, 1985 N.J. Laws §§ S. 2046A-2334, [hereinafter Fair Housing Act].

26. The other half of the legislative response is the State Planning Act. See *supra* note 6 and accompanying text.

Finance Agency to administer resale controls, rent controls, and other aspects of administration of the low and moderate income housing; (8) a temporary moratorium on the builder's remedy; (9) amendment of the zoning enabling legislation requiring a housing element to be part of the municipal master plan; and (10) a six-year period of repose for municipalities that settle exclusionary zoning litigation.<sup>27</sup>

Some of the above provisions require further explanation. The Council of Affordable Housing (the Council) is a new state agency created to calculate the housing obligations of municipalities. The legislature authorized the Council to determine state housing regions, estimate the present and future need for low and moderate income housing, adopt guidelines for municipalities to determine their present and future fair shares of regional housing needs and methods of meeting these obligations, and provide predictions of future populations and household size.<sup>28</sup>

In the months following the law's enactment, the Council made all the calculations the Act required. On May 21, 1987, the Council announced its estimates of the number of low and moderate income housing units each municipality would provide for a six-year period.<sup>29</sup> The numbers the Council calculated were lower than the obligations previously determined by the trial court judge to whom the supreme court assigned all exclusionary zoning litigation under *Mount Laurel II*.<sup>30</sup> The trial court calculated the statewide need for low and moderate income housing at 250,000 units. The Council set the total need at 145,707.<sup>31</sup>

The legislation encouraged each municipality to submit a housing plan and a housing element of a municipal master plan to the Council. The housing element must contain (1) an inventory of existing housing, (2) a projection of future housing, including low and moderate income housing, (3) an analysis of the municipality's demographic characteristics, (4) an analysis of present and future employment characteristics, (5) a calculation of the municipality's present and future share of low and moderate income housing, and (6) an analysis of the land most

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27. For an in-depth analysis of this statute, see Rose, *New Jersey Enacts a Fair Housing Law*, 14 REAL EST. L.J. 195 (1985).

28. Fair Housing Act, § 7.

29. The Newark Star-Ledger, May 22, 1986, at 1.

30. For a discussion of some problems created by court-made legislative policy and administrative decisions, see Rose, *Caving In To The Court*, N. J. REP. 31 (Oct. 1985).

31. The Newark Star-Ledger, May 23, 1986, at 1.

appropriate for such housing.<sup>32</sup>

When preparing its housing element, a municipality may choose any combination of techniques which create a realistic opportunity for providing its fair share of affordable housing. Every municipality, however, must "consider" a variety of techniques proposed by the Council, including the following: (1) mandatory set-asides,<sup>33</sup> density bonuses, and higher zoning densities; (2) sufficient residential zoning to assure that the municipality provides its fair share of affordable housing; (3) measures to assure that such housing remains affordable to low and moderate income households for at least six years; (4) infrastructure expansion and rehabilitation required by such housing; (5) donation of municipally owned land or condemned land for low and moderate income housing; (6) tax abatements; (7) use of funds obtained from any state or federal subsidy; and (8) uses of municipality generated funds for construction of affordable housing.<sup>34</sup> The Act, however, does not require municipalities to expend municipal revenue to provide low and moderate income housing.<sup>35</sup>

The Act's provisions relating to "substantive certification" provide municipalities with the incentive to eliminate exclusionary zoning provisions. The drafters achieved this by offering a "presumption of validity" to municipal zoning ordinances that the Council certifies. These provisions effectively return the burden of proof to the plaintiff challenging the validity of municipal zoning on the ground that it is exclusionary.<sup>36</sup> To successfully challenge a municipality's zoning ordinance that the Council has certified, the plaintiff must prove that the housing element and ordinances implementing the housing element fail to allow a realistic opportunity for providing the municipality's fair share of regional housing needs. Often, a developer attacks the validity of the zoning in an effort to increase the development density on his land. The presumption of validity reasonably assures a municipality that courts will uphold the zoning ordinance against such attacks.

Upon certain findings, a municipality may obtain substantive certifi-

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32. Fair Housing Act, § 10.

33. For a discussion of "mandatory set-asides" and other new concepts of exclusionary zoning litigation, see *Lexicon of Exclusionary Zoning Litigation*, *supra* note 9, at 861.

34. Fair Housing Act, § 11a.

35. Fair Housing Act, § 11d.

36. Fair Housing Act, § 17a. The burden of proof was on the plaintiff prior to the *Mount Laurel* decisions.

cation from the Council. The municipality must show that its fair share plan complies with the Council's rules and criteria. Additionally, the Council must find that the municipality has eliminated "cost-generating features" and has adopted "affirmative measures"<sup>37</sup> to achieve its fair share of the region's low and moderate income housing.<sup>38</sup>

The Fair Housing Law contains a provision that authorizes a "regional contribution agreement" by which a municipality may transfer up to one half of its fair share obligation to another municipality by mutual agreement.<sup>39</sup> This provision permits a suburban municipality in the same region as a central city to meet up to one half of its fair share obligation by financing the construction or rehabilitation of housing in the central city.

After receiving a report from the county planning board, the Council must approve regional contribution agreements.<sup>40</sup> After the Council approves the agreement, it must prescribe a schedule of the amount of money the sending municipality is to contribute annually. The Council's approval entitles the agreement to a presumption of validity in exclusionary zoning suits against the municipality. To rebut the presumption, the plaintiff must prove that the agreement fails to allow a realistic opportunity for providing low and moderate income housing in the region.<sup>41</sup>

### 'C. *The Municipal Land Use Law*

The New Jersey Constitution provides a formidable obstacle to *regional* planning and control of development. Under the constitution, the legislature can delegate zoning power to *municipalities*, but not to counties.<sup>42</sup> Pursuant to this constitutional provision, the state legislature enacted a comprehensive Municipal Land Use Law.<sup>43</sup> This en-

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37. *Lexicon of Exclusionary Zoning Litigation*, *supra* note 9, at 855-58.

38. Fair Housing Act, § 14a, 14b.

39. Fair Housing Act, § 11c.

40. Fair Housing Act, § 12c.

41. Fair Housing Act, § 17b.

42. "The Legislature may enact general laws under which municipalities, *other than counties* may adopt zoning ordinances. . . ." [emphasis added.] N.J. CONST. art. IV, § 6, para. 2.

43. N.J. STAT. ANN. §§ 40:55D-1 to -112 (West Supp. 1987). For an excellent analysis of the issues involved in the administration of the New Jersey Municipal Land Use Law, see COX, ZONING AND LAND USE ADMINISTRATION IN NEW JERSEY (1984); MINELY, MUNICIPAL LAND USE (1980).

abling legislation vests the power to plan and zone in municipal governments.

The Municipal Land Use Law authorizes the municipal planning board to prepare and adopt a master plan.<sup>44</sup> The municipal master plan delineates its underlying principles, assumptions, policies and standards. Additionally, the master plan contains various elements, including (1) a land use element, (2) housing plan element, (3) a circulation plan element, (4) a utility service plan element, (5) a community facilities plan element, (6) a recreation plan element, (7) a conservation plan element, (8) an economic plan element and (8) a historical preservation plan element, which relate to the specific problems of the particular municipality.

In preparing the municipal master plan and the related public hearings, the municipal planning board becomes aware of the local community's concerns. Because of local political forces, municipal master plans often become self-centered and parochial. To offset these local pressures, the Municipal Land Use Law requires the master plan to include a specific policy statement indicating the relationship of the municipality's proposed development to the master plans of contiguous municipalities, the master plan of the county in which the municipality is located, and the State Development and Redevelopment Plan adopted pursuant to the State Planning Act.<sup>45</sup> The statutory language of the Municipal Land Use Law, however, requires only a statement that the municipality recognizes the relationship between its master plan and those of other municipalities, the county, and the state.

The municipal governing body is authorized to adopt and amend zoning laws.<sup>46</sup> The Municipal Land Use Law imposes minimal restrictions on the discretion given to the governing body. For example, the planning board may adopt a zoning law only after it has adopted the land use plan element and housing plan element of the master plan, and only if the zoning law is consistent with both elements.<sup>47</sup> This statute fails to specifically require consistency among the municipal zoning law, the zoning laws of contiguous municipalities, or with the

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44. N.J. STAT. ANN. § 40:55D-28 (West Supp. 1987).

