

# REGULATING AREAS OF CRITICAL STATE CONCERN: FLORIDA AND THE MODEL CODE

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## I. INTRODUCTION

The widely acclaimed "quiet revolution" in state land use regulation has produced a variety of new land use controls.<sup>1</sup> Of these recent innovations, critical area controls have emerged as the most popular technique for protecting and promoting state and regional

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1 Although now outdated, F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1971), is still a useful review of the earliest of the new state land use controls. For discussions of some of the more recent state land use legislation, see R. HEALY, *LAND USE AND THE STATES* (1976); R. LINOWES & D. ALLENSWORTH, *THE STATES AND LAND-USE CONTROLS* (1975). Probably the best overview of state land use planning and regulation is the excellent treatise, D.

interests in the use and development of land.<sup>2</sup> The term "critical area" is a reference to a geographical area possessing unique characteristics which make it of significant interest to inhabitants of the state or region beyond the boundaries of local governments within whose jurisdictions part of the area is located.<sup>3</sup> An area's criticalness may derive from its historical,<sup>4</sup> environmental, or natural resources,<sup>5</sup> from its major development potential,<sup>6</sup> from the existence of problems, conditions, or mutually reinforcing land use interdependencies that require areawide management,<sup>7</sup> or from the location of major public facilities in the area.<sup>8</sup>

Critical area controls single out such areas for special land use regulation by state or regional agencies or local governments. Although local governments may continue to exercise regulatory powers in such areas, the critical areas technique usually subjects adoption and exercise of local development regulations to some form of state or regional supervision. Thus, the critical areas technique allows the state to intervene expeditiously in areas of genuine state concern while simultaneously providing for a continuing local role in these areas. Moreover, local autonomy is entirely preserved in noncritical areas. These features of the critical areas technique should make

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MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION (1976) [hereinafter cited as MANDELKER], which also contains detailed analyses of selected state land use programs.

2. See Mandelker, *Critical Areas Controls: A New Dimension in American Land Development Regulation*, 41 AM. INST. PLAN. J. 21 (1975).

3. COUNCIL OF STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS NO. 5: ISSUES AND RECOMMENDATIONS—STATE CRITICAL AREAS PROGRAMS 1 (1975).

4. Historical resources were an important consideration in the designation of the Florida Keys as an area of critical state concern. See note 214 and accompanying text *infra*.

5. Preservation of natural resources was the motivating factor in the New York legislature's designation of the Adirondack Park as a critical area. See notes 20, 21 and accompanying text *infra*.

6. Managing rapid development was a primary consideration in the designation of the Lake Tahoe Region for special regulatory treatment, see notes 28-30 and accompanying text *infra*, while promoting planned development principally motivated the creation of the Hackensack Meadowland District, see notes 31-37 and accompanying text *infra*.

7. The interdependence of water, wetlands, and wildlife habitat figured prominently in Florida's designation of the Green Swamp as an area of critical state concern. See notes 192-194 and accompanying text *infra*.

8. The existence of valuable public facilities were cited by Florida officials as justification for designation of both the Green Swamp and the Florida Keys as critical areas. See notes 195-97, 215 and accompanying text *infra*.

state intervention less objectionable to entrenched local governments and opponents of greater public control of private property.

Two general approaches to state regulation of critical areas have emerged: regulation of an entire geographical region legislatively designated on an ad hoc basis and comprehensive statewide mechanisms for administrative designation and regulation of critical areas. Several states, of which California,<sup>9</sup> Massachusetts,<sup>10</sup> New Jersey,<sup>11</sup> New York,<sup>12</sup> and North Carolina<sup>13</sup> are prime examples, have experimented with the critical areas technique on an ad hoc regional basis through legislative designation of discrete geographical areas. At least six states—Colorado,<sup>14</sup> Florida,<sup>15</sup> Minnesota,<sup>16</sup> Nevada,<sup>17</sup> Ore-

