
COASTAL PLANNING: THE DESIGNATION AND
MANAGEMENT OF AREAS OF CRITICAL
ENVIRONMENTAL CONCERN†

*THOMAS J. SCHOENBAUM**

*KENNETH G. SILLIMAN***

One of the most interesting and controversial methods of land use control that has emerged in recent years is the regulation of development in "areas of particular concern."¹ This concept, which is a feature of several land use planning laws at the federal and state levels, is predicated on two fundamental ideas. First, that there are certain geographical areas possessing unique or significant characteristics making special management treatment appropriate. And second, that responsibility for these areas should be primarily vested at the state level.

This development control technique has advantages over more traditional methods in that it compels the identification of fragile or important areas that are of special value and focuses regulation directly on safeguarding the natural characteristics, resources or public investments of the sites. The regulatory authority can also base development

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* Professor of Law, University of North Carolina. B.A., St. Joseph College, 1961; J.D., University of Michigan, 1965.

** B.A., Case Western Reserve University, 1974; J.D., University of North Carolina, 1977.

1. This is the synonym for areas of critical environmental concern used in the Coastal Zone Management Act of 1972 (CZMA). 16 U.S.C. § 1454(b)(3) (Supp. III 1973). In this article these terms will be used interchangeably.

decisions on the impact of the proposed action on the dynamics of the whole natural and human environment involved instead of on only a few factors, such as water or air quality.

Despite these attributes, regulation of areas of particular concern has not been widely used as a planning technique. One reason is that the attention of planners has been diverted toward other issues, for example, growth control. A more fundamental explanation is that the designation and management processes involved have been retarded by unresolved legal and technical problems. Foremost among these are: (1) defining what characteristics are "of particular concern"; (2) determining what information is necessary for designation of such areas; (3) formulating criteria for development in a particular type of area, once it has been designated; and (4) determining whether regulation can be conducted without infringing established constitutional norms.

Although development of the technique has been slowed by these problems, it seems clear that regulation of areas of particular concern will be of increasing importance in the years ahead. A requirement of the Coastal Zone Management Act of 1972 (CZMA)² is that each state, in order to qualify for federal grants for coastal zone management, must include in its management program "an inventory and designation of areas of particular concern within the coastal zone."³ This designation is to assure that there is a measure of state control over significant natural, historic or resource areas, natural hazard areas and areas of unique significance to industrial or commercial development.⁴ Specific attention must be given to developing policies and a decision-making process to manage these areas, including formulation of guidelines on priority of uses.⁵

Virtually all the eligible coastal states have applied for or received planning money under the CZMA to develop a coastal management program.⁶ By necessity, designation and management of areas of particular concern will be key elements in the elaboration of their manage-

2. 16 U.S.C. §§ 1451-1464 (Supp. III 1973). See generally Mandelker & Sherry, *The National Coastal Zone Management Act of 1972*, 7 URBAN L. ANN. 119 (1974).

3. 16 U.S.C. § 1454(b)(3) (Supp. III 1973); 15 C.F.R. § 923.13 (1976). See generally Mandelker, *Critical Area Controls: A New Dimension in American Land Development Regulation*, AM. INST. PLAN. J. 21 (Jan. 1971).

4. 15 C.F.R. § 923.14 (1976).

5. 16 U.S.C. § 1454(b)(5) (Supp. III 1973); 15 C.F.R. § 920.15 (1976).

6. The CZMA provides funds for management program development. 16 U.S.C. § 1454 (Supp. III 1973).

ment programs. The purpose of such designation is not to exclude all development in such areas,⁷ but only to assure that such areas are subjected to special management so that their unique values and functions are not destroyed. The underlying concept is that private ownership rights in certain areas of the coastal zone are intimately bound up with public needs (for example, waters, wetlands, wildlife) and sites of important public investment (for example, ports, airports and parklands). In this instance the unregulated market, which is ordinarily relied on to allocate scarce economic goods, does not properly reflect the cost diminution or degradation of common property resources since joint public and private interests in such goods renders competition and a competitive market price impossible.⁸ In order to protect public resources, then, a system of administrative allocation must supplement the market function in such areas.⁹

This Article will first briefly examine legislation in several states concerning the designation and management of areas of particular concern. Attention will be focused on the North Carolina statute, which lodges much of the responsibility for critical area planning and management in a state-level administrative body. Secondly, two broad areas of legal problems—the limitations of administrative law and the constitutional restrictions of due process and equal protection as they apply to these administrative processes—will be discussed in light of the North Carolina planning scheme. A third section will discuss the troublesome taking problem and how agencies can minimize the risk that their actions will be found to be unconstitutional takings for public purposes without just compensation.

I. AN OVERVIEW OF AREAS OF CRITICAL CONCERN LEGISLATION

The inclusion of areas of particular concern in the CZMA reflects

7. In fact, some areas of particular concern will be shorelands where port complexes, oil refineries and other heavy industry that is directly or indirectly dependent on access to coastal waters will be accommodated. 15 C.F.R. § 923.13(a)(4) (1976).

8. J. HITE & E. LAURENT, ENVIRONMENTAL PLANNING: AN ECONOMIC ANALYSIS, APPLICATIONS FOR THE COASTAL ZONE 18-19 (1972). This does not exclude the possibility of conflicts over the use of such goods; it is merely a reflection of the fact that the right to use certain resources exists in common and is not, at least in theory, affected by another's use.

9. Some economists argue that administrative allocation should not be allowed to replace the market because decisions will be in the hands of a planning elite. Johnson, *Some Observations on the Economics of the Coastal Plan*, 49 S. CALIF. L. REV. 749, 756 (1976). This overlooks the fact that individuals still have the power to initiate development and that mechanisms for public participation can be built into any administrative allocation system.

the influence of the Model Land Development Code of the American Law Institute, a suggested uniform law for state land use legislation that includes provision for direct state-level intervention in the designation and management of "areas of critical state concern."¹⁰ Such treatment is reserved for areas of major public investment of more than local significance—important historical, natural or environmental resource lands, proposed new community sites and lands within the jurisdiction of local governments that have not adopted development ordinances.¹¹ After the designation of these areas, local governments are required to control development in compliance with standards established by the state. Local development decisions may be appealed to a state-level adjudicatory board.¹²

Despite the widely acclaimed "quiet revolution"¹³ in state land use planning legislation, very few states have adopted this approach. Comprehensive "critical areas" laws have been defeated in several jurisdictions.¹⁴ Many states, however, have adopted embryonic critical areas controls in the form of subjecting particular regions or resource areas to state or regional development controls. For example, most coastal states have adopted regulations for wetlands, which are usually defined in terms of tidal data or plant species.¹⁵ An increasing number of states have set criteria for the designation of flood plains and require local governmental regulation of development within them.¹⁶ State coastal zone management laws have afforded protection to shorelands,¹⁷ shorelines of statewide significance¹⁸ and arbitrary geographical areas in close proximity to the land-water margin.¹⁹ Moreover, large geographical areas in New York,²⁰ New Jersey²¹ and California²² have

10. MODEL LAND DEVELOPMENT CODE §§ 7-201 to -208 (1975).

11. *Id.* § 7-201(3).

12. *Id.* §§ 7-502 to -503.

13. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

14. R. LINOWES & D. ALLENSWORTH, *THE STATES AND LAND USE CONTROL* 108, 122 (1975).

15. For a review of these laws, see Ausness, *Land Use Controls in Coastal Areas*, 9 CALIF. WESTERN L. REV. 391, 408-10 (1973).

16. For a summary of this legislation, see R. LINOWES & D. ALLENSWORTH, *supra* note 14, at 103-04.

17. WIS. STAT. ANN. § 59.971 (Supp. 1975).

18. WASH. REV. CODE § 90.58.030(e) (Supp. 1974).

19. California, for example, has established a permit area one thousand yards inward from the mean high tide line. CAL. PUB. RES. CODE § 27104 (West Supp. 1975).

20. New York has subjected Adirondack Park to special regulation by a regional agency. N.Y. EXEC. LAW §§ 800-819 (McKinney Supp. 1976).

been singled out for special management. A few states have attempted state-wide zoning.²³

Critical areas designation and management authority of the type envisioned by the ALI Model Land Development Code has been enacted in only a handful of states, however, and in none is it fully operational. Six states, four of which are "coastal states"²⁴ eligible to participate in coastal management under the CZMA, have taken the lead in the use of this planning tool. They are Florida, Oregon, Minnesota, North Carolina, Nevada and Colorado.

The Florida Environmental Land and Water Management Act of 1972²⁵ is one of the earliest critical areas laws. The Governor and his Cabinet are empowered to declare a geographical unit to be an area of critical state concern if it: (1) contains environmental, historical, natural or archeological resources of regional or statewide significance, (2) is significantly affected by a proposed major public investment, or (3) has major development potential.²⁶ An area must be recommended first by the state land planning agency. The agency must specify the area's boundaries, the basis and reasons for its inclusion and principles for guiding its development.²⁷ Local governments and regional planning agencies affected by the proposal must be given notice of any proposed recommendation and, in the event of designation, must adopt and enforce land development regulations that have been approved by the state land planning agency.²⁸ If enforcement at the local level is inadequate, the state land planning agency can institute suit to compel enforcement.²⁹

Critical area designation in Florida has proceeded very slowly. This

21. New Jersey has singled out the Hackensack Meadowlands for special regulation. N.J. STAT. ANN. §§ 13:17-1 to -86 (Supp. 1975).