45. N.J. STAT. ANN. § 40:55D-28(d) (West Supp. 1987).

46. N.J. STAT. ANN. § 40:55D-62 (West Supp. 1987).

47. N.J. STAT. ANN. § 40:55D-62(a) (West Supp. 1987). The same section, however, also provides that the zoning ordinance may be inconsistent with the land use plan element and housing plan element if the governing body, by a majority of the full authorized membership, so decides and states its reasons in a recorded resolution.

planning of the county or the state.<sup>48</sup>

A landmark New Jersey case, however, held that a municipal zoning ordinance is invalid if it fails to provide for the *regional* need for housing, not merely the need for housing within the municipality.<sup>49</sup> The court reasoned that a valid exercise of the police power must promote the "general welfare," which it defined as "regional general welfare."<sup>50</sup>

It seems clear that regional general welfare concerns matters beyond housing. Arguably, the regional general welfare includes environmental concerns such as water supply, solid waste management, flood control, health facilities, and other subjects of statewide planning.<sup>51</sup> The court's reasoning provides a constitutional basis<sup>52</sup> for requiring all municipal zoning to accommodate regional needs. Under this precedent, courts should invalidate any municipal zoning ordinance that fails to fulfill this requirement. One could argue that this constitutional requirement exists even absent a legislative requirement that municipal zoning laws be consistent with statewide and regional planning.

#### D. *Environmental Protection Statutes*

Over a period of time, the state legislature has enacted a series of environmental protection statutes. Each deals with a particular environmental concern. Taken together, these statutes constitute a legisla-

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48. Under the State Planning Act, however, county planning boards have the authority to negotiate plan "cross-acceptance" to attain compatibility between local, county, and state plans. See *supra* note 21 and accompanying text. It is still unclear whether the state will impose sanctions upon a municipality that refuses to adapt its land use element and housing element to the county and master plan. Additionally, it remains unclear whether the courts will set aside decisions of the governing body to adopt zoning laws that are substantially inconsistent with a municipal master plan and also incompatible with the county and state plans.

49. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*]. For an analysis of this issue, see Williams, *On from Mount Laurel: Guidelines on the "Regional General Welfare,"* in *AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING* 79 (J. Rose & R. Rothman eds. 1977) [hereinafter *AFTER MOUNT LAUREL*].

50. *Mount Laurel I*, 67 N.J. at 175-79, 336 A.2d at 725-28.

51. English, *The General Welfare and Environmental Considerations*, in *AFTER MOUNT LAUREL*, *supra* note 49, at 195.

52. The New Jersey Supreme Court held that the failure of a municipal zoning ordinance to provide for *regional* housing needs violates the "inherent" state constitutional requirements of substantive due process and equal protection. *Mount Laurel I*, 67 N.J. at 174-75, 336 A.2d at 725.

tive statement about the role of the state and counties in regional planning and control of development.

\* *Water Supply Management Act*

The New Jersey legislature enacted the Water Supply Management Act<sup>53</sup> in 1981 to authorize the state Department of Environmental Protection (DEP) to manage the state's water supply system. The legislature achieved this delegation of power by adopting a uniform water diversion permit system and fee schedule and by planning for future water needs.<sup>54</sup> The Water Supply Act authorizes the DEP to adopt rules and regulations prescribing the methods used to divert water, the quantity of water to be diverted, and the standards for water quality.<sup>55</sup>

In addition to its regulatory and management functions, the DEP must prepare and periodically update a statewide water supply plan.<sup>56</sup> The plan includes descriptions of existing statewide and regional ground and surface water supply sources, a projection of and recommendation for improvements of statewide and regional water supply, and construction of facilities needed to meet future demand for water supply.

\* *Water Quality Planning Act*

The purpose of the Water Quality Planning Act,<sup>57</sup> enacted in 1977, is to improve water quality by establishing an areawide waste treatment management planning process to control the sources of water pollution. *Regional planning* is the heart of this statute. The Water Quality Act directs the DEP to establish an "areawide" *continuing planning process*. The legislature declared that, wherever possible, waste treatment management planning areas should be coterminous with *county* boundaries, and that county government should perform the planning.<sup>58</sup>

The Water Quality Act authorizes the county planning board to pre-

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53. Water Supply Management Act, N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1979).

54. N.J. STAT. ANN. § 58:1A-2 (West 1979).

55. N.J. STAT. ANN. § 58:1A-5(b) (West 1979).

56. N.J. STAT. ANN. § 58:1A-13 (West 1979).

57. Water Quality Planning Act, N.J. STAT. ANN. §§ 58:11A-1 to -66 (West 1979 & Supp. 1981).

58. N.J. STAT. ANN. §§ 58:11A-2 and 11A-4 (West 1979).

pare a county water quality management plan.<sup>59</sup> The county plan must be consistent with the areawide plan, which in turn must be consistent with the statewide planning process. The areawide plan contains a program to regulate the location of any facilities which may discharge in the area.<sup>60</sup> Vigorous enforcement of the provision could significantly affect the growth and development of the area.

In addition to the role given to county government agencies, the Water Quality Act directs the DEP to integrate and unify the statewide and areawide water quality management processes. Once an areawide plan is adopted, the DEP is prohibited from awarding funds for any publicly owned treatment works or from granting any permit which conflicts with the plan.<sup>61</sup>

#### \* *Water Pollution Control Act*

The New Jersey legislature enacted the Water Pollution Control Act<sup>62</sup> in 1977 to comply with the Federal Water Pollution Control Act.<sup>63</sup> The state statute establishes a permit system to regulate the discharge of pollutants and allows for state rather than federal regulation.<sup>64</sup>

The state Water Pollution Control Act prohibits the discharge of any pollutant unless the actor has a valid new Jersey Pollutant Discharge Elimination System (NJPDES) permit.<sup>65</sup> The DEP is authorized to grant, deny, modify, suspend, or revoke NJPDES permits. If necessary to maintain the state's water quality standards, the DEP may establish more stringent effluent limitations than those required by the federal act.<sup>66</sup>

The fact that the Act prohibits the DEP from issuing a permit for any discharge that conflicts with an adopted areawide plan significantly affects state and regional planning.<sup>67</sup> Thus, if a proposed use of land is

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59. N.J. STAT. ANN. § 58:11A-5 (West 1979).

60. N.J. STAT. ANN. § 58:11A-5(c)(2) (West Supp. 1987).

61. N.J. STAT. ANN. § 58:11A-10 (West 1979).

62. Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1979 & Supp. 1987).

63. Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251 to 1376 (1986).

64. N.J. STAT. ANN. § 58:10A-2 (West 1979).

65. N.J. STAT. ANN. § 58:10A-6(a) (West 1979).

66. N.J. STAT. ANN. § 58:10A-8 (West 1979).

67. N.J. STAT. ANN. § 58:10A-6(e)(4) (West 1979).

inconsistent with the areawide plan, the denial of a NJPDES permit could effectively prevent such use of land.

\* *Flood Hazard Area Control Act*

The Flood Hazard Area Control Act (Flood Hazard Act) was originally enacted in 1962 to authorize the Division of Water Policy and Supply (DWPS) to delineate and mark flood hazard areas.<sup>68</sup> The New Jersey legislature amended the Flood Hazard Act in 1972 to transfer the DWPS's authority to the DEP and to authorize the DEP to adopt land use regulations for flood hazard areas and to control stream encroachments.<sup>69</sup>

The Flood Hazard Act authorizes the DEP to adopt regulations that delineate as flood hazard areas those locations where improper development and use of the land constitute a threat to the safety, health, and general welfare. The Act demands that when possible, the DEP's flood hazard delineations should be identical to the floodway delineations approved by the federal government for the National Flood Insurance Program.<sup>70</sup> The DEP has the authority to mark conspicuously any flood hazard area. Consent of the owner, however, is necessary prior to the erection of markers.<sup>71</sup>

The statute grants authority to the DEP to regulate land use in delineated floodways<sup>72</sup> by enacting rules and regulations. In such regulations, the DEP may require that landowners obtain its approval for any changes of use in such areas.<sup>73</sup> For example, the Flood Hazard Act prohibits the construction or rehabilitation of any structure in a 100-year flood plain without the DEP's approval and without complying with the DEP's safety standards.<sup>74</sup> In addition, a municipality may not grant an application for development within a delineated floodway or flood fringe area without the DEP's approval.<sup>75</sup>

County government plays an important role in the regulatory process. County governing bodies are authorized to prepare a stormwater

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68. 1969 N.J. Laws, ch. 19, § 1; N.J. STAT. ANN. § 58:16A-50.

69. 1972 N.J. Laws, ch. 185.

70. N.J. STAT. ANN. § 58:16A-52 (West 1979). The National Flood Insurance Program is included in the Federal Flood Control Acts, 33 U.S.C. §§ 701 to 7099 (1986).