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9. The California legislature singled out the San Francisco Bay area for special regulatory treatment in 1955 when it enacted the Bay Area Air Pollution Control Law. CAL. HEALTH & SAFETY CODE §§ 24345-24375 (Deering 1975) (repealed 1975), in an effort to combat the regional air pollution problem. See Brooks, *The Metropolis, Home Rule, and the Special District*, 11 HASTINGS L.J. 110 (1959-60) for a discussion of the act. In 1969 California joined Nevada in designating, with congressional ratification, the Lake Tahoe region as an interstate critical area. See notes 28-29 and accompanying text *infra*. for a brief discussion of this designation. In 1976 the California legislature enacted the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1978), which designates the state's entire coastal zone as a critical area requiring special regulatory treatment.

10. By special act the Massachusetts legislature in 1977 designated Martha's Vineyard, an island, as a critical area. 1977 Mass. Acts ch. 831. See notes 24-27 and accompanying text *infra*.

11. In 1968 the New Jersey legislature singled out the Hackensack Meadowlands for special regulatory treatment. N.J. STAT. ANN. § 13:17-1 to -86 (West Cum. Supp. 1978-79). See notes 31-37 and accompanying text *infra*.

12. In 1971 the New York legislature conferred critical area status on the Adirondack Park. See notes 20-23 and accompanying text *infra*.

13. In 1974 the North Carolina Legislature designated that state's entire coastal zone as a critical area. N.C. GEN. STAT. § 113A-100 to -128 (1978). For a detailed analysis of the North Carolina legislation, see Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1; 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 (1974).

14. Colo. Rev. Stat. § 24-65.1-201, -202, -401, -501 (Cum. Supp. 1976). The Colorado legislation is analyzed in White & Petros, *Land Use Legislation: H.B. 1034 and H.B. 1041*, 6 THE COLO. LAW. 1686 (1977); Kurtz-Phelan, *H.B. 1041: A Step Toward Responsible and Accountable Land Use Decisions*, 6 THE COLO. LAW. 1718 (1977).

15. FLA. STAT. § 380.05 (1977). For earlier discussions of Florida's legislation, see the excellent introductory essay, Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, URBAN L. ANN. 103 (1973); and Comment, *Area of Critical State Concern: Its Potential for Effective Regulation*, 26 U. FLA. L. REV. 858 (1974).

16. MINN. STAT. ANN. § 116G.01 to .14 (West 1977).

17. NEV. REV. STAT. § 321.655(2), .755, .770(1)(a) (1977).

gon<sup>18</sup> and Wyoming<sup>19</sup> have enacted comprehensive statewide programs for regulating critical areas. While sharing a common purpose, the two approaches have produced markedly different regulatory systems.

### A. *Ad Hoc Regulation of Critical Areas*

The most impressive implementations of critical area controls have occurred in states using the technique on an ad hoc regional basis. Under this approach, a particular region of the state is designated as critical by state legislation establishing a special regulatory system for the area. The legislation has no application beyond the designated area. If another area of the state becomes of crucial importance to the state or region, the state legislature may confer critical area status upon it only by enacting new legislation that may differ significantly from its earlier enactment. A survey of the most prominent examples of the ad hoc regional approach is instructive not only in evaluating statewide comprehensive critical area programs but also in illustrating the versatility of the critical areas technique.

The Adirondack Park Agency is an example of how critical area controls may be used for preservationist purposes. Encompassing approximately six million acres of wilderness area in northeastern New York State, the Adirondack Park is larger than the entire state of Massachusetts. Approximately sixty percent of the park's acreage is in state ownership; the remainder is privately owned. As a national and international tourist attraction, a major source of water, and the site of substantial forest, agricultural and mining industries, the park is subject to conflicting demands for preservation and development. The location within the park's boundaries, either wholly or partially, of 119 separate local government units made it virtually impossible to fashion a comprehensive strategy for dealing with the park's problems.<sup>20</sup>

In response to this situation, the New York legislature, in 1971, created the Adirondack Park Agency and authorized it to adopt and

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18. OR. REV. STAT. § 197.400, .405 (1977).