22. The San Francisco Bay Conservation and Development Commission regulates wetlands around San Francisco Bay. CAL. GOVT CODE § 66632(a) (Supp. 1975). In August 1976, the California Legislature adopted a coastal plan placing development controls on the state's 1,072-mile coastline. The plan will be administered by the Coastal Zone Conservation Commission. 7 ENV'T'L REP. (BNA) 660 (Aug. 27, 1976).

23. Hawaii, for example, has enacted a statewide land use management law establishing a state land use commission. All the lands of the state are classified according to four categories: urban, rural, agricultural and conservation. HAW. REV. STAT. §§ 205-1 to -2 (Supp. 1975).

24. 16 U.S.C. § 1453(c) (Supp. III 1973).

25. FLA. STAT. ANN. §§ 380.012-.10 (1974).

26. *Id.* § 380.05(1)(b), (2).

27. *Id.* § 380.05(1)(a).

28. *Id.* § 380.05(4)-(6).

29. *Id.* § 380.05(9).

is due largely to political pressures against state-level control and the difficulty of compiling an administrative basis for the designation sufficient to show that the area is in fact of state or regional significance. Three areas—the Big Cypress Swamp, the Green Swamp and the Florida Keys—have been designated,³⁰ and more than sixty additional areas are under study.³¹ The experience so far shows that Florida's program has not yet been able to overcome the legal and technical obstacles to designating a multiplicity of smaller areas as critical. Only large areas whose statewide importance is easy to defend have been included.

Oregon has also devoted considerable effort to critical area designation. Under the Oregon Land Use Law of 1973,³² a Land Conservation and Development Commission was established with the authority to review and recommend to the legislature the designation of areas of critical concern.³³ Priority may be given to the planning for and location of three types of public activity—transportation facilities, public schools and utilities, such as sewage and water supply systems—as well as ten categories of geographical areas. The latter are: (1) lands adjacent to freeway interchanges, (2) estuarine areas, (3) tide, marsh and wetland areas, (4) lakes and lakeshore areas, (5) wilderness, recreational and outstanding scenic areas, (6) beaches, dunes and coastal headlands, (7) wild and scenic rivers, (8) flood plains and hazard areas, (9) unique wildlife habitats, and (10) agricultural land.³⁴ The designation of particular areas is a cumbersome administrative and legislative process that is carried out on a case-by-case basis. For each area of critical concern recommended, the Land Commission must specify the criteria developed and the reasons for the proposed designation, the damages that would result from uncontrolled development and suggested state regulations that would apply within the proposed area.³⁵ Not surprisingly, the implementation of this program in Oregon has been slow,³⁶ to date only one area, the Willamette River Greenway, has been designated.

30. The Big Cypress Swamp has been designated by statute. *Id.* § 380.055. The other two areas have been administratively designated. See R. HEALY, *LAND USE AND THE STATES* 113-17 (1976).

31. R. HEALY, *supra* note 30, at 113.

32. ORE. REV. STAT. § 197.

33. *Id.* § 197.040(i).

34. *Id.* § 197.230(2).

35. *Id.* § 197.405.

36. Akins, *Designation of Areas of Critical State Concern in Oregon*, in UNIVERSITY

In Minnesota the critical areas designation process begins with the Environmental Quality Council which is authorized to prepare criteria for the selection of two types of critical areas—sites surrounding major governmental development facilities and historical, natural, scientific or cultural resources of regional or statewide importance.³⁷ Specific critical areas can only be designated by the Governor upon the recommendation of the Environmental Quality Council, which must specify the area's boundaries, the basis for the designation and principles for guiding development in the area.³⁸ The Governor's designation is effective for no longer than three years, and permanent approval must be obtained by the legislature or the appropriate regional development commission.³⁹ The lower St. Croix River is the only area which has been designated by the Governor under this process.⁴⁰

North Carolina's "area of environmental concern" (AEC) program is a critical areas process that applies only in twenty counties covered under the Coastal Area Management Act of 1974.⁴¹ It requires local governmental units to adopt land use plans pursuant to state-level guidelines and subject to the approval of a state agency, the Coastal Resources Commission.⁴² The AEC program is intended to supplement the local planning process by creating a separate state-local system of direct control of development in the designated areas. The AEC designation and implementation are thus independent of the planning and plan implementation processes,⁴³ but the latter must be carried out in a manner consistent with the AEC program.⁴⁴

Unlike Florida, Oregon and Minnesota, in North Carolina a state agency, the Coastal Resources Commission (CRC), has the authority

OF NORTH CAROLINA SEA GRANT PROGRAM, COASTAL DEVELOPMENT AND AREAS OF ENVIRONMENTAL CONCERN, PROCEEDINGS OF A SYMPOSIUM 10 (1975).

37. MINN. STAT. ANN. § 116G.05 (Supp. 1976).

38. *Id.* § 116G.06.

39. *Id.* § 116G.06 subd. 2(c).

40. Telephone interview with Ms. Yo Jouseau, staff member, Minnesota Environmental Quality Council, July 24, 1976.

41. N.C. GEN. STAT. §§ 113A-100 to -128 (1975). Under the North Carolina Land Policy Act of 1974, the Land Policy Council is authorized to identify policies for the determination of areas of environmental concern on a statewide basis, but this law is not self-executing. N.C. GEN. STAT. § 113A-155 (1975).

42. *Id.* § 113A-110.

43. For a description of the plan implementation process, see Schoenbaum & Rosenbert, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1 (1976).

44. N.C. GEN. STAT. § 113A-111 (1975).

to designate areas of environmental concern.⁴⁵ Categories of areas that may be the subject of designation include: (1) coastal wetlands; (2) estuarine waters; (3) renewable resource areas (watersheds, aquifers and prime forestry land); (4) natural or historic areas (national or state parks, natural and scenic rivers, wildlife refuges, complex natural areas, remnant species areas, unique geological formations and historic sites); (5) public trust areas; (6) natural-hazard areas (sand dunes, beaches, floodways, erosion-prone areas and potential air inversion areas); and, (7) sites around major public facilities.⁴⁶ The designation process is a formal rulemaking procedure requiring notice, a public hearing and a comment period.⁴⁷

This process has only recently been implemented despite the fact that the CRC has possessed this authority since 1974. The first step was the designation of interim areas of environmental concern,⁴⁸ which became effective August 1, 1976. These include: (1) coastal wetlands characterized by the presence of some of ten specified species of marsh plants; (2) estuarine waters including the coastal bays, sounds and the Atlantic Ocean to the limit of the state's jurisdiction; (3) several public water supply areas; (4) national and state parks; (5) ten properties owned by the State which have been designated as National Historic Landmarks; (6) public trust submerged lands to the mean high water mark; (7) frontal dunes along the Outer Banks; (8) ocean and estuarine erodible areas; and (9) complex natural areas that were nominated by members of the public.⁴⁹ The CRC has been inhibited by political and legal uncertainties from more extensive use of its authority to designate AEC's.

Two non-coastal states, Colorado and Nevada, have also established critical areas programs on the ALI model. In Nevada the Division of State Lands of the Department of Conservation and Natural Resources is authorized to carry on a statewide land use planning process that includes the identification of "areas of critical environmental concern."⁵⁰ This term is defined very generally, however, to include any

45. *Id.* § 113A-113. Local governments participate in the designation process through nominating particular areas within their jurisdiction.

46. *Id.*

47. *Id.* § 113A-115.

48. The authority for interim designation is *id.* § 113A-114. Development within an interim AEC does not require a permit, but notice must be given to the CRC. *Id.* § 113A-114(e).

49. Coastal Resources Commission Rules, subch. 7F §§ .01000 - .1401 (1976).

50. NEV. REV. STAT. § 321.720 (1975).

area where "uncontrolled development could result in irreversible degradation of more than local significance,"⁵¹ and this program is not typical because more than eighty-six percent of the lands of the state are federally owned,⁵² thereby exempted from state regulation. The Colorado "areas of state interest" program is unique in that it is administered by local governments. They are given the authority to designate areas of state interest and to grant or deny permits for development within such areas.⁵³ The state-level land use commission reviews local government designations and can nominate specific areas for inclusion.⁵⁴

From this review of jurisdictions that have established critical areas programs, it is evident that there is no single coherent process for the designation and management of such areas. Political considerations have prevented the full utilization of this management tool, and the important administrative and constitutional questions inherent in such a program have yet to be faced. If critical areas programs and the mandate of the CZMA to establish coastal areas of particular concern are to be carried out, a process must be designed that surmounts and deals with the important legal questions involved. This, in turn, can lead to a greater political acceptance of these programs.

II. A CASE STUDY IN THE ADMINISTRATIVE AND CONSTITUTIONAL LAW FRAMEWORK FOR DESIGNATING CRITICAL AREAS: THE NORTH CAROLINA COASTAL AREA MANAGEMENT ACT

The North Carolina model for designating areas of environmental concern under the Coastal Area Management Act is a useful prototype for the analysis of the appropriate administrative framework for critical areas designation, particularly in the coastal zone. It is unique in setting out relatively detailed statutory categories of coastal AEC's, in delegating the power to designate critical areas to a state agency with heavy local representation⁵⁵ and in employing a relatively simple designation process.

The North Carolina designation process involves four major categories of administrative action. First, policies, standards and

51. *Id.* § 321.660.

52. *Id.* § 321.640(5).

53. COLO. REV. STAT. §§ 24-65.1, -401, -501 (Supp. 1975).

54. *Id.* § 24-65.1-407 (Supp. 1975).