71. N.J. STAT. ANN. § 58:16A-53 (West 1979).

72. N.J. STAT. ANN. § 58:16A-50 to 52 (West 1979).

73. N.J. STAT. ANN. § 58:16A-55 (West 1979).

74. N.J. STAT. ANN. § 58:16A-55.2 (West 1979).

75. N.J. STAT. ANN. § 58:16A-55.3 (West 1979).

control and drainage plan for the county.<sup>76</sup> The DEP relies on these plans when deciding whether to approve development applications.<sup>77</sup> The statute further enhances the power of county government by permitting the DEP to delegate its power to county governing bodies to consider development applications.<sup>78</sup>

\* *Solid Waste Management Act*

The Solid Waste Management Act<sup>79</sup> aids in planning and coordinating regional collection, disposal, and utilization of solid waste. To develop and implement a comprehensive solid waste management plan in compliance with DEP standards,<sup>80</sup> the statute designates every county in the state, and the Hackensack Meadowlands District,<sup>81</sup> as a Solid Waste Management District. If any county, including the Meadowlands District, fails to adopt a satisfactory plan, the DEP has the authority to implement a scheme for that county.<sup>82</sup>

Under the Waste Management Act, the DEP must supervise the solid waste collection and disposal operations and the registration of all solid waste collection and disposal facilities.<sup>83</sup> In reviewing applications for registration, the Act directs the DEP to disapprove the application of any facility which fails to conform to the solid waste management plan.<sup>84</sup>

\* *Agriculture Retention and Development Act*

The Agriculture Retention and Development Act<sup>85</sup> creates state and

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76. N.J. STAT. ANN. § 58:16A-55.4 (West 1979).

77. N.J. STAT. ANN. § 58:16A-55.4 (West 1979).

78. N.J. STAT. ANN. § 58:16A-55.6 (West 1979).

79. Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1 to -176 (West 1979 & Supp. 1987).

80. N.J. STAT. ANN. § 13:1E-2 (West Supp. 1987); N.J. STAT. ANN. § 13:1E-20 (West Supp. 1987) directs the county government and Hackensack Meadowlands District to develop and formulate a solid waste management plan.

81. The Hackensack Meadowlands District is an area within the jurisdiction of the Hackensack Meadowlands Development Commission created pursuant to the provisions of the Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. § 13:17-1.

82. N.J. STAT. ANN. § 13:1E-23(i) (West Supp. 1987).

83. N.J. STAT. ANN. § 13:1E-4 (West 1979).

84. N.J. STAT. ANN. § 13:1E-4 (West Supp. 1987).

85. Agriculture Retention and Development Act, N.J. STAT. ANN. §§ 4:1C to 1-37 (West Supp. 1987).

county organizations to coordinate the development of farmland preservation programs. The legislature intended these organizations to identify areas where agricultural use is the landowner's first priority and where financial, administrative, and regulatory benefits are made available to landowners who choose to participate in the farmland preservation program.<sup>86</sup>

The Act authorizes county governments to establish County Agricultural Development Boards.<sup>87</sup> The county boards are responsible for developing agricultural retention and development programs to preserve agricultural land in the county.<sup>88</sup> The Act allows the County Agricultural Development Boards to identify and recommend sites for classifications as agricultural development areas.<sup>89</sup> That recommendation is forwarded to the county planning board. Landowners within a municipally approved program may enter into an agreement with the County Agricultural Development Board and the municipal governing body. Under such an agreement, the landowners would retain their land in agricultural production for a minimum period of eight years and sell a development easement on their land.<sup>90</sup> Other provisions protect farmers from civil suits attempting to enjoin agricultural activities based on nuisance.<sup>91</sup>

#### \* *Freshwater Wetlands Protection Act*

The purpose of the Freshwater Wetlands Protection Act, enacted in 1987,<sup>92</sup> is to protect and regulate freshwater wetlands and buffer zones, called "transition areas." The Act directs the DEP to classify freshwater wetlands into three categories: (1) wetlands of exceptional resource value, (2) those of intermediate resource value, and (3) those of ordinary resource value.<sup>93</sup> The Act defines "regulated activity" to include: (1) the removal, excavation, disturbance, etc. of soil, sand, gravel, etc.; (2) the drainage or disturbance of the water level or water table; (3) the dumping, discharge or filling with any materials; (4) the

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86. N.J. STAT. ANN. § 4:1C-12(c) (West Supp. 1987).

87. N.J. STAT. ANN. § 4:1C-14 (West Supp. 1987).

88. N.J. STAT. ANN. § 4:1C-15 (West Supp. 1987).

89. N.J. STAT. ANN. § 4:1C-18 (West Supp. 1987).

90. N.J. STAT. ANN. § 4:1C-24 (West Supp. 1987).

91. N.J. STAT. ANN. § 4:1C-26 (West Supp. 1987).

92. Freshwater Wetlands Protection Act, N.J. Assembly Bill Nos. 2342 and 2499 (1986).

93. *Id.* at § 7.

driving of pilings; (5) the placing of obstructions; or (6) the destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees.<sup>94</sup>

A person proposing to engage in a regulated activity must apply to the DEP for a freshwater wetland permit.<sup>95</sup> Similar restrictions apply to buffer zones as well.<sup>96</sup> The DEP may grant a permit *only if* it finds that the regulated activity: (1) is the only practicable alternative; (2) will result in minimum feasible alteration or impairment of the wetland; (3) will not jeopardize endangered species; (4) will not cause significant degradation of ground or surface water quality; *and* (5) serves the public interest.<sup>97</sup>

Land use experts predict that the Act will affect about 323,000 acres of freshwater wetlands, or about one-sixth of the state's land mass.<sup>98</sup> About 200,000 acres of tidal wetlands already regulated under the Coastal Area Facilities Act are beyond the Act's jurisdiction.<sup>99</sup> Similarly, an additional 300,000 acres of freshwater wetlands regulated by the Pinelands Protection Act<sup>100</sup> and the Hackensack Meadowlands Reclamation and Development Act are excluded from the regulations of the Freshwater Protection Act.<sup>101</sup>

### E. *Statewide and Regional Agencies*

From 1969 to 1973 New Jersey created three regional planning and development programs to deal with the complex problems that arise when a critical area of environmental concern extends beyond municipal boundaries.<sup>102</sup> The state enacted the legislation to provide a rational and comprehensive plan for three regions: the Hackensack Meadows, the Pinelands, and the coastal areas.

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94. *Id.* at § 3.

95. *Id.* at § 9(a).

96. *Id.* at § 17.

97. *Id.* at § 9(b).

98. The Newark Star-Ledger, June 30, 1987, at 1.

99. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979).

100. N.J. STAT. ANN. §§ 13:18A-1 to -49 (West Supp. 1987).

101. N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979).

102. The Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979 & Supp. 1987); The Pinelands Protection Act §§ 13:18-1 to -21 (West 1979 & Supp. 1987); Coastal Area Facilities Review Act, §§ 13:19-1 to -21 (West 1979 & Supp. 1987).

\* *The Hackensack Meadowlands Reclamation and Development Act*

The New Jersey legislature enacted the Hackensack Meadowlands Reclamation and Development Act<sup>103</sup> in 1968 to provide for the planning and redevelopment of the Hackensack Meadowlands, which are situated in the New York-Northeastern New Jersey metropolitan area. The Act created the Hackensack Meadowlands Development Commission<sup>104</sup> with jurisdiction including a district encompassing fourteen northern New Jersey municipalities in Bergen and Hudson Counties. The district is approximately 20,000 acres and is composed of largely undeveloped tidal salt meadows and marshes. The urban development surrounding the Meadowlands includes major cities such as New York City; Newark, Jersey City, and Paterson, New Jersey.

Because of its proximity to these cities, the most important function of the Meadowlands at the time of the statute's enactment was the disposal of solid waste including household garbage, industrial waste, demolition rubble, and junked automobiles. More than 100 municipalities relied on this land for the disposal of 42,000 tons of solid waste per week.

The Commission has broad financial and regulatory powers. It has the authority to issue bonds, impose special assessments, and acquire property by purchase or condemnation. The Commission must prepare and adopt a master plan for the development of all affected land. To implement this master plan, the Commission must adopt and enforce the necessary land use schemes. Moreover, the Commission may review and regulate plans for any subdivision or development within the district.<sup>105</sup>

The Commission's most extraordinary and far-reaching power is its authority to provide for intermunicipal tax-sharing.<sup>106</sup> Under this authority the Commission may determine the financial benefits and liabilities of development under the comprehensive plan and provide for an equitable distribution of those benefits and liabilities among the municipalities in the district.<sup>107</sup>

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103. The Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979).

104. N.J. STAT. ANN. § 13:17-7.

105. N.J. STAT. ANN. § 13:17-6.

106. N.J. STAT. ANN. §§ 13:17-60 to -76 (West 1979 & Supp. 1987).

107. See *Meadowlands Regional Redevelopment Agency v. State*, 63 N.J. 35, 304 A.2d 545 (1973), *appeal dismissed*, 414 U.S. 991 (upholding the constitutionality of the system of redistribution of municipal tax liability and benefits).