19. WYO. STAT. §§ 9-19-102(a)(ii), 9-19-203(a)(ix) (1977).

20. Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612, 613-15 (1975).

implement a comprehensive land use controls system for the dual purpose of preserving and using the vast resources of the area.<sup>21</sup> The agency was required to prepare and implement a legislatively approved land use and development plan and map for the park. Within the constraints of the use districts and density guidelines established by the plan, constituent local governments are permitted and encouraged to adopt detailed local land use programs to effectuate the purposes of the Act.<sup>22</sup> Certain categories of proposed development are subject to binding agency review for conformity with the regional or local plan.<sup>23</sup>

A unique example of how the ad hoc regional approach may be employed to manage the coastal zone is provided by Martha's Vineyard, an island off the southeastern coast of Massachusetts. The island's quaint old villages, colonial architecture, sandy beaches and scenic beauty have made it a national tourist attraction and an attractive site for commercial development.<sup>24</sup> To protect the unique natural, historical, ecological and cultural values of the island, the Massachusetts legislature in 1977 created the Martha's Vineyard Commission<sup>25</sup> and authorized it to implement and administer a regulatory system that is essentially an application of Article 7 of the American Law Institute's Model Land Development Code (Model Code).<sup>26</sup> Within its territorial jurisdiction, which includes seven local governmental entities, the Commission is empowered to designate districts of critical planning concern and developments of regional impact and to adopt guidelines and standards with which local regulation of such districts or development must conform.<sup>27</sup> Thus, the

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21. N.Y. EXEC. LAW § 801 (McKinney Supp. 1972-78).

22. *Id.* §§ 807, 808, 818.

23. *Id.* §§ 809, 810.

24. Graves, *Martha's Vineyard*, 1961 Nat'l Geographic 780; Island Properties, Inc. v. Martha's Vineyard Comm'n, 361 N.E.2d 385, 386 (Mass. 1977).

25. 1977 Mass. Acts, ch. 831, §§ 1, 2.

26. ALI, MODEL LAND DEVELOPMENT CODE (1975) [hereinafter cited as Model Code]. Article 7 provides for the designation and regulatory supervision of developments of regional impact and areas of critical state concern by a state administrative agency. *Id.* For an excellent analysis of Article 7, see MANDELKER, *supra* note 1, at 63-126. The derivative Martha's Vineyard legislation is discussed in Jaffe, *Island Properties v. Martha's Vineyard Commission: Regional Planning and the ALI Code*, 29 LAND USE L. & ZONING DIG. 4 (No. 6, 1977).

27. 1977 Mass. Acts §§ 3, 9.

Massachusetts Legislature has transplanted Article 7's dual regulatory techniques from the state level to a single area of the state.

The ad hoc regional approach to regulating critical areas has been used on an interstate basis to manage growth and development in an environmentally endangered area, the Lake Tahoe basin. Straddling the California-Nevada border, the basin, over a third of which is covered by Lake Tahoe, includes portions of two California counties, a California city, and three Nevada counties. Because of its natural beauty and the growth of the gambling industry, the basin has attracted an increasing number of tourists and substantial residential development, thereby endangering the water quality of Lake Tahoe.<sup>28</sup> Consequently, the U.S. Congress in 1969 ratified an interstate compact between California and Nevada which created the basinwide Tahoe Regional Planning Agency.<sup>29</sup> The primary responsibilities of the agency are the formulation of a regional plan for the basin and the adoption of implementing regulations that are binding on all constituent local governments.<sup>30</sup>

Although critical area controls are commonly associated with environmental or preservationist concerns, the Hackensack Meadowlands District demonstrates how the technique may be used to promote development. Prior to 1968, the Hackensack Meadowlands consisted of approximately 21,000 acres of vacant swamps, meadows and marshlands located in the New York City-New Jersey metropolitan area and distributed among two counties and fourteen municipalities.<sup>31</sup> Due to its low elevation, unfavorable soil composition and political fragmentation, the Meadowlands, although urgently needed for industrial, commercial, residential and recreational purposes in a burgeoning metropolitan area, had resisted comprehensive

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28. Comment, *Regional Government for Lake Tahoe*, 22 HASTINGS L.J. 705, 706 (1971); Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 58 CALIF. L. REV. 1273, 1276 (1970).