55. The majority of the members of the CRC are nominated by local governments. N.C. GEN. STAT. § 113A-105 (1975).

criteria must be developed by the CRC for the various types of AEC's. These must, of course, be consistent with the statutory categories,⁵⁶ but the CRC is specifically authorized⁵⁷ to adopt more detailed policies and standards. These include not only precise scientific criteria that will serve to define AEC's but also guidelines for the priority of uses within each category.⁵⁸ The CRC's policies should also include a statement of the basis for the inclusion of each category of AEC. This is necessary to provide an adequate basis for the administrative action. The second step of the process is the application of the standards and criteria to particular coastal resources. It is essential to carry out an inventory of resources and, with respect to each area proposed as an AEC, to establish by means of scientific data that the particular characteristics of the area fit the general criteria for the AEC category in which it is to be included. At that point a proposed designation may be adequately defined either in terms of specific geographical boundaries or a precise written definition. The third step required by statute⁵⁹ is public notice of proposed rulemaking to designate a particular AEC and a public hearing on the merits. The final step is the consideration of the submitted comments and the final designation of the AEC.⁶⁰

The analysis that follows will consider the legal problems and challenges that may arise with respect to this four-part designation process and what must be done by an administrative body in order to minimize the possibility of a successful legal attack on the process. Because the North Carolina pattern closely follows that required for area of particular concern designation under the CZMA,⁶¹ this inquiry should be relevant for other coastal states as well.

A. *Administrative Law and the Designation Process*

An agency attempting to implement critical areas legislation must not exceed its statutory authority or operate in violation of statutory requirements.⁶² Substantively, this means that the CRC's general criteria and standards formulated in the course of step one⁶³ of the administrative process must be consistent with the statutory language

56. See text at note 46 *supra*.

57. N.C. GEN. STAT. § 113A-107 (1975).

58. *Id.* This step is also required by the CZMA regulations. 15 C.F.R. § 923.13 (1976).

59. N.C. GEN. STAT. § 113A-115 (1975).

60. *Id.*

61. 15 C.F.R. § 920.13 (1976).

62. See generally 1 F. COOPER, STATE ADMINISTRATIVE LAW 677-89 (1965).

63. See text at notes 56-58 *supra*.

and objectives of the Coastal Area Management Act (CAMA) and that the designation of particular geographical areas must be defensible in terms of both the statutory language and the general criteria relied upon by the agency.

Where an agency rule or designation violates the plain meaning of the statutory language, it will be invalidated. In *Sibson v. State*,⁶⁴ the New Hampshire Port Authority attempted to apply the requirements of a state law which covered "any bank, flat, marsh, or swamp in and adjacent to tidal waters" to a four-acre parcel of land on the landward side of a salt meadow. The court, holding that the Port Authority lacked jurisdiction, interpreted the words "adjacent to" as applying only to land contiguous with tidal waters.⁶⁵

On the other hand, an agency such as the CRC can adopt criteria to define ambiguous statutory language or categories of critical areas,⁶⁶ and in such a case, its application of the criteria to designate particular sites will be upheld if consistent with general statutory objectives. The courts will usually defer to an agency's interpretation, but the agency will be called upon to produce testimony as to the scientific basis of its action and the relationship to legislative purposes. In *Juanita Bay Valley Community Association v. City of Kirkland*,⁶⁷ a property owners' association in Washington challenged the designation by the State Department of Ecology of "associated wetlands" as applied to the Lake Washington area. The relevant statute, the Washington Shoreline Management Act, contained no specific statutory definition of this term, but the agency drew a series of maps designating "associated wetlands" throughout the entire state. A witness from the Department testified that the criterion used in designating the wetland was whether a marshy area was essentially at the same level and connected to the major body of water. The court, in upholding the designation as consistent with the statutory purposes, stated that where reasonable men could differ on the interpretation of the statute, the agency's view will be upheld.⁶⁸ Similarly, in *Gulf Holding Corporation v. Brazoria County*,⁶⁹ the determination by a Texas agency that a beach along San Luis

64. 110 N.H. 8, 259 A.2d 397 (1969).

65. *Id.* at 11, 259 A.2d at 400.

66. Under the North Carolina CAMA, several critical area categories are precisely defined by reference to objective criteria. Others, however, are defined only in general terms in the Act. See text at notes 96-97 *infra*.

67. 9 Wash. App. 59, 510 P.2d 1140 (1973).

68. *Id.* at 79-81, 510 P.2d at 1153.

69. 497 S.W.2d 614 (Tex. App. 1973).

Pass was covered by the Texas Open Beach Act, which protects public access to beaches on the Gulf of Mexico, was upheld on the basis of evidence in the form of aerial photos and testimony of a biologist that San Luis Beach had the characteristics of a Gulf of Mexico beach as opposed to a bay beach.⁷⁰

Procedurally, the critical areas designation process must be carried out by the agency in strict conformity with the enabling statute. In addition, many states have adopted general administrative procedure acts to govern agency decisionmaking.⁷¹ Such an act will normally apply to the critical areas designation process except to the extent that a particular critical areas statute may provide to the contrary.⁷² Thus, to the maximum extent possible, the procedural requirements of both laws must be observed. The North Carolina CAMA specifies its own rulemaking procedure for the designation of AEC's⁷³ as well as provision for judicial review from permit denial.⁷⁴ But the publication of rules of the CRC is governed by the North Carolina Administrative Procedure Act.⁷⁵

An important procedural issue is whether the critical areas designation process is rulemaking or adjudicatory. Two important consequences flow from this determination. If the agency's action is adjudicatory, a hearing must be provided with the right to introduce evidence and the right to cross-examine witnesses, and there is normally a right to judicial review.⁷⁶ If the statute is not clear as to which is intended, the determination will fall to the courts.

70. *Id.* at 618.

71. Administrative Procedure Acts have been enacted in at least the following states: Alaska, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington, Wisconsin, Wyoming and Virginia. For a partial listing of the statutes, see W. GELLHORN & C. BYSE, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 1160-64 (1974).

72. *E.g.*, N.C. GEN. STAT. § 150A-1 (Supp. 1975); HAW. REV. STAT. § 91-14 (Supp. 1975).

73. *See* N.C. GEN. STAT. §§ 113A-114 to -115 (1975).

74. N.C. GEN. STAT. § 113A-123 (1975).

75. It is questionable at this point whether the statutory rulemaking procedure provided in CAMA will be affected by the enactment of the Administrative Procedure Act. *See* text at note 72 *supra*.

76. The rationale for this difference in treatment is the distinction between adjudicative and legislative facts, which was first advanced by Professor K.C. Davis in 1942. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942). When adjudicative facts are in dispute, the party affected is entitled to support his allegations by argument and proof. *Londoner v. City and County*

A classic example of this problem is the Hawaii case, *Town v. Land Use Commission*.⁷⁷ Acting under that state's land use act, the Land Use Commission had approved a petition to amend the district designation of certain property to rural from agricultural. The landowners adjoining this property then brought an action challenging this decision. Plaintiffs alleged that the procedure of approval had violated the Hawaii Administrative Procedure Act in that the Commission had taken testimony from the applicant for the district change and had "viewed" the actual site without giving prior notice to adjoining landowners. Whether plaintiffs were entitled to prior notice and the right to rebut the applicant's testimony hinged on the determination of whether the action of the Commission constituted rulemaking or action on a contested case. The Hawaii Supreme Court found the action to be a contested case and, accordingly, the denial of the notice and cross examination rights was held to be reversible error.⁷⁸

The North Carolina CAMA specifically allays this difficulty by providing that the AEC designation process is through a rulemaking procedure involving public notice and a hearing.⁷⁹ There appears to be no specific right of judicial review of an AEC designation,⁸⁰ although

of Denver, 210 U.S. 373 (1908). In addition, the rights of confrontation and cross examination are constitutionally required in adjudicatory proceedings. *Greene v. McElroy*, 360 U.S. 474 (1959). On the other hand, "parties ordinarily have no constitutional right to present oral argument on issues of law, policy, and discretion." K. DAVIS, ADMINISTRATIVE LAW TEXT § 6.01 (3d ed. 1972), citing *FCC v. WJR*, 337 U.S. 265 (1949). As for statutory rights, it is rare for a state administrative procedure act to provide full trial-type procedures for rulemaking. Hawaii's Act does provide for 20 days notice and allows "all interested persons opportunity to submit data, views, or arguments, orally or in writing." HAW. REV. STAT. § 91-3 (1968). However, cross examination is not provided. Accordingly, it may be concluded that in most cases an affected person will have no cross examination rights when an agency is engaging in rulemaking unless that agency's organic legislation specifically provides for such a right. With respect to judicial review of an agency determination, it should be noted that many states provide only for review of "an order in a contested case." 1 F. COOPER, *supra* note 62, at 537 (emphasis added). North Carolina has defined contested case as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of specific parties are to be determined. Contested cases include, but are not limited to proceedings involving rate making, price fixing and licensing. Contested cases shall not be deemed to include rulemaking and declaratory rulings." N.C. GEN. STAT. § 150A-2(2) (Supp. 1975).

77. 55 Haw. 538, 524 P.2d 84 (1974).

78. *Id.* at 549-50, 524 P.2d at 91-92.