\* *The Pinelands Protection Act*

The Pinelands Protection Act<sup>108</sup> protects approximately 1.1 million acres of land in southeast New Jersey. The Pinelands encompasses approximately twenty percent of the state's land area. This ecologically fragile area contains pine-oak forests, scenic rivers, and cedar swamps, as well as unique ecological, historical, and recreational resources. In addition, the area overlies the seventeen-trillion-gallon Cohansey aquifer, one of the world's largest sources of pure water.<sup>109</sup>

The Act established the Pinelands Commission as a political subdivision of the state.<sup>110</sup> The Act directs the Commission to prepare and effectuate a comprehensive management plan for the Pinelands areas.<sup>111</sup> The plan is to designate a "preservation area" that should preserve an extensive contiguous area of land in its natural state to ensure the continuation of a pinelands environment and to prohibit construction or development.<sup>112</sup>

Once the Pinelands Commission adopts the comprehensive management plan, every county and municipality within the Pinelands area is required to submit the necessary revisions of their plans and the relevant local land use ordinances to the Commission.<sup>113</sup> The Commission may approve, reject, or conditionally accept the reviewed plans and ordinances. Additionally, the Commission may delegate responsibility for the review of municipal master plans or land use ordinances to the planning board of the county in which the municipality is located.<sup>114</sup> More importantly, a municipality may approve an application for development within the Pinelands area only if the proposed development conforms to the comprehensive management plan.<sup>115</sup>

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108. Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -21 (West 1979 & Supp. 1987); see Randle, *The National Reserve System and Transferable Development Rights: Is The New Jersey Pinelands Plan An Unconstitutional "Taking?"*, ENVTL. AFF. 183 (1982).

109. Statement of N.J. Senate Energy and Env't Comm., in N.J. STAT. ANN. § 13:18A-1 (West Supp. 1987).

110. N.J. STAT. ANN. § 13:18A-4 (West Supp. 1987).

111. N.J. STAT. ANN. § 13:18A-8 (West Supp. 1987).

112. N.J. STAT. ANN. § 13:18A-9(c) (West Supp. 1987).

113. N.J. STAT. ANN. § 13:18A-12 (West Supp. 1987).

114. N.J. STAT. ANN. § 13:18A-12(b) (West Supp. 1987).

115. N.J. STAT. ANN. § 13:18A-10. The Comprehensive Management Plan became effective in January 1981. The Plan delineated a 368,000-acre Preservation District in which no development is permitted without Commission approval. The Pinelands Commission has designated the balance of the Pinelands, approximately 780,000 acres,

\* *Coastal Area Facilities Review Act*

The Coastal Area Facilities Review Act,<sup>116</sup> enacted in 1973, balances the need to protect the state's coastal areas from environmental degradation with the need for economic development and recreational facilities.<sup>117</sup> The statute applies to most of the state's coastal area from the Raritan River in the north to the Delaware Memorial Bridge in the southern coastal zone.<sup>118</sup> Within the designated area, the statute prohibits the construction of any "facility" until the DEP issues a permit.<sup>119</sup>

Applications for a permit must contain an environmental impact statement containing information requested by the DEP.<sup>120</sup> The DEP is authorized to issue a permit only if it makes a two-part finding. First, the DEP must find that the proposed facility will not impair public health, safety, or welfare. Second, the DEP must verify that the proposed facility will cause minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing scenic and aesthetic attributes at the site and surrounding region.<sup>121</sup>

F. *The Proposed Transplan Legislation*

The Transplan legislation consists of three separate bills: (1) a County-Municipal Planning Partnership Amendments Act<sup>122</sup> to give

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as a Protection District in which municipal development plans and approvals must be consistent with the Pinelands Management Plan. *See* New York Times, May 29, 1983, at E-6.

116. Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19-1 et seq.

117. Public Interest Research Group of New Jersey, Inc. v. State Dept. of Env'tl. Protection, 152 N.J. Super. 191, 377 A.2d 915 (1977). In his state of the state message in January 1987, and in February 1987, Governor Kean announced that he would support the creation of a regional authority to plan and regulate the problems that arise in coastal areas, including ocean pollution, storm-water runoff, antiquated wastewater treatment plants, and rapid growth along the shore. The Newark Star-Ledger, Feb. 19, 1987, at 23.

118. The Newark Star-Ledger, Oct. 14, 1986, at 13. This includes approximately 880,000 acres (about 1,200 square miles) or 18% of the state's land in 116 municipalities in 8 counties.

119. N.J. STAT. ANN. § 13:19-5 (West 1979). The term "facility" is defined to include a long list of industrial and commercial activities as well as new housing developments of 25 or more dwelling units.

120. N.J. STAT. ANN. § 13:19-6 (West 1979).

121. N.J. STAT. ANN. § 13:19-10 (West 1979).

122. N.J. Assembly Bill No. 3289 (1986).

county planning boards greater control over regional development; (2) a State Highway Access Management Code<sup>123</sup> to give the state additional powers to control access to state highways; and (3) a Transportation Development District Act<sup>124</sup> to create transportation development districts, requiring developers to help pay the costs of needed highway and mass-transit improvements. The New Jersey legislature introduced the three-bill package at the urging of the governor<sup>125</sup> and with bipartisan support.<sup>126</sup>

## 1. County-Municipal Planning Partnership Amendments

### \* *Legislative Findings*

The preliminary findings in the County-Municipal Planning Partnership legislation indicate that the New Jersey state legislature has embraced and attempted to implement regional planning. The legislative findings include a statement that the general welfare requires that "*county governments* act to encourage sound regional development patterns. . . ."<sup>127</sup> By assigning this responsibility to *county governments*, the legislature has departed from its prior policy of having municipalities control planning and land use regulation. The current legislation follows the principle the state established, granting counties power to negotiate the cross-acceptance of municipal, county, and state planning objectives.<sup>128</sup> The two statutes illustrate a legislative objective of using county government to achieve statewide and regional planning and development control.<sup>129</sup> The legislative findings emphasize this intention by declaring it desirable that a county board resolve issues of county, regional, or state significance *prior* to a municipality's consideration of a development application.<sup>130</sup>

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123. N.J. Assembly Bill No. 3291 (1986).

124. N.J. Assembly Bill No. 3290 (1986).

125. New York Times, Jan. 4, 1986, § 11, at 1.

126. The Newark Star-Ledger, Oct. 7, 1986, at 25.

127. N.J. Assembly Bill No. 3289 1(a).

128. N.J. STAT. ANN. §§ 52:18A-196 et. seq.

129. For a discussion of the legal issues created by the state constitutional provision, see N.J. CONST. art. IV, § 6, para. 2, that authorizes the legislature to give the zoning powers to municipalities, other than counties, see *supra* note 42 and accompanying text.

130. N.J. Assembly Bill No. 3289, § 1(1).

\* *Powers of the County Planning Board*

The bill *requires* every county in the state to create a county planning board.<sup>131</sup> The county planning board must in turn prepare and adopt a master plan as a cornerstone for physical development of the county.<sup>132</sup> The master plan will designate areas within the county for regional economic centers, residential communities, industrial development, parks, wetlands, and agricultural areas. The plan will also provide a comprehensive development strategy to accomplish the land use plan, provide population and employment projections, and propose a transportation system capable of supporting the projected development.<sup>133</sup> Before adopting the master plan, the county planning board must review all municipal plans and inform the municipality of any inconsistencies between the municipal plan and the county plan.<sup>134</sup>

The proposed bill authorizes the county planning board to review all development applications in the county to determine if they have "potential regional significance" and to certify that such developments comply with the county's planning standards.<sup>135</sup> The bill designated the county governing body to prescribe planning and engineering standards for this review. The county board's review is strictly limited to several specified criteria<sup>136</sup> including: (1) adequacy of the drainage caused by development of county roads or state highways; (2) additional rights-of-way needed for roads and drainageways; (3) improve-

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131. N.J. Assembly Bill No. 3289, § 2 (amending N.J. STAT. ANN. § 40:27-1 (West 1979 and Supp. 1987)).

132. N.J. Assembly Bill No. 3289, § 3 (amending N.J. STAT. ANN. § 40:27-2(a) (West 1979)).

133. N.J. Assembly Bill No. 3289, § 3 (amending N.J. STAT. ANN. § 40:27-2).

134. N.J. Assembly Bill No. 3289, § 4 (amending N.J. STAT. ANN. § 40:27-4 (West 1979)).

135. N.J. Assembly Bill No. 3289, § 7 (amending N.J. STAT. ANN. § 40:27-6.2(a) (West 1979 and Supp. 1987)). The statute defines "development of potential regional significance" in detail. It includes any development that:

- (1) is located on a State highway or affects the State drainage facilities, or;
- (2) includes more than 250 housing units, or;
- (3) contains more than 100,000 square feet or nonresidential floor space, or;
- (4) is located on a county road or affects county drainage facilities, or;
- (5) adjoins other property owned by the developer that would permit additional development of 250 housing units or 100,000 square feet of nonresidential floor space when combined.

N.J. Assembly Bill No. 3289, § 6 (amending N.J. STAT. ANN. § 40:27-6.1 (West 1979 & Supp. 1987)).