29. Pub. L. No. 91-148, 83 Stat. 360 (1969). Congressional ratification was required by U.S. CONST. art. I, § 10, cl. 3, which provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." The California codification of the compact is found at CAL. GOV'T CODE §§ 66800-66801 (Deering 1974 & Supp. 1978). The Nevada codification is found at NEV. REV. STAT. § 277.190 to .220 (1977).

30. CAL. GOV'T. CODE § 66801 (Deering 1974 & Supp. 1978); NEV. REV. STAT. § 277.200 (1977).

31. *Meadowlands Regional Dev. Agency v. State*, 112 N.J. Super. 89, 97, 103, 270 A.2d 418, 422, 425 (1970), *aff'd*, 63 N.J. 35, 304 A.2d 545 (1973), *appeal dismissed*, 414 U.S. 991 (1973).

development.<sup>32</sup> Thus, in 1968 the New Jersey legislature designated a large portion of the area as the Hackensack Meadowland District and created a development commission for the purpose of reclaiming, planning and developing the area.<sup>33</sup> The Commission, a separate political subdivision of the state,<sup>34</sup> is empowered to undertake any development necessary to reclaim and improve the district.<sup>35</sup> It is required to prepare, adopt and implement a master development plan and subdivision regulations to which all municipal land development regulations must conform.<sup>36</sup> No constituent local government may undertake any project requiring expenditure of public funds, and no structure or subdivision may be commenced without prior approval of the Commission.<sup>37</sup>

Several features of the various ad hoc regional experiments are noteworthy. First, each establishes a regional agency with jurisdiction over the entire designated area. Local government powers are subordinated to those of the regional entity which has either the power to regulate directly certain activities in the area or to review and disapprove local regulation. Second, with the exception of the Martha's Vineyard Commission, each embodies a strong planning component. The regional agency is authorized to prepare and adopt a comprehensive regional plan to which local plans or development regulations must conform. Third, these ad hoc approaches collectively demonstrate that critical area controls may be used to attack a broad array of regional problems.

### B. *Comprehensive Statewide Mechanisms*

Comprehensive statewide mechanisms for designating and regulating critical areas provide an interesting contrast to the ad hoc regional approach. Of the six states using this approach, most have adopted a modified version of the Model Code's critical areas technique. Basically, the Model Code identifies three broad categories of critical areas and authorizes a state administrative agency to designate areas of critical state concern from among those categories and

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32. N.J. STAT. ANN. § 13:17-1 (West 1979).

33. *Id.* § 13:17-4, -5, -6.

34. *Id.* § 13:17-5(a).

35. *Id.* § 13:17-6(j).

36. *Id.* § 13:17-6(i), -9, -11(b).

37. *Id.* § 13:17-12(a), -12(b), -14(a).

establish guiding principles for their development.<sup>38</sup> Local governments within a designated area must submit land development regulations to a state administrative agency.<sup>39</sup> Local land use decisions made pursuant to the regulations are then subject to review and disapproval by the agency.<sup>40</sup> While each of the six states adopting the comprehensive statewide approach has borrowed from the Model Code concept, each state also has deviated from the ALI proposal in some significant respects.

Colorado deviates sharply from the Model Code by allowing local governments rather than a state agency to designate "areas of state interest."<sup>41</sup> Although the Colorado Land Use Commission may request local governments to designate a particular area of state interest and seek judicial review of a local refusal to make the requested designation,<sup>42</sup> the Commission has no power to directly designate such areas. In specifying an area of state interest, a local government must adopt guidelines and may enact implementing regulations in accordance with statutory criteria for administering the area.<sup>43</sup> Consistent with the weak role accorded the state under the Colorado system, the Commission may review and recommend modifications in local guidelines, however, its recommendations are purely