79. N.C. GEN. STAT. § 113A-115 (1975).

80. Although the North Carolina CAMA does allow any person having an interest in land within an area of environmental concern to obtain judicial review to determine whether a final CRC decision affecting such land constitutes a taking, its provisions are limited to decisions or orders of the CRC under Part Four of the CAMA. *Id.* § 113A-123(a)-(b). Since Part Four deals only with *permit* applications and appeals, the section

under the Declaratory Judgment Act,⁸¹ a person directly affected could obtain an adjudication of the general legal and constitutional validity of the rule on its face.⁸²

B. *Adequate Standards for Critical Area Designation: The Non-Delegation Doctrine*

The maxim that legislative and judicial powers may not be delegated to state agencies has its roots in the separation of powers required by many state constitutions.⁸³ Although the non-delegation doctrine was strictly applied in early state court cases, the factors that dictated the creation of state administrative agencies have transformed this rule into a requirement that legislative and adjudicative power not be delegated without adequate "guiding standards."⁸⁴ This test has been criticized as inadequate, however, in that it fails to furnish criteria that can be consistently and equitably applied.⁸⁵ Thus, it has been suggested that the significant factor in the application of the non-delegation doctrine is not the presence of standards but rather the degree of protection against arbitrariness.⁸⁶ Consequently, a number of courts have begun to emphasize procedural safeguards as well as standards.⁸⁷

cannot be interpreted as granting judicial review of AEC *designations*. Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275, 297 (1974). In addition, it is unlikely that AEC designations would be reviewable under the North Carolina Administrative Procedure Act. See note 76 *supra*.

81. N.C. GEN. STAT. §§ 1-253 to -267 (1975), *as amended*, (Supp. 1975).

82. *E.g.*, CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974); Potomac Sand and Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U. S. 1040 (1972); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); J.M. Mills, Inc. v. Murphy, —R.I.—, 352 A.2d 661 (1976); Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973).

83. 1 F. COOPER, *supra* note 62, at 45. It should be noted that if the constitution of a particular state has no separation of powers requirement, the non-delegation doctrine does not apply. See cases cited 1 F. COOPER, *supra* note 62, at 45 n.17.

84. K. DAVIS, *supra* note 76, at § 2.06 (3d ed. 1972).

85. *Id.* For a general discussion of the flaws of the "adequate standards" test see, 1 F. COOPER, *supra* note 62, at 61-70.

86. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.15 (1958).

87. Professor Davis contends this approach has been adopted in at least California, Iowa, Kentucky, New Jersey and Wisconsin. K. DAVIS, *supra* note 76, at § 2.06 n.16. The new test is well articulated in *Toms River Affiliates v. Department of Envir. Protection*, 140 N.J. Super. 135, 145, 355 A.2d 679, 685 (App. Div. 1976). In addition, the North Carolina Supreme Court seems to have adopted this position in *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974). In response to Humble's contention that a zoning ordinance was void for lack of adequate standards the court stated:

Recent decisions in several state courts indicate that critical areas legislation will not be vulnerable to attack based on the non-delegation doctrine. In *CEED v. California Zone Conservation Commission*,⁸⁸ the California Court of Appeals held that the Coastal Conservation Act of 1972 contained adequate standards to guide the agency in issuing permits for development in the coastal zone. Found sufficient were the general legislative policies that "the development will not have any substantial adverse environmental or ecological effect" and that the development will be consistent with the objectives of the act, which were found to be preservation, restoration and enhancement of the coastal area and balanced use of coastal resources. The court stated that it was permissible for the agency to be empowered to use discretion and judgment of a high order in weighing complex factors in the decisionmaking.⁸⁹ *Toms River Affiliates v. Department of Environmental Protection*,⁹⁰ a New Jersey case upholding the constitutionality of the Coastal Facility Act, sustained the validity of general standards in regulatory legislation, especially when adequate procedural safeguards protected against unreasonable administrative action.⁹¹ In *Mills, Inc. v. Murphy*,⁹² the Supreme Court of Rhode Island upheld the Fresh Water Wetlands Act although the agency was given discretion to decide on wetland alterations governed only by the standard of "best public interest" and the general legislative purposes of the act.⁹³

Under the North Carolina CAMA, the CRC is delegated the tasks of designating AEC's⁹⁴ and of adopting guidelines for the use of all coastal lands and waters, but with particular attention to AEC's.⁹⁵ The different categories of AEC's are defined in the statute with varying

In our view the ordinance achieves reasonable specificity. Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair trial standards; (3) base its findings of fact only upon competent, material and substantial evidence; and (4) in allowing or denying the application, it state [sic] the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

Id. at 471, 202 S.E.2d at 138.

88. 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (Ct. App. 1974).

89. *Id.* at 327, 118 Cal. Rptr. at 330 (1974).

90. 140 N.J. Super. 135, 355 A.2d 679 (App. Div. 1976).

91. *Id.* at 145, 355 A.2d at 684-85.

92. —R.I.—, 352 A.2d 661 (1976).

93. *Id.* at —, 352 A.2d at 665-68.

94. N.C. GEN. STAT. § 113A-113 (1975).

95. *Id.* § 113A-107.

degrees of specificity. On one hand, there are several categories that are very precisely defined. They include: coastal wetlands, estuarine waters, water supply sources, capacity water use areas, prime forestry land, natural and scenic rivers, scientific or research stream segments, wildlife refuges and historic places.⁹⁶ As to these types of AEC's, the CRC needs little if any discretionary power and there is no delegation problem.

On the other hand, many categories of AEC's are defined only in general terms. These are: complex natural areas, remnant species areas, unique geological formations, public trust areas, sand dunes along the outer banks, ocean and estuarine beaches and shorelines, floodways and floodplains, areas of excessive erosion or seismic activity, air inversion areas and key facility areas.⁹⁷ In order to designate these types, the CRC must necessarily exercise discretion in adopting more detailed criteria and in designating particular geographical areas. This may be difficult because of a lack of scientific data, differing views among scientists on the validity of various criteria and legal uncertainties when, as in the definition of public trust areas,⁹⁸ legal judgment is necessary. The CRC, however, will apparently be able to choose between competing alternatives as long as its designations are: (1) supported by reasonable scientific evidence, (2) within the general goals of the act, and (3) adopted in compliance with procedural formalities. The North Carolina courts are expected to follow the *CEEED*, *Mills* and *Toms River* decisions in upholding the exercise of such a delegation of authority since in other contexts it has been held that a delegation is constitutionally permissible when accompanied by a general policy standard and procedural safeguards.⁹⁹

96. See *id.* § 113A-113.

97. *Id.*

98. For a discussion of the public trust doctrine as applied in North Carolina, see Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1, 16-18 (1972).

99. Although the North Carolina courts continue to refer to the adequate standards test in their opinions, there are indications that other factors are involved. At least two North Carolina cases cannot be explained in terms of standards alone. Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303, 327 (1974), citing *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965) and *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970). The North Carolina Supreme Court may allow an administrative agency to function on somewhat vague statutory guidelines if the agency can show that review of its decisions will be accomplished in a format that meets specifically enumerated administrative procedures. Public hearings are required by the N.C. GEN. STAT. §§ 113A-114, to -115 (1975). See Glenn, *supra*, at 322-23. In addition, the recent enactment of the North Carolina Administrative Procedure Act, N.C. GEN. STAT. ch. 150A (1975), may add another layer of procedural protections.

C. *Substantive Due Process and the Scope of the Police Power*

The objectives of state critical areas laws go beyond the traditional land use measures such as zoning and subdivision controls. Lands and waters are treated as resources and as units of the natural world. The goal is not merely to provide for the orderly development of the community, to protect against nuisances and to prevent the danger of fire and collapse of buildings.¹⁰⁰ Rather, the legislation is designed to safeguard the environment, natural resources and natural ecosystems. Thus, it is necessary to inquire whether these are valid substantive legislative goals and permissible state objectives under the police power.

Since *Nebbia v. New York*,¹⁰¹ the permissible reach of the police power as a matter of federal law has embraced a wide range of social and economic legislation.¹⁰² Recent decisions in the area of land use legislation clearly indicate that the police power encompasses more than the traditional purposes of zoning and includes the more amorphous area of environmental quality.¹⁰³ But the scope of the police power is still an issue under the various state constitutions.

In general, the state courts have been much more active in invalidating legislation because it exceeds the scope of the police power under state constitutions.¹⁰⁴ It can therefore be expected that state courts will closely scrutinize both the objectives of critical areas laws and the relationship of any particular designation or development control to those objectives.

100. These purposes were upheld in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

101. 291 U.S. 502 (1934).

102. The following quotation is illustrative:

We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1962). For a general discussion of the decline of substantive due process in the federal courts, see Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

103. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court stated: "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9.

104. See Heatherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. REV. 229-30 (1958). Although municipal land use controls have often enjoyed a strong presumption of validity in state courts, some jurisdictions are now returning to more stringent review of these regulations. N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW §§ 5.01 to -.06 (1974).

Although the law in this area is still emerging, a series of recent state court decisions indicates that protection of natural resources and natural systems are, at least on their face, permissible objectives under the police power. Most of these decisions involve critical areas controls over wetlands, shorelands or coastal areas. In New Jersey, wetlands legislation was upheld, and regulation relating to environmental and ecological considerations and the continued existence of species of wildlife was stated to be a valid police power objective.¹⁰⁵ A Maryland court sustained that state's dredge and fill statute, stating that it was "within the purview of the police power for the state to preserve its natural resources."¹⁰⁶ In *Mills, Inc. v. Murphy*,¹⁰⁷ the Supreme Court of Rhode Island upheld the regulation of wetlands as buffer zones and absorption areas for flood waters, wildlife habitat and recreation areas. The well-known Wisconsin case of *Just v. Marinette County*¹⁰⁸ upheld the protection of natural shorelands as within the police power. Other courts have upheld protection of air, soil and water,¹⁰⁹ and marine resources¹¹⁰ as permissible state objectives.