136. N.J. Assembly Bill No. 3289, § 4 (amending N.J. STAT. ANN. § 40:27-6.2(b) (1) to (4) (West 1979 & Supp. 1987)).

ments to the public transportation system, county roads or state highways; (4) requirements for performance bonds to assure compliance with transportation improvements; (5) conformity with access standards prescribed under the State Highway Access Management Bill; and (6) conformance standards prescribed by other state planning legislation such as the State Planning Act.<sup>137</sup>

The county planning board must review all subdivision and other development applications *before* the municipal approving authority will accept the applications as complete.<sup>138</sup> If the application is for a development of potential regional significance, the county planning board must withhold certification if the application fails to meet the standards adopted by the county governing body.<sup>139</sup> A requirement which prohibits a developer from filing a subdivision plat that lacks the county planning board's certification further tightens the regulatory system.<sup>140</sup>

The purpose and effect of this legislation is to give New Jersey's county planning boards a greater role in regional planning and development control. The authority given to the counties in the development approval process, however, is limited to transportation and drainage issues in very large developments.<sup>141</sup>

## 2. State Highway Access Management Act

The State Highway Access Management Bill signifies an attempt by the state legislature to establish a comprehensive system to manage access to state highways. To effectuate the bill's purpose, the state Department of Transportation must adopt a state highway access management code providing for the regulation of access to state highways.<sup>142</sup> The code is to contain standards suitable for adoption by counties and municipalities for management of access to streets and

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137. N.J. STAT. ANN. § 52:18A-202 (West Supp. 1987). For an analysis of the State Planning Act, see *supra* note 6 and accompanying text.

138. N.J. Assembly Bill No. 3289, § 5 (amending N.J. STAT. ANN. § 40:27-6.3 (West 1979 & Supp. 1987)).

139. N.J. Assembly Bill No. 3289, § 9 (amending N.J. STAT. ANN. § 40:27-6.4 (West 1979 & Supp. 1987)).

140. N.J. Assembly Bill No. 3289, § 10 (amending N.J. STAT. ANN. § 40:27-6.5 (West 1979 & Supp. 1987)).

141. This provision belies the significant accumulation of regulatory authority given to counties in other legislation. See *infra* note 190 and accompanying text.

142. N.J. Assembly Bill 3291, § 3(a).

highways under their jurisdiction.<sup>143</sup>

The heart of the regulatory system is the requirement that anyone seeking to construct a driveway or public street entering a state highway must obtain an access permit from the Commissioner of Transportation.<sup>144</sup> Municipal zoning ordinances must provide for the regulation of land adjacent to state highways in conformity with the code.<sup>145</sup> Thus, municipal subdivision regulations must require compliance with the code.<sup>146</sup>

The bill authorizes the Commissioner of Transportation to build new roads or acquire access easements to provide alternative means of access to existing developed lots that enter only onto a state highway.<sup>147</sup> In addition, the Commissioner of Transportation is directed to build all new state highways as "limited access highways."<sup>148</sup>

### 3. Transportation Development District Act

As a response to the rapid development in New Jersey's growth corridors, legislators proposed the Transportation Development District Act. The legislature declared that the need for transportation improvements in some of the state's growth corridors exceeded the financial resources of the state, county, and local government.<sup>149</sup> To help fund these improvements, the bill authorizes counties to create transporta-

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143. N.J. Assembly Bill 3291, § 3(e).

144. N.J. Assembly Bill 3291, § 4.

145. N.J. Assembly Bill 3291, § 25 (amending N.J. STAT. ANN. § 40:55D-62 (West Supp. 1987)).

146. N.J. Assembly Bill 3291, § 24 (amending N.J. STAT. ANN. § 40:55D-38 (West Supp. 1987)).

147. N.J. Assembly Bill 3291, § 9.

148. N.J. Assembly Bill 3291, § 15 amending N.J. STAT. ANN. § 27:7A-2 (West 1979). "Limited access highway" is "a highway especially designed for through traffic over which abutters have no easement or right of light, air or direct access by reason of the fact that their property abuts upon such way." Sec. 14, amending N.J. STAT. ANN. § 27:7A-1 (West 1979 & Supp. 1987).

149. N.J. Assembly Bill 3290, Legislative Statement.

For a description of New Jersey's growth corridors and an analysis of the problems created by them, see Rose, *Growing Pains: Coping With Suburban Sprawl*, 16 N. J. REP. 28 (Sept. 1986). The Bill's legislative findings elucidate the explosive expansion in some growth corridors along state highway routes, the enormous burden on existing transportation infrastructure created by this growth, and the inadequacy of existing financial resources and mechanisms to meet the transportation improvement needs. N.J. Assembly Bill 3290, § 2.

tion development districts (TDDs) and to impose development fees on developers.

The bill authorizes county government to provide leadership to respond to various transportation needs. The county governing body may propose a transportation development district (TDD) to the state transportation commissioner.<sup>150</sup> The proposed TDD must conform to the county master plan and the State Development and Redevelopment Plan adopted under the State Planning Act.<sup>151</sup> If the state transportation commissioner approves of the proposed TDD, the county governing body will undertake a joint planning process for the TDD which includes participation from state, county, municipal, and private representatives.<sup>152</sup> The planning process will produce a draft district transportation improvement plan that addresses the transportation needs and available financial resources of the district.<sup>153</sup> After a public hearing, the county governing body has the authority to adopt the proposed district transportation improvement plan.<sup>154</sup>

The county governing body is authorized to impose a development fee on developments within the TDD.<sup>155</sup> The county governing body will place the funds raised by the development fee in a TDD trust fund under the control of the county treasurer.<sup>156</sup> Every transportation project financed by the trust fund must stipulate to a project agreement with the state transportation commissioner. Additionally, the project

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150. N.J. Assembly Bill 3290, § 4(a).

151. *Id.* For a discussion of the State Planning Act, see *supra* note 6 and accompanying text.

152. N.J. Assembly Bill 3290, § 5(a).

153. N.J. Assembly Bill 3290, § 5(b) and (c).

154. N.J. Assembly Bill 3290, § 6(a).

155. N.J. Assembly Bill 3290, § 7(a). The development fee must be based on one or more of the following criteria:

- a. a *vehicle trip fee*, based on the number of vehicle trips generated by the development;
- b. a *square footage fee*, based on the occupied square footage of developed structure;
- c. an *employee fee*, based on the number of employees regularly employed at the development;
- d. a *parking space fee*, based on the number of parking spaces located at the development; or
- e. any other fee, approved by the commissioner, that is related to trip generation or impact on the transportation system.

*Id.* at § 8.

156. N.J. Assembly Bill 3290, § 7(d).

must receive the approval of both the county governing body and the municipal governing body.<sup>157</sup>

The State of New Jersey assists the transportation development districts in two ways: (1) the New Jersey Transportation Trust Fund Authority is authorized to act as a banker to advance cash for projects that will be repaid from projected revenue;<sup>158</sup> and (2) a special State Aid program provides matching funds for fees assessed in transportation development districts.<sup>159</sup>

## II. CUMULATIVE SYNERGISM OF NEW JERSEY'S PLANNING LEGISLATION

Synergism is the simultaneous action of separate forces which together have a greater effect than the sum of their individual parts.<sup>160</sup> The thesis presented in this section is that the synergism principle applies to the cumulative effect of planning legislation. In other words, the aggregate effect of planning legislation has a greater total effect than the sum of the individual pieces of planning legislation.

### A. *The Synergistic Effect on Statewide and Regional Planning*

The most profound synergistic effect of statewide and regional planning legislation is that it diminishes the influence of home rule. The principle of municipal home rule has been a recurrent obstacle to the adoption of statewide and regional planning legislation. There are several legal and political reasons for New Jersey's adherence to municipal home rule.<sup>161</sup> Consequently, New Jersey state officials support the idea

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157. N.J. Assembly Bill 3290, § 10.

158. N.J. Assembly Bill 3290, § 12.

159. N.J. Assembly Bill 3290, § 14(a).

160. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1851 (2d ed. 1964). For example, there is evidence to indicate that the effect of exposure to asbestos by a person who smokes creates a greater incidence of cancer than the sum of the individual effects of asbestos exposure and smoking.

161. "Home rule" is a constitutional provision or type of legislative action which results in providing local cities and towns with a measure of self-government if such local government accepts the terms of the state legislation. BLACK'S LAW DICTIONARY (5th ed. 1979). State constitutional provisions and judicial decisions support the conclusion that New Jersey is a home rule state. Under the state constitution, courts should construe liberally statutes conferring authority on municipalities. N.J. CONST. art. IV, § 7, para. 11. In the absence of constitutional prohibition, municipalities may exercise the police power. *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973). The state constitution prohibits the legislature from passing special laws regulating the internal affairs of municipalities. N.J. CONST. art. IV, § 7, para. 9. In addi-

that municipal officials, rather than those of the state, should make decisions relating to local affairs. The state has long recognized that decisions relating to land use within the municipality are a local affair.