Although the North Carolina courts have traditionally taken a more narrow approach to the valid scope of the police power than some states,¹¹¹ it can be expected that the courts will uphold as valid state

105. *Sands Point Harbor, Inc. v. Sullivan*, 136 N.J. Super. 436, 439, 346 A.2d 612, 613 (App. Div. 1975).

106. *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358, 371, 293 A.2d 241, 248, *cert. denied*, 409 U.S. 1040 (1972).

107. —R.I.—, 352 A.2d 661 (1976).

108. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

109. *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973).

110. The regulation of marshland with saline water on it through a permit system is a valid exercise of the police power in New Hampshire. *Sibson v. State*, 111 N.H. 305, 282 A.2d 664 (1971). Similarly, the regulation of filling in a bay area by a permit procedure is permissible in California. *Candlestick Prop., Inc. v. San Francisco Bay Conserv. & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970). The aesthetic requirement that docks constructed on the shorelines of an Adirondack Park lake be compatible with that lake's rustic shoreline was upheld in New York, *McCormick v. Lawrence*, 83 Misc. 2d 64, 372 N.Y.S.2d 156 (Sup. Ct. 1975), and the regulation of an area subject to seasonal or periodic flooding was validated in Massachusetts. *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972).

111. In contrast to the broad New York view, "it is still doubtful in North Carolina whether aesthetic considerations alone will support zoning restrictions." Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases*, 53 N.C.L. REV. 925, 941 (1975), citing *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972); *Little Pep Delmonico Restaurant, Inc. v. Charlotte*, 252 N.C. 324, 113 S.E.2d 422 (1960); *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959). Of course, those AEC designations which can be supported by economic arguments as well are likely to be on firmer ground. See Note, *Aesthetic*

objectives the environmental objectives of the CAMA—the conservation of natural resources and the management of the natural ecosystems of the coastal area.¹¹² In *Stanley v. Department of Conservation and Development*,¹¹³ the Supreme Court of North Carolina stated that the abatement and control of air, water and environmental pollution were valid functions under the police power. In addition, a 1973 amendment to the North Carolina Constitution specifies that “it shall be a proper function of the State of North Carolina . . . to . . . preserve park, recreational and scenic areas, to control . . . the pollution of our air and water . . . and in every other appropriate way to preserve as a part of the heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty.”¹¹⁴

Assuming that the purposes of a critical areas statute are constitutionally valid on their face, agency action to implement the legislation must bear real and substantial relation to permissible statutory objectives.¹¹⁵ For example, in *MacGibbon v. Board of Appeals of Duxbury*,¹¹⁶ a landowner was denied a special permit by the town board of appeals to excavate and fill a marsh based on a zoning ordinance which imposed controls on marshes and wetlands. On judicial review the Supreme Judicial Court of Massachusetts annulled the board’s decision. It was found that preservation of the ocean food chain was not a sufficient ground for denying the permit where the land in question was above mean high tide, although the court recognized that protection of marine fisheries and coastal wetlands were proper police power objectives. Similarly, the danger of flooding and erosion, although valid police power objectives, was not an adequate ground for permit

Zoning: A Current Evaluation of the Law, 18 U. FLA. L. REV. 430, 437 (1965). The regulation of coastal wetlands and estuarine waters, for example, can be supported by reference to the relation between the viability of these areas and the sports and commercial fisheries catch. *Potomac Sand & Gravel Co., v. Governor of Md.*, 266 Md. 358, 373, 293 A.2d 241, 249, *cert. denied*, 409 U.S. 1040 (1972); *Tihansky & Meade, Economic Contribution of Commercial Fisheries in Valuing U.S. Estuaries*, 2 COASTAL ZONE MANAGEMENT J. 411 (1976).

112. In addition, regulation of the environment in the interest of public health and safety has been validated in North Carolina. See text at note 113 *infra*. Natural hazard AEC’s such as frontal dunes, ocean erosion areas, and estuarine and river erosion areas should clearly fall within this holding.

113. 284 N.C. 15, 199 S.E.2d 641 (1973).

114. N. C. CONST. art. XIV, § 5.

115. *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973); *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

116. —Mass.—, 340 N.E.2d 487 (1976).

denial when this problem could have been resolved by permit conditions and safeguards.¹¹⁷

Under the North Carolina CAMA, the discretionary actions of the CRC must satisfy this standard. Thus the adoption of general criteria for the various categories of AEC's should be based upon specific resource objectives that are clearly within the general legislative purposes¹¹⁸ and the particular statutory definitions¹¹⁹ of the Act. The application of these criteria to particular geographical areas must be based upon empirically derived data documenting the fact that the designation meets the criteria of a particular category. Permit denials, in the case of privately owned land in AEC's, must be based upon the grounds enumerated by statute,¹²⁰ accompanied by the factual basis for such findings. In addition, the exercise of authority under the police power must not unreasonably restrict a private landowner's right to use his land.¹²¹

D. *Procedural Due Process Requirements for the Definition and Delineation of the Boundaries of Critical Area*

Procedural due process under the fourteenth amendment¹²² requires that an individual be given adequate notice and an opportunity for a hearing before he is deprived of any significant property interest.¹²³ Whether there is a constitutional right to a hearing in the critical areas designation process is unclear. Notice and a hearing may be required before the promulgation of a zoning ordinance or the rezoning of specific property.¹²⁴ But critical areas designation, unlike zoning, does

117. *Id.* at —, 340 N.E.2d at 491-92.

118. The goals of the coastal area management system are expressed in N.C. GEN. STAT. § 113A-102(a)-(b) (1975).

119. *Id.* § 113A-113.

120. *Id.* § 113A-120.

121. See text at notes 156-96 *infra*.

122. U.S. CONST., amend. XIV.

123. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

124. See *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 346 P.2d 1101 (1959); *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *Bell v. Stoddard*, 220 Ga. 756, 141 S.E.2d 536 (1965). *Hurst* and *Hart*, however, were based on zoning enabling statutes which required notice and hearing. "[D]iscussion of constitutional requirements was pure dictum." *San Diego Bldg. Constr. Assoc. v. City Council*, 118 Cal. Rptr. 146, 529 P.2d 570 (1974). In the *San Diego* case the adoption of a city zoning ordinance through the initiative process was upheld against plaintiffs' contention that such a procedure violated constitutional notice and hearing requirements. More significantly, the Supreme Court has recently held that a zoning *amendment* adopted by referendum vote was not invalid for failure to provide notice and hearing. *Eastlake v. Forest City*

not in itself prohibit or affect any specific use of property. In *CEED v. California Coastal Zone Conservation Commission*,¹²⁵ the California Court of Appeals held that the state need not afford affected property owners a hearing prior to implementing an interim permit system applying only to land within one thousand yards of the coast. This may not apply in the case of permanent critical area designation, however, and most states, including North Carolina under the CAMA,¹²⁶ provide for notice and a hearing prior to administrative designation.

The most important due process problem faced by an agency in designating critical areas, however, is how to describe or limit the boundaries of such areas in order to give affected landowners adequate notice of the regulation of their property. Specific boundary determination will often be impractical or expensive, yet the area regulated must not be defined in unduly vague terms. It appears that three different methods may be used to solve this problem.

First, some categories of critical areas may be best described through word definitions. In *United States v. St. Thomas Beach Resorts*,¹²⁷ the court upheld a word definition of "shoreline of the Virgin Islands" against a vagueness attack. The definition, held to give adequate notice, was: "from the seaward line of low tide, running inland a distance of fifty (50) feet, or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier, whichever is the shortest distance."¹²⁸ Word definitions are

Enterprises, Inc., 96 S. Ct. 2358 (1976). *But cf.* *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973) in which the Oregon Supreme Court ruled that zoning decisions focusing on specific lots or landowners would be subject to quasi-judicial review procedures. Despite this apparent disparity, the cases may be reconciled by reference to the distinction between legislative and adjudicative facts. *See* note 76 *supra*. Thus, in the zoning field, a decision concerning a specific piece of property is quasi-judicial, while one applying to an "open class" is legislative. *See* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972), *quoted in* *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 581, 507 P.2d 23, 27 (1973). Although the *Fasano* court provided little guidance as to how this distinction can be applied in future litigation, relevant factors may include the size of the parcel involved, who initiates the change, the number of owners affected, the label of local decision (e.g., variance, zone change), and the nature of the deciding body. Coon, *The Initial Characterization of Land Use Decision*, 6 ENV'T L LAW 121, 126-35 (1975).

125. 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974).

126. N.C. GEN. STAT. § 113A-115 (1975).

127. 386 F. Supp. 769 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975).

128. *Id.* at 772-73. The court stated:

Defendant does not state whether it believes the Open Shorelines Act to be unconstitutional for this reason, on its face, or in its application. There is nothing before the court other than defendant's naked assertion to this affect [sic]. Nonetheless, whatever may be the unexpressed contention of the defendant in this

also common in wetlands statutes and have been upheld against a vagueness attack.¹²⁹

Second, where mapping is desirable, the agency may informally plot boundary lines using aerial photos and tax maps. Massachusetts has recently adopted this form of notification in implementing its coastal wetlands act.¹³⁰ The Massachusetts courts have not ruled on the procedural adequacy of this form of notification, but authorities have not encountered any problem with it.¹³¹ It appears to meet "the two major statutory functions which may be affected by definitions. One of these functions is to guide the adjudication of rights and duties; the other is to guide the individual in planning his own future conduct."¹³²

Third, where necessary and appropriate, boundary lines of critical areas may be described with reference to readily identifiable landmarks, such as highways, county lines, ownership lines or geographical features. When adequate reason exists for the designation and when necessary for administrative purposes, courts have allowed considerable discretion in the drawing of regulatory boundary lines and do not require mathematical precision or a line in which all would agree. There must only be a reasonable basis for the particular line selected.¹³³

E. *Equal Protection Considerations*

All persons are guaranteed equal protection of the laws by the

regard, I do not believe the act to suffer from vagueness but rather consider it to pass constitutional muster with flying colors.

Id. at 773.

129. *Potomac Sand & Gravel Co. v. Governor of Md.* 266 Md., 358, 377-78, 293 A.2d 241, 252, *cert. denied*, 409 U.S. 1040 (1972). In a Utah case, a district court held that reference to a surveyed meander line provided sufficient notice. The court said: "The fact that in one small area on the west side of the lake the meander line has not as yet been surveyed and established does not affect this conclusion. It is something which is susceptible of ascertainment." *Great Salt Lake Auth. v. Island Ranching Co.*, 18 Utah 2d 45, 48, 414 P.2d 963, 965, *rev'd on other grounds*, 18 Utah 2d 776, 421 P.2d 304 (1966).

130. The procedure is described in detail in F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 208-09 (1971).

131. Telephone interview with Paul W. Granges, Attorney, Massachusetts Water Resources Commission, February 17, 1976.

132. Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 76, 77 (1948), *quoted in* *Swed v. Inhabitants of Bar Harbour*, 182 A.2d 664, 667 (Me. 1962).

133. *Meadowlands Regional Dev. Agency v. State*, 112 N.J. Super, 89, 102, 270 A.2d 418, 425 (Ch. Div. 1970), *aff'd*, 63 N.J. 35, 304 A.2d 545, *appeal dismissed*, 414 U.S. 99 (1973). *See* text at notes 144-45, 152 *infra*. Of course, it may be advisable to survey boundary lines when feasible. For a discussion of methods of demarking shoreline

United States Constitution,¹³⁴ and this requirement is also a feature of most state constitutions.¹³⁵ In the context of the regulation of land use, this right affords protection against classifications that are arbitrary or not reasonably related to legitimate objectives.¹³⁶ A classification that is found to be unreasonable will be struck down.

A state critical areas law and designation process creates a classification in distinguishing between those who own land within critical areas and those who do not. In general, the courts have evolved two different legal tests to determine the reasonableness of a classification depending on the subject matter and the nature of the right affected. The more lenient rational basis test is used in examining classifications in economic and social legislation; this holds that if there is any reasonable basis for the difference in treatment it will be sustained, and the attacking party must establish the invalidity beyond a reasonable doubt.¹³⁷ The strict scrutiny test, on the other hand, is generally reserved for examining classifications involving fundamental rights and certain suspect classifications, such as race.¹³⁸ Land use classifications generally have been judged by the rational basis test. Thus, courts have been reluctant to overturn legislative determinations in the area.¹³⁹ There is no bright line distinction between the two tests,¹⁴⁰

boundaries, see Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C.L. REV. 185, 249-60 (1974).

134. U.S. CONST. amend. XIV.

135. *E.g.*, N.C. CONST. art. I, § 19 (1970).

136. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910).

137. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1968); McGowan v. Maryland, 366 U.S. 420, (1957).

138. For a concise discussion of cases involving fundamental interests or suspect classifications, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-20 (1972).

139. *See* Young v. American Mini Theatres, Inc., 96 S. Ct. 2240, 2453 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1973). In *Young*, the Supreme Court rejected both equal protection and first amendment challenges to a Detroit ordinance prohibiting operation of certain "adult" establishments within certain distances of each other.

140. Professor Gunther has analyzed several cases in terms of a "sliding scale" approach to equal protection analysis. This new test would recognize a middle ground between a rational basis test and strict scrutiny. The elements of this "minimum scrutiny with bite" standard are as follows:

It would have the Court assess the means in terms of legislative purposes that have substantial basis in *actuality*, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are *offered to the Court*, rather than resorting to national reactions created by perfunctory judicial hypothesizing.

Gunther, *supra* note 138, at 21 (emphasis added). For cases that may support Gunther's

however, and in designating critical areas, the agency should be prepared to go beyond the minimum requirements of the rational basis test.

In a variety of contexts, courts have recently upheld state critical areas legislation in the face of equal protection challenges. Classifications based upon both the natural characteristics and resources of areas and upon the size of a particular development within a resource area have been validated. In *Mills, Inc. v. Murphy*,¹⁴¹ landowners alleged that Rhode Island's wetlands act had denied them equal protection by treating their freshwater wetlands differently and less favorably than saltwater wetlands. The Rhode Island Supreme Court, in upholding the classification, emphasized that the difference in overall approach whereby the state promulgated a statewide plan for coastal wetlands but required an owner to apply for a permit to develop fresh water wetlands was susceptible to a variety of reasonable explanations. The court said:

[T]he greater development pressure on coastal wetlands suggests the need for immediate state action while the situation regarding fresh water wetlands might not be so pressing; the high incidence of state-ownership in coastal wetlands might facilitate centralized action while the almost exclusively private ownership of fresh water wetlands would tend to hinder such an approach; the probable interdependence and interactions of coastal wetlands could necessitate unitary state action while the more random pattern of fresh water wetlands might thwart such an attempt.¹⁴²

*Potomac Sand and Gravel Co. v. Governor of Maryland*¹⁴³ considered the validity of prohibiting dredging of sand and gravel from wetlands but not interfering with the taking of sand and gravel from inland pit excavations. This classification was held valid since the protection of natural resources was a valid purpose under the police power and since the prohibition of dredging in a natural area such as a wetland was rational in the light of the harm to those areas caused by dredging.¹⁴⁴ *In*

approach, see *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Eisenstadt v. Baird*, 415 U.S. 438 (1971); *Reed v. Reed*, 404 U.S. 71 (1971). The Alaska Supreme Court has explicitly adopted this more rigorous test. *Isakson v. Rickey*, 550 P.2d 359, 363 (Alas. 1976) ("This new standard will, in short, close the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry.") For a federal land use decision which applied the sliding scale approach, but was later reversed, see *Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

141. —R.I.—, 352 A.2d 661 (1976).

142. *Id.* at —, 352 A.2d at 669.

143. 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972).

144. *Id.* at 373, 293 A.2d at 249.

re Spring Valley Development,¹⁴⁵ a 1973 decision of the Maine Supreme Court, upheld that state's Site Location of Development Act, which applied only to subdividers of more than twenty acres. This was held to be reasonably related to the statutory purpose of protection of the environment because of the likely heavy impact of large developments.¹⁴⁶

Not every court will unquestioningly accept the reason for a classification, however, especially when the classification is made by an administrative agency. *Kmiec v. Town of Spider Lake*¹⁴⁷ involved landowners who began a development after assurances by a local official that their development would not infringe a town zoning ordinance, but whose property was subsequently placed in an agricultural classification by a new ordinance adopted by the town, based on a proposal of a regional development commission. The court held that the landowners had met the burden of proving there was no rational basis for the agricultural classification. The agency determined that the property was agricultural based solely upon aerial photos and maps that were several years old without inspecting the property. The court was unwilling to hypothesize conceivable justifications for this classification and, even though control of orderly community development was accepted as a proper public purpose, it carefully scrutinized the testimony of the official responsible for the classification and the expert appraiser of the property.¹⁴⁸ Moreover, other courts in considering land use classification have applied the traditional rational basis test, but have referred either to specific trial testimony or to legislative findings to buttress their conclusions that the classifications involved were reasonable.¹⁴⁹

In order to overcome equal protection problems in adopting general criteria and in selecting particular critical areas, an agency should, keep careful records of the basis of its designations and be prepared to

145. 300 A.2d 736 (Me. 1973).

146. *Id.* at 752.

147. 60 Wis. 2d 640, 211 N.W.2d 471 (1973).

148. *Id.* at 648-49, 651, 211 N.W.2d at 475-76.