In the past, political realities in New Jersey have required the legislature to justify each piece of statewide and regional planning legislation as a necessary response to a unique and critical state problem. The state adopted some of the legislation only after extraordinary gubernatorial<sup>162</sup> or judicial<sup>163</sup> action. Most members of the state legislature have been unwilling to publicly advocate reduced municipal authority in favor of statewide and regional state agency power. Legislators, however, have found it politically feasible to avoid a confrontation on the home rule issue and achieve the same result by the cumulative synergistic effect of creeping incrementalism.

The underlying assumption that made it possible to enact each of the early planning statutes is that the state regulation addressed only the statewide aspects of the problem. That way, the law would not challenge or infringe upon municipal home rule. The state has found it useful to maintain the myth that control of land use planning and development is, and continues to be, a municipal function. Some legislation contains specific provisions to maintain the myth of municipal home rule. For example, provisions in the State Planning Act encourage, but do not require, municipalities to cooperate with the state plan.<sup>164</sup> The assumption that the state is preserving home rule may be credible when applied to a single or a limited number of statewide planning programs. Eventually, however, a point is reached when the cumulative effect of the statewide programs belies the underlying assumption that the state legislature is preserving municipal home rule. The gradual erosion of municipal home rule in land use planning is illustrated by the three statewide-regional programs, the numerous en-

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tion, the entire land area of the state is divided into 567 municipalities without any unincorporated area subject to the jurisdiction of county or other governmental regulation.

162. The legislature enacted the Pinelands Protection Act only when Governor Brendan Byrne imposed a building ban in the Pinelands by executive order, thereby creating a constitutional crisis. Weissman, *Byrne Signed Pineland Control Bill In Emotional Trenton Ceremony*, The Newark Star-Ledger, June 29, 1979, at 1. Governor Thomas Kean used the same technique to get legislative action on the Freshwater Wetlands Protection Act. Johnson, *Kean Signs Wetlands Bill, Lifts Building Moratorium*, The Newark Star-Ledger, July 2, 1987, at 1.

163. The legislature passed the Fair Housing Law and the State Planning Act as a response to the *Mount Laurel* decision. See *supra* note 26 and accompanying text.

164. State Planning Act; see *supra* note 6 and accompanying text.

vironmental protection programs, and the State Planning Act. Moreover, if the Transplan legislation is enacted, the state would further advance the demise of the municipal home rule.

\* *Effect of the Three State Regional Programs*

There was formidable political resistance to the adoption of the Hackensack Meadows, Pinelands, and Coastal Area legislation. The enactment of each statute signified a loss in the battle for the preservation of home rule. A new but unannounced political reality emerged as a result of the synergistic effect of all three programs: *the bastions of municipal home rule will fall when confronted by a legislative determination that there is a need for regional or statewide planning and regulation of a state problem.*

Of all the statewide and regional planning and development legislation, the Hackensack Meadowlands Reclamation and Development Act of 1968 authorizes the state's most extensive intrusion into local affairs of municipalities. The Hackensack Meadowlands Development Commission has the power to prepare and adopt a master plan for the development of all land within its jurisdiction, irrespective of municipal boundary lines. The Commission is authorized to, and has in fact superseded, the planning and zoning powers of the municipal governing bodies. The Commission can determine all land use and review all subdivision applications in its jurisdiction.

Illustrating the state's greatest intrusion into municipal affairs, the Hackensack Meadowlands Development Commission has invaded the municipal budget.<sup>165</sup> Since tax revenues and municipal expenses are directly related to land use, the legislature authorized the Commission to deal with the problem of fiscal zoning. Relying on this authority, the Commission analyzed the financial benefits and liabilities of development pursuant to its land use plan. Furthermore, the Commission provided for an equitable redistribution of those benefits and liabilities among the municipalities in the district. In effect, it has removed some tax revenue from various municipalities with tax ratables, and allocated it to other municipalities in the district.

Having successfully invaded this protected ground of municipal home rule, the legislature established a precedent for state programs to address the inequities resulting from reliance upon the property tax as the primary method of municipal finance. The next important step in

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165. N.J. STAT. ANN. §§ 13:17-60 to -76 (West 1979 & Supp. 1987).

the process should be a state program that seeks to provide a more equitable distribution of municipal tax revenue from development in accordance with a comprehensive state land use plan.

In 1973 the Coastal Area Facilities Review Act<sup>166</sup> added another dimension of statewide and regional control of land use planning and development. The legislature established a statewide policy limiting the ability of municipal governments to permit land development where a state agency had found that the development impaired an environmental resource of the state. The legislature defined "environmental resource" to include historical, archeological, scenic, and aesthetic attributes. Under this legislation, a municipality in the coastal area retains the initiative to develop its own plan and to regulate the land use within its jurisdiction. The municipal system of land use regulation, however, requires approval of a state agency.

The Pinelands Protection Act of 1979 goes one step further.<sup>167</sup> This legislation sets forth a state planning and development policy to preserve a vast area of the state from development.<sup>168</sup> The Pinelands Protection Act authorizes the Pinelands Commission, a state agency, to prepare a comprehensive plan on which it would approve or reject municipal master plans and land use ordinances.<sup>169</sup> The Pinelands Act contained no provision to compensate municipalities for the loss of tax revenue resulting from the loss of land capable of being developed. The statute implicitly establishes the principle that a state plan designed to protect the state's environmental resources limits municipal power to authorize the development of that land for fiscal purposes.

The cumulative effect of the three statewide programs is enhanced by the enormous amount of land subject to direct statewide and regional planning and control. Taken together, there are almost two million acres, or forty-two percent of the land area of the state, currently regulated directly by a regional or statewide agency.<sup>170</sup> The large proportion of the state's land included in these programs provides persuasive evidence that the state is already engaged in a large scale process of

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166. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 and Supp. 1987).

167. N.J. STAT. ANN. §§ 13:18A-1 to -49 (West Supp. 1987).

168. N.J. STAT. ANN. §§ 13:18A-2, to -9 (West Supp. 1987).

169. N.J. STAT. ANN. §§ 13:18A-6 to -10.

170. There are 19,730 acres of land covered by the Hackensack Meadows program, 880,000 acres subject to the Coastal Area Facilities Act, and approximately 1.1 million acres covered by the Pinelands Act.

statewide and regional planning, and that there is a substantial political support for this policy.

\* *Effect of the Environmental Protection Statutes*

New Jersey's environmental protection legislation began tentatively in 1962 with the enactment of the Flood Hazard Area Control Act.<sup>171</sup> In the twenty-five years that followed, the individual statutes and their cumulative effect established a pattern of statewide and regional planning and regulation for the protection of environmental resources. The legislature amended the Flood Hazard Area Control Act in 1972 to permit the DEP to control development and land use in delineated floodways.<sup>172</sup> The Flood Hazard Area Control Act authorized county government to prepare countywide stormwater and drainage plans for the area.<sup>173</sup>

Regional planning was an underlying principle of the Water Quality Planning Act of 1977.<sup>174</sup> The Act establishes an "areawide" water quality management plan that contains a program to *regulate* the location of any area facility, the discharge of which may affect water quality.<sup>175</sup> The Act directs the DEP to deny any grant of funds and any permit that conflicts with that plan.<sup>176</sup>

The Water Pollution Control Act of 1977<sup>177</sup> establishes a permit system to regulate the discharge of pollutants.<sup>178</sup> The DEP may not issue a permit for any discharge that is inconsistent with an areawide plan.<sup>179</sup> The denial of a discharge permit can effectively control land use. The Water Supply Management Act of 1981<sup>180</sup> requires the DEP to prepare and update a statewide water supply plan.<sup>181</sup> The Water

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171. N.J. STAT. ANN. §§ 58:16A-1 to -66 (West 1979 & Supp. 1987). *See supra* notes 68-78.

172. N.J. STAT. ANN. § 58:16A-55 (West 1979). *See supra* note 71-78.

173. N.J. STAT. ANN. § 58:16A-55.4 (West 1979). *See supra* notes 76-78.

174. N.J. STAT. ANN. §§ 58:11A-1 to -66 (West 1979 & Supp. 1987). *See supra* notes 55-59.

175. N.J. STAT. ANN. § 58:11A-5 (West 1979). *See supra* notes 57-58.

176. N.J. STAT. ANN. § 58:11A-10 (West 1979).

177. N.J. STAT. ANN. §§ 58:10A-1 to -20 (West 1979 & Supp. 1987). *See supra* notes 60-65.

178. N.J. STAT. ANN. § 58:10A-2 (West 1979).

179. N.J. STAT. ANN. § 58:10A-6(e)(4) (West 1979).

180. N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1979). *See supra* notes 51-54.

181. N.J. STAT. ANN. § 58:1A-5(b) (West 1979).

Supply Plan determines the methods to divert water and its quantity and quality within the state.<sup>182</sup> These two statutes, taken together, establish a planning process and give the DEP power to control the supply of water and the discharge of pollutants in accordance with that plan.