149. In *Sands Point Harbor, Inc. v. Sullivan*, 136 N.J. Super. 436, 346 A.2d 612 (App. Div. 1975), New Jersey's Wetlands Act was upheld against an equal protection challenge. The court drew on trial testimony relating to the differences between regulated and non-regulated areas to support its decision. *Id.* at 441, 346 A.2d at 614. In *Toms River Affiliates v. Department of Envir. Protection*, 140 N.J. Super. 135, 355 A.2d 679 (App. Div., 1976), the court used the legislative findings of New Jersey's Coastal Area Facility Review Act to support its conclusion that the coastal area could constitutionally receive special treatment. 140 N.J. Super. at 147, 355 A.2d at 686.

document the relationship of the designation to statutory goals that are permissible under the police power. When this is done, the courts will accept some seemingly arbitrary legislative or administrative line-drawing, such as mapping the geographic boundaries of particular areas or subjecting developers of projects of a certain size tract to special rules,¹⁵⁰ when done for administrative convenience.¹⁵¹

Equal protection considerations also require that all persons within a particular classification be treated alike. This would prohibit an ad hoc or piecemeal designation of critical areas within a regulated area. As a practical matter, however, this merely requires that the designation process be preceded by an inventory of the resources of the area and a good faith attempt not to discriminate between like areas. Complete knowledge and perfect data are not required under the rational basis test, and designations may be added, deleted or modified as new data becomes available and as conditions change.¹⁵²

An additional problem of equal protection is presented when critical areas legislation is limited to one particular portion of a state, as is the North Carolina CAMA which is limited to twenty coastal counties. This in effect establishes a class consisting of the particular section of the state subject to regulation, as opposed to the rest of the state which is not. This also raises the question of whether such legislation is invalid as a local, private or special act which is prohibited under the constitutions of many states, including North Carolina.¹⁵³

These questions have been extensively litigated in New Jersey in the context of that state's Hackensack Meadowlands Reclamation and Development Act and the Coastal Facility Review Act. In *Meadowlands Regional Development Agency v. State*,¹⁵⁴ the court upheld the constitutionality of the Hackensack Meadowlands Act, which created a special regional commission to regulate development within an 18,000-acre area in two New Jersey counties. The crucial question

150. "Major developments" under North Carolina's CAMA must obtain permits directly from the CRC. N.C. GEN. STAT. § 113A-118 (1975). Major developments include, *inter alia*, those "which occup[y] a land or water area in excess of 20 acres; . . . or which occup[y] on a single parcel a structure or structures in excess of a ground area of 60,000 square feet." *Id.* § 113A-118(d)(1).

151. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 & n.5 (1974); *In re Spring Valley Dev.*, 300 A.2d 752, 752-54 (Me. 1973).

152. North Carolina's CAMA allows the CRC to periodically amend its AEC designations. N.C. GEN. STAT. § 113A-115(c)(1975).

153. N.C. CONST. art. II, § 24(1). For discussion of the possible application of this doctrine to the N.C. CAMA, see Glenn, *supra* note 99, at 306-14.

154. 112 N.J. Super. 89, 270 A.2d 418 (Ch. Div. 1970), *aff'd*, 63 N.J. 471, 304 A.2d 545 (1972).

under the local legislation provision of the state constitution was whether the classification was reasonable when viewed against the purpose of the Act. The court applied the rational basis test, and indicated that the identical question is presented in the context of equal protection. It was found that the Hackensack Meadowlands constituted a "vast reservoir of vacant lands" possessing factual characteristics that warranted special treatment.¹⁵⁵ In *Toms River Affiliates v. Department of Environmental Protection*,¹⁵⁶ the Coastal Facility Review Act withstood attack on equal protection and local legislation grounds. The court found that the "unique and irreplaceable nature of the coastal area . . . and its importance to the public health and welfare amply support the reasonableness of special legislative treatment and regulation."¹⁵⁷

Each court gave short shrift to challenges based upon the arbitrariness of geographical boundaries drawn on maps. The courts explicitly recognized that a line on a map is a product of a series of decisions based on planning criteria and on choices made between competing alternatives. There is no need for such a line to be ultimately correct or beyond argument; it need only be reasonable under the circumstances in which it was made.¹⁵⁸

A similar view is likely in the North Carolina courts. Professor Glenn has extensively analyzed the North Carolina CAMA on the issues of whether its application to a twenty-county coastal zone infringed the local legislation provision of the North Carolina Constitution or the equal protection clause of the United States Constitution. He concluded that this classification was reasonably related to the purposes of the CAMA and would be upheld.¹⁵⁹

II. THE MANAGEMENT OF CRITICAL AREAS AND THE TAKING PROBLEM

Once critical areas have been designated and general principles have been formulated to guide development, a permit-letting process is the

155. *Id.* at 103, 270 A.2d at 425.

156. 140 N.J. Super. 135, 355 A.2d 679 (App. Div. 1976).

157. *Id.* at 147, 355 A.2d at 686. The court found that the legislative findings included in the Act expressed the reasons for the legislation and its rational correlation with the area involved. *Id.*

158. *Meadowlands Regional Dev. Agency v. State*, 112 N.J. Super. 89, 103, 270 A.2d 418, 425 (Ch. Div. 1970), *aff'd*, 63 N.J. 471, 304 A.2d 545 (1972); *Toms River Affiliates v. Department of Envir. Protection*, 140 N.J. Super. 135, 147, 355 A.2d 679, 686 (App. Div. 1976). See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

159. See Glenn, *supra* note 99, at 306-14.

usual mechanism for their management. The CZMA requires and the Model Land Development Code recommends state-level control of the management process, although the actual grant or denial of a permit may be the responsibility of local government.¹⁶⁰ Experience has shown that local participation in management is essential to the success of a critical areas program.¹⁶¹ Some states with critical areas laws, such as Oregon and Florida, vest permit letting in local governmental authorities under guidelines issued by the state.¹⁶² The North Carolina CAMA, on the other hand, grants this authority to the state-level CRC, although local governments are given permit-letting power over minor developments.¹⁶³

Whichever level of government has primary authority, effective management implies the power to attach conditions or to deny permits for development. Denial of a permit under the North Carolina CAMA requires an adjudicatory hearing and specific findings of certain statutorily required grounds.¹⁶⁴ Lurking in the background of every proceeding, however, will be the question of whether in the particular case regulation constitutes a taking of private property,¹⁶⁵ despite the fact that the statutory grounds for permit denial may be present. The permit-letting agency, not wanting to commit an unconstitutional act, will search for guidance on how far it may go in attaching conditions or in denying a permit without infringing this constitutional norm.

There is no shortage of impressive legal scholarship¹⁶⁶ on the taking issue. Its jurisprudential basis has been explored¹⁶⁷ and its origin and history have been analyzed.¹⁶⁸ Writers have attempted to find guiding principles for its application,¹⁶⁸ and there have been calls for reforming

160. See text at notes 3-4, 10-12 *supra*.

161. R. LINOWES & D. ALLENSWORTH, *THE STATES AND LAND USE CONTROL* 232-33 (1975).

162. FLA. STAT. ANN. § 380.05 (1975); ORE. REV. STAT. § 197.250 (1975). In Oregon, however, a state agency has responsibility for issuing permits for activities of statewide significance. *Id.* § 197.415.

163. N.C. GEN. STAT. § 113A-118 (1975).

164. *Id.* § 113A-120. These findings would be reviewable in court under the "substantial evidence" standard. *In re Main Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 346 A.2d 645 (1975).

165. U.S. CONST. amend. V, XIV.

166. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165 (1967).

167. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 51-138 (1973).

168. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CALIF. L. REV. 1 (1971). The authors of this article do not purport to offer

its impact by statute or by a decision of the United States Supreme Court.¹⁶⁹ Yet, there is still tremendous confusion about this doctrine among decision-makers who are called upon to face it on a day-to-day basis.

The only certain proposition that may be advanced regarding the manner the taking clause is applied today by the courts is that there is no abstract legal theory that will provide a basis for predicting the outcome of any particular case. This is evident from the recent cases that have applied the taking doctrine in a wetlands or coastal context. In *Just v. Marinette County*,¹⁷⁰ the Wisconsin Supreme Court upheld a shoreland zoning ordinance that placed a landowner's property in a conservation district. The land was in close proximity to a navigable lake, and denying the owner the right to change the natural character of the site was found necessary to protect navigable waters for fishing, recreation and scenic beauty under the public trust.¹⁷¹ Loss of property value was irrelevant where the depreciation was based only on what the land would be worth in its filled condition.¹⁷²

In *Turnpike Realty Company v. Town of Dedham*,¹⁷³ a zoning by-law establishing a flood plain district was found to not constitute a taking by the Massachusetts Supreme Judicial Court even though the landowner introduced testimony of an expert witness that the highest and best use of his property was for apartment buildings and that the value of the land was reduced by eighty-eight percent. The court found that the purposes of the ordinance were: (1) protection of persons and property against floods, (2) protection of other landowners against possible damage from the removal of the natural buffer effect of the flood plain, and (3) saving the community the cost of disaster relief and flood-preventing public works. The purposes were held to be valid and the record showed that the land in question was in fact subject to flooding. Reasonable uses of the landowner's property under these circumstances were, the court found, woodland, grassland, agricultural and recreational uses that did not require filling.¹⁷⁴

an exhaustive analysis of the taking question. The textual discussion is directed towards the practical concerns faced by administrators of critical areas statutes.

169. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 167, 238-55, 266-83.

170. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

171. *Id.* at 18, 201 N.W.2d at 768.

172. *Id.* at 23, 201 N.W.2d at 771.

173. 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973).

174. *Id.* at 235, 284 N.E.2d at 899-900.

*Potomac Sand and Gravel Co. v. Governor of Maryland*¹⁷⁵ is also instructive to show the practical application of the taking doctrine. The Maryland Court of Appeals sustained as reasonable a prohibition on dredging or filling wetlands because the use of the lands for this purpose would cause too great a loss to the public benefits derived from marshes. The court specifically cited: (1) the deprivation of spawning areas for fish, (2) the destruction of rare species of vegetation, (3) increased turbidity of coastal waters, and (4) loss of an accessible food supply for diving ducks. Also relevant was the fact that seventy percent of the proposed dredge sites were tidal waters and state-owned property.¹⁷⁶

On the other hand, in *MacGibbon v. Board of Appeals of Duxbury*,¹⁷⁷ the Massachusetts Supreme Judicial Court, although it did not directly decide the taking issue, annulled a denial of a permit application to fill coastal wetlands on the basis that the town board in question had a general policy that no permits would be granted to fill coastal wetlands. The court held that the town had exceeded its authority in not making adequate findings of fact and in not considering the extent to which the landowner was deprived of all practical value of his property.¹⁷⁸ The court suggested that the town should acquire the property in some way if its purpose was the preservation of the marshland in its natural state.¹⁷⁹

In *State v. Johnson*,¹⁸⁰ the Maine Supreme Court invalidated a restriction on the filling of a particular plot of coastal wetlands as an

175. 266 Md. 358, 293 A.2d 241 (1972).