The Solid Waste Management Act of 1970<sup>183</sup> calls for a comprehensive solid waste management plan<sup>184</sup> and authorizes the DEP to require all collection and disposal facilities to comply with that plan.<sup>185</sup> The Agriculture Retention and Development Act of 1983<sup>186</sup> establishes a procedure to identify and to create programs to preserve farmland.<sup>187</sup> The Freshwater Wetlands Protection Act,<sup>188</sup> enacted in 1987, creates a system to identify, classify, and protect over 300,000 acres of freshwater wetlands.<sup>189</sup>

Each environmental protection statute addresses a specific environment concern. At the same time, each statute advances the principle of statewide and regional planning and control development in the state. The effect of the aggregate of all of the legislation is greater than the effect of the sum of each statute. The legislation, taken together, establishes a principle, creates a pattern, and declares a political philosophy. The cumulative synergistic effect of the legislation is a statewide policy, established by the legislature, supported by the governor, and approved by the courts that the use and development of land and construction of infrastructure and facilities in the state in the future will be guided by the foresight and wisdom available from the process of statewide and regional planning.

### B. *The Synergistic Effect on County Power*

An analysis of New Jersey's planning legislation reveals a slow and subtle transfer of planning authority from municipal to county govern-

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182. *Id.*

183. N.J. STAT. ANN. §§ 13:1E-1 to -176 (West 1979 & Supp. 1987). *See* notes 79-84.

184. N.J. STAT. ANN. § 13:1E-2 (West 1979).

185. N.J. STAT. ANN. § 13:1E-23(i) (West 1979).

186. Agriculture Retention and Development Act, N.J. STAT. ANN. §§ 4:1C-1 to -37 (West Supp. 1987).

187. N.J. STAT. ANN. § 4:1C-11 (West Supp. 1987).

188. Freshwater Wetland Protection Act, N.J. Assembly Bill Nos. 2342 and 2499 (1986). *See supra* notes 92-101.

189. *See* The Newark Star-Ledger, *supra* note 98.

ment. It may be premature to announce the unobtrusive emergence of county pre-eminence. A pattern has emerged from the accumulation of planning legislation, however, that discloses an ever increasing involvement of county government in planning and development control. The aggregation of county involvement produces an effect on county power that is greater than the sum of the individual powers granted to the county by the planning legislation.

The State Planning Act provides the most direct and express enhancement of the county role in planning and development control. Under this Act, county planning boards have the authority to "negotiate plan cross-acceptance" of the State Development Plan among the municipal planning bodies.<sup>190</sup> The process of "cross-acceptance" is a method of reconciling conflicts between state and local policies. County planning boards function as negotiating agents of the state for the purpose of harmonizing municipal plans with the State Plan.

The Act presumes that the State Commission will negotiate cross-acceptance with the planning boards of each county and that each county planning board will in turn negotiate cross-acceptance with the municipalities within the county.<sup>191</sup> This process subjects municipal plans and zoning laws to the scrutiny of county planning boards. Although the statute does not specifically require the county planning board to approve municipal plans, the process makes the county planning board an overseer of municipal planning policies. If a municipality fails to participate in the negotiation of cross-acceptance, the State Commission regards this failure to act as a concurrence in the county's final report.<sup>192</sup>

The Fair Housing Law gives county planning boards additional power to review municipal plans and zoning ordinances under the Act's provisions on the "regional contribution agreement."<sup>193</sup> Under these provisions two municipalities may agree for one to transfer up to half of its fair share obligation<sup>194</sup> to the other. The Council on Affordable Housing must approve the regional contribution agreements after receiving a report from the county planning board.<sup>195</sup> In reviewing

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190. N.J. STAT. ANN. § 52:18A-202(b) (West Supp. 1987).

191. N.J. STAT. ANN. § 52:18A-202 (West Supp. 1987).

192. N.J. ADMIN. CODE § 17:30-1.5.

193. Fair Housing Act, § 11(c).

194. For a discussion of "fair share obligation," see *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

195. Fair Housing Act, § 12(c).

municipal master plans to prepare its report, the county planning board must consider the master plan of the participating municipalities, its own plan, and the state plan.

The regional contribution agreement has become a popular and politically acceptable program for suburban municipalities to fulfill their obligation to subsidize affordable housing. This technique has also turned out to be a financial bonanza for urban municipalities. Both types of municipalities have been willing to submit to the authority of the county planning board in the preparation of the terms and conditions of the contribution agreement.

Many of the state's environmental protection statutes give county governments a role that enhances their power and authority. The Water Quality Planning Act provides that, wherever possible, waste treatment management planning areas should be coterminous with county boundaries and that county government should perform the planning.<sup>196</sup> The Act also authorizes the county planning board to prepare a county water quality management plan.<sup>197</sup> The areawide plan should contain a regulatory program to determine the location of facilities that may discharge in the area. This provision can have a significant effect upon development in the area.

The regulatory process under the Flood Hazard Area Control Act also gives county government an important role.<sup>198</sup> Under the Act, county governments prepare the stormwater control and drainage plans.<sup>199</sup> Once DEP approved, the county government uses these county plans, deciding whether to accept development applications.<sup>200</sup> Although the flood hazard statute gives the state DEP the power to approve development applications, it authorizes the DEP to delegate this power to county governing bodies.<sup>201</sup>

The Solid Waste Management Act increases the influence of county government by designating every county in the state, and the Hackensack Meadowlands District, a Solid Waste Management District responsible for developing and implementing a comprehensive solid waste management plan. In reviewing applications for facilities to col-

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196. N.J. STAT. ANN. § 58:1A-2 (West 1979). *See supra* notes 57-61 and accompanying text.

197. N.J. STAT. ANN. § 58:11A-5 (West 1979). *See supra* note 59.

198. *See supra* notes 68-77.

199. *See supra* note 76.

200. N.J. STAT. ANN. § 58:16A-55.4 (West 1979).

201. N.J. STAT. ANN. § 58:16A-55.6 (West 1979).

lect, dispose, and utilize solid waste, the DEP is directed to deny the registration of any facility that fails to conform to the solid waste management plan.<sup>202</sup>

New Jersey enacted the Agriculture Retention and Development Act<sup>203</sup> to coordinate farm preservation programs. This Act further enhances county government authority. County governments establish County Agricultural Development Boards to develop agricultural retention and development programs to preserve county land for agriculture. A landowner seeking to sell his development easement must enter into a contract with both the municipal and the county governments.

The combination of regulatory and administrative powers bestowed on county government transforms the county into a center of planning and development control. Municipal planning and administrative officials must communicate and coordinate with county officials to perform a growing number of municipal functions. For example, municipal officials rely upon county officials for planning information and development approval. With each addition to county authority, the focus of planning and development control shifts from municipal government to county government.

There will be a quantum leap in county influence and authority if the pending Transplan legislation is adopted.<sup>204</sup> The County Municipal Planning Partnership Amendments<sup>205</sup> contain the most explicit legislative statement to date that the general welfare requires *county governments* "to encourage sound regional development patterns. . . ." The bill requires every county to have a planning board and to prepare a county master plan. The county master plan provides a comprehensive development strategy based on population and employment projections. Before adopting the master plan, the county planning board reviews all municipal plans and informs the municipality of any inconsistency between the municipal and county plans.

The bill would also authorize the county planning board to review all development applications that have potential regional significance. In this review, the county planning board would prescribe planning and engineering standards relating to transportation and roadway re-

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202. N.J. STAT. ANN. § 13:1E-4 (West 1979).

203. N.J. STAT. ANN. §§ 4:1C-1 to -37 (West Supp. 1987). *See supra* notes 81-85 and accompanying text.

204. *See supra* notes 126-128 and accompanying text.

205. N.J. Assembly Bill No. 3289 (1986).

quirements. The county planning board would also review all subdivision and other development applications *before* review by the municipal agency.

Under the proposed Transportation Development District Act,<sup>206</sup> the county governing bodies would delineate transportation development districts and would undertake a joint planning process to produce a plan for the transportation needs of the district. The proposed Act authorizes the county governing body to impose a fee on developments within the district. Use of the funds raised by this fee would require approval of the county as well as the municipal government body.

At the time of this writing it is unclear whether the New Jersey legislature will adopt all or any part of the three-part Transplan legislation. The legislation grants county government additional statutory authority. Even if the proposed Transplan legislation is rejected, the legacy of existing laws has already established that New Jersey lawmakers have given county government a substantial role in areawide planning and control of development.

### III. OMISSIONS IN AND LIMITATIONS OF NEW JERSEY'S LEGISLATIVE PROGRAMS

New Jersey's legislation provides extensive authority for statewide and regional planning and control of development. Nevertheless, the existing and proposed programs are ineffective because (1) they fail to address the difficult political issue of equitable reallocation of fiscal resources among municipalities, and (2) the legislation does *not require* municipal planning and land use regulation to be consistent with the state plan.

#### A. *Equitable Reallocation of Fiscal Resources*

In every analysis of programs for effective regional planning and implementation, the problems arising from municipal finance and the relationship between land use and fiscal resources must be addressed. The primary source of municipal revenue in New Jersey and most other states is the property tax. The amount of revenue available to municipalities from the property tax depends upon the market value of the state's real estate. In turn, the market value varies with the land's development or development potential. When land is zoned for housing, officials can expect that the residents therein will require municipal

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206. N.J. Assembly Bill No. 3290 (1986).

services, resulting in greater municipal expenditures and a possible increase in the tax rate.

Statewide and regional planning programs are particularly important to combat municipal land use policies designed to maximize municipal fiscal advantage. Although they benefit the municipality, such land use policies may produce consequences adverse to the best interest of the state or region. For example, high density commercial development along a state highway may provide substantial property tax revenue to the individual municipality. This roadside development, however, may also generate traffic of gridlock proportions on the state or regional roadway.

It would seem, therefore, that the legislature could greatly increase the opportunities for effective regional planning if municipal governments were financed by a system of taxation that does not promote a municipal quest for tax ratables. A state could change the property tax system to eliminate the incentive for municipal officials to seek traffic-generating and environment-polluting uses of municipal land. A modified tax system could transform municipal reluctance into willingness to include high density zones and to create affordable housing.

The statements in the above paragraphs constitute the conventional wisdom of idealistic planners and students of municipal government. This line of thought encompasses a spirit of egalitarianism and expresses a sense of optimism that government officials can base their planning and land use policy decisions on principles of fairness and equity. Further study of the property tax discloses a regressive tax system that creates many other obstacles to the achievement of planning objectives. These observations disclose a desire that a state can create a more equitable system of municipal finance to assist rather than to frustrate the regional planning public policy objectives. There is some evidence in the New Jersey experience which may justify this idealistic optimism. Other evidence exists, however, which indicates that these aspirations may soon prove to be unrealistic.

The Hackensack Meadowlands Reclamation and Development Act is the best illustration of success in establishing a regional system to coordinate municipal taxation and land use regulation.<sup>207</sup> Despite vociferous opposition from most of the fourteen municipalities included in the Hackensack Meadowlands District, a state-created commission took control of all land use decisions. This commission established in-

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207. See *supra* note 103 and accompanying text.

termunicipal tax sharing to provide an equitable distribution among municipalities of the benefits and liabilities of land use regulations and property tax revenues. Advocates of property tax reform cite this experience as an example of what a state can achieve when its legislature decides to provide tax reform and effective regional planning and development control.

A subsequent New Jersey experiment in property tax reform created such political upheaval that despite its success many legislators have become cautious about embarking on that route unnecessarily. The issue arose when the New Jersey Supreme Court held that the state's system of school finance based on the municipal property tax violated the state constitution.<sup>208</sup> The court ordered the state legislature to revise the tax system to eliminate the constitutional objection. The legislature created a constitutional crisis when it balked at this judicial intrusion into the legislative domain. Eventually, the increased political pressure persuaded the legislature to adopt a tax reform program to eliminate the inequities in the funding of public education. New Jersey achieved property tax reform only because the state's highest court was willing to push the issue to the brink of judicial legitimacy. It is unlikely that the New Jersey Supreme Court will again embark on this confrontational path in the near future.

More recently, municipalities in New Jersey and other states have adopted another technique to raise revenue for municipal needs created by development. Municipalities have imposed a charge, called a "linkage fee," "impact fee," or "development charge" as a condition for development approval.<sup>209</sup> The justification for this form of municipal exaction is that each new development should pay for its fair share of the cost of municipal obligations, including affordable housing, resulting from the development.

The courts must resolve several legal issues before the linkage fee can become a viable technique to ease the disparities caused by reliance on the municipal property tax as the primary source of municipal revenue. In some states, a court may hold the fee invalid if the state legislature

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208. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973); For an analysis of this dramatic episode in New Jersey's fiscal history, see Rose, *Limitations on State Taxation and Spending: The Impact on Future Land Use and Development*, 9 REAL EST. L.J. 91, 95 (1980).

209. See Major, *Linkage of Housing and Commercial Development: The Legal Issues*, 15 REAL EST. L.J. 328 (1987); Note, *The Legality of California Development Fees*, 13 PEPPERDINE L. REV. 759 (1986); Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985).

fails to enact enabling legislation authorizing its use. Furthermore, some state courts find the fee invalid as a violation of the "equal and uniform" provision of the state constitution. No court has resolved the question whether such an exaction violates the due process clause or effects an unconstitutional taking.

The historical reliance upon the property tax raises serious doubts about the availability of alternate sources of revenue. It is questionable whether the legislature will resolve the state's optimistic and idealistic quest for property tax reform in the near future. For this reason, advocates of statewide and regional planning must continue to pursue programs of administrative reform rather than relying on the wistful hopes of property tax reform.

### B. *Submission of Municipal Planning to State Planning*

The New Jersey legislation discloses that the legislature is aware that it cannot achieve a rational system of statewide planning until it requires each municipality to conform to important principles of state planning. The legislature has been unwilling to confront this problem. For example, the State Planning Act establishes a procedure to obtain cross-acceptance, or compatibility, between local, county, and state plans.<sup>210</sup> The Act, however, does *not require* the municipality to modify its plan and regulations to be consistent with the state plan. The Fair Housing Act requires municipalities to consider a list of techniques to provide its fair share of affordable housing.<sup>211</sup> The Act, however, fails to require the municipality to adopt any of these techniques. In the Municipal Land Use Law the municipal land use plan must contain a statement describing its relationship with the state plan.<sup>212</sup> Again, the municipal plan is not required to be consistent with the state plan.

A legislature could effectively eliminate this problem by including an express provision in the Municipal Land Use Law that *requires* the municipal master plan and all municipal land use regulations to be consistent with the state plan. The Municipal Land Use Law currently requires municipal zoning law to be consistent with the Land Use Plan element and the Housing Plan element of the municipal master plan.<sup>213</sup>

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210. See *supra* note 21 and accompanying text.

211. See *supra* note 34 and accompanying text.

212. See *supra* note 48 and accompanying text.

213. See *supra* note 47 and accompanying text.

As a next step in the incremental process of coordinating the local and state planning process, the legislature could amend this provision to require the municipal master plan to be consistent with the state plan as well.

#### IV. CONCLUSION: THE WHY AND WHEREFORE OF CREEPING INCREMENTALISM

The above analysis of New Jersey's legislation reveals an extensive program of statewide and regional planning and control of development. The cumulative effect of the legislation approaches, but fails to provide, a comprehensive program of statewide and regional planning. Success will continue to be elusive until the system of municipal finance is reformed and until the principle of home rule is subordinated to the general welfare of New Jersey residents.

Two questions linger from the New Jersey experience. First, why has it been necessary for the legislature to adopt New Jersey's program by creeping incrementalism rather than by a bold, comprehensive legislative proposal? Second, why does the state legislature fail to eliminate the two remaining obstacles to successful statewide planning? The answer to both questions is that there is insufficient moral and political readiness to accept these proposals.

In a democratic society, these key ingredients for legislative reform require the passage of time and a source of moral leadership. Strong moral leadership can shorten the time needed for reform. The passage of time in which a public issue is contemplated, but not acted upon, can sometimes embolden acts of political leadership.

The sources of moral leadership have dwindled in recent decades. In the late 1960's, many of the nation's most capable graduate students enrolled in graduate programs of urban and regional planning to learn about the principles and techniques of improving the quality of life in America. In their childhood, many of these students heard frequent public statements at home, at school, and in the press about the American ideals of the dignity of the individual and the continuing need to protect the right of all people to make a better life for themselves and their families. Today, many of the most capable graduate students enroll in business school and law school having heard at home, at school, and in the press about the right of each individual to seek his own rewards and to disregard issues relating to the quality of life of the rest of the world.

The sources of political leadership have also weakened in recent de-

cares. Today's political leaders base their position on opinion polls rather than on idealistic principles. Politics, frequently described as the art and science of achieving the possible, has become an art of cynical compliance with political forces. Today's political leaders have strayed from formulating and transmitting idealistic principles.

Unless our elected officials decide to become moral leaders rather than political poll watchers, our democratic society will advance only by the slow, quiet, unobtrusive method of creeping incrementalism and cumulative synergism rather than by bold and dramatic programs. Creeping incrementalism will continue to be the technique for legislative reform as long as elected officials continue to avoid taking a position too far in advance of their lumbering constituencies. In the long run, however, the preservation and stability of democratic government may be well served by this slow process.