176. *Id.* at 375, 293 A.2d at 250. In *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969), a zoning ordinance was upheld despite a two-thirds' diminution in value of a landowner's property. In New Jersey, wetlands legislation has been upheld. *Toms River Affiliates v. Department of Envir. Protection*, 140 N.J. Super. 135, 355 A.2d 679 (App. Div. 1976); *Sands Point Harbor, Inc. v. Sullivan*, 136 N.J. Super. 436, 346 A.2d 612 (App. Div. 1975). In Maine, the application of the Site Location Law was upheld in *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973). See *Candlestick Prop., Inc. v. San Francisco Bay Conservation & Dev. Comm'n* 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975).

177. 356 Mass. 635, 255 N.E.2d 347 (1970).

178. *Id.* at 638, 641, 255 N.E.2d at 350, 352. The town board subsequently denied the permit a second time; on judicial review of the decision the Massachusetts Supreme Court ordered the granting of the permit. *MacGibbon v. Board of Appeals*, —Mass.—, 340 N.E.2d 487 (1976).

179. 356 Mass. at 641, 255 N.E.2d at 352. See *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965).

180. 265 A.2d 711 (Me. 1970).

unconstitutional taking. It was found that the natural resource benefits of regulation—"the conservation and development of aquatic and marine life, game birds and waterfowl"—were public benefits whose cost should be publicly borne. Moreover, the land, absent the addition of fill, had no commercial value whatever.¹⁸¹

These cases offer little guidance in guarding against unconstitutional takings. Diminution of the value of the land involved is not the key, since courts will overlook this to the extent they are willing to uphold the police power purpose.¹⁸² The distinction between preventing a public harm versus securing a public benefit¹⁸³ is not a workable test, since one court's prevention of public harm is another court's securing of a public benefit.¹⁸⁴ The North Carolina CAMA adopts a statutory test—whether the restriction deprives the owner "of the practical uses of [his property], being not otherwise authorized by law."¹⁸⁵ But this rule, as Professor Glenn has demonstrated,¹⁸⁶ merely codifies the confusing case law in North Carolina and presents the problems of determining a "practical use" and when a restriction is "authorized by law."¹⁸⁷

As a practical matter, a permit-letting agency must learn to live with uncertainty on how the taking clause will be applied. It should be realized, however, that taking cases turn on their facts and that it is within the agency's power to deal with and to minimize this problem.

181. *Id.* at 716. Contrast the decision of the same court in *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973). The court distinguished *Johnson* because in *Spring Valley* there was nothing in the record to indicate an unreasonable burden. *Id.* at 749. For earlier cases holding that an unconstitutional taking existed, see *Bartlett v. Zoning Comm'n*, 161 Conn. 24, 282 A.2d 907 (1971); *Dooley v. Town Plan and Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964); *Morris County Land Improvement Co. v. Township of Parsippany - Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

182. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *cert. denied*, 371 U.S. 36 (1962) (property in question rendered worthless).

183. Under the harm-benefit test a taking occurs when the police power is used to secure a public benefit. For criticism of this rule, see Bowden, *Legal Battles on the California Coast: A Review of the Rules*, 2 COASTAL ZONE MANAGEMENT J. 273, 281-82 (1976).

184. This is readily apparent from a consideration of the cases cited in notes 174-81 *supra*.

185. N.C. GEN. STAT. § 113A-123(b) (1975).

186. Glenn, *supra* note 99, at 330-38 (1974). The case from which this statutory definition was apparently taken is *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961).

187. See Glenn, *supra* note 99, for a discussion of these problems.

Careful agency rulemaking and factual development are the best method of minimizing the risk of unconstitutional taking. In the context of an agency managing critical areas, three particular suggestions may be made.

First, in drafting guidelines for priority uses for different categories,¹⁸⁸ the agency should list what uses of land are practical for each type of critical area. This listing should not be a mere pro forma exercise but should represent a good faith attempt by the agency to nominate practical uses that would be consistent with the resource value objective of the particular category.¹⁸⁹ It should be made clear that no general prohibition against changing its natural character is intended if it can be done without infringing specific resource values.

Second, the purposes of the use restrictions for each category of critical area should be carefully and precisely expressed in the general guidelines. Such purposes, in order to be valid, must be permissible state objectives under the police power. The purposes to which use restrictions are tied will range from the more traditional police power objectives to the newer and more controversial. Traditionally, permissible police power objectives have included protection of property and persons from natural hazards, safeguarding major public investments, assuring the orderly development of the community, and protecting the public from having to bear the financial burden of disaster assistance and the construction of structures to protect persons and property against natural hazards. There should also be little doubt that protection of important resources, such as air, soil, water and marine fisheries, is permissible under the police power.¹⁹⁰ The basis for protecting these objectives should be based on existing water and air quality standards, as well as study of the "carrying capacity" of such resources to accommodate development.¹⁹¹

The protection of public rights and the public trust have also been

188. This is a required step for the designation of areas of particular concern in coastal zone management. *See* note 58 *supra*.

189. For examples of this, see *Turnpike Realty v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). For descriptions of planning methods, see I. MCHARG, *DESIGN WITH NATURE* (1969); KAISER, *PROMOTING ENVIRONMENTAL QUALITY THROUGH URBAN PLANNING AND CONTROL* (U.S. Environmental Protection Agency Grant No. 801376, 1974); Lyle & Wodtke, *An Information System for Environmental Planning*, *AMER. INST. PLAN. J.* 394 (Nov. 1974).

190. *See* text accompanying notes 104, 105 and 108 *supra*.

191. *See generally* D. GODSCHALK, F. PARKER & T. KNOCH, *CARRYING CAPACITY: A BASIS FOR COASTAL PLANNING?* (1974).

recognized as proper public purposes under the police power.¹⁹² Although the precise extent of the public trust doctrine is uncertain in many states,¹⁹³ the emerging view is that it is a source of public ownership of tidelands and lands under navigable waters.¹⁹⁴ This would include many coastal areas, such as beaches, estuarine lands, shorelands and marshlands. In some states the public trust doctrine has been more expansively defined as including habitat for wildlife and marine life.¹⁹⁵ In addition, legal doctrines other than the public trust doctrine have been recognized as the source of public rights to use the dry sand area of beaches¹⁹⁶ and non-navigable waters.¹⁹⁷

The most controversial police power purpose in the land use context will be the preservation of wildlife, natural areas and rare species of plants and animals. These are increasingly recognized as legitimate state objectives, however, by constitutional amendment¹⁹⁸ or by court decisions upholding a broadened view of the police power.¹⁹⁹

Third, a management agency under a critical areas statute should develop a factual record in each case to show the relationship of any permit restriction or denial to a particular public purpose, as well as the necessity of the restriction in order to achieve it. If it cannot be shown that a restriction on development is reasonably related to even an unquestioned public purpose, a taking problem may result.²⁰⁰ Thus, care must be taken by the agency in making its findings of fact.

192. *Potomac Sand and Gravel Co. v. Governor of Md.*, 266 Md. 358, 293 A.2d 241 (1972); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). See N.C. CONST. art. XIV, § 5.

193. See generally Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1 (1972).

194. *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334 (1976); *International Paper Co. v. Mississippi State Highway Dep't*, 271 So.2d 395 (Miss. 1972), cert. denied, 414 U.S. 827 (1973); *Borough of Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970); *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 148 S.C. 428, 146 S.E. 434 (1928). See generally Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

195. *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

196. *United States v. St. Thomas Beach Resorts*, 386 F. Supp. 769 (D.V.I. 1974), aff'd, 529 F.2d 513 (3d Cir. 1975); *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (dedication); *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P.2d 671 (1969) (custom); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. 1964) (prescription).

197. *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); See generally D. DUSCIK, *SHORELINE FOR THE PUBLIC* 87-136 (1974).

198. N.C. CONST. art. XIV, § 5.

199. See text at notes 105-09 *supra*.

200. *MacGibbon v. Board of Appeals*, —Mass.—, 340 N.E.2d 487 (1976).

It must be recognized, however, that the police power alone cannot be relied upon to achieve natural area preservation in the coastal area. Where it is desirable to go beyond the protection of specific police power objectives, public acquisition will be necessary. Effective land use management to achieve the preservation of natural diversity requires the creation of a separate but related program to survey potential natural areas and to secure their acquisition by means of purchase or gift of legal title, easements or development rights.²⁰¹

CONCLUSION

Critical areas controls have not met with great success so far because they have involved large geographical areas and only generalized regulatory purposes. There is understandable opposition to state-imposed land use controls using a broad-brush approach. A more workable critical areas program is the designation of specialized geographical areas tied to particular state police power objectives. The experience of North Carolina's "areas of environmental concern" program tends to indicate that this approach is more politically acceptable and easier to implement because the planning process can be left largely in local hands.

201. For recommendations and a survey of state natural area preservation programs, see generally *THE PRESERVATION OF NATURAL DIVERSITY: A SURVEY AND RECOMMENDATIONS* (The Nature Conservancy 1975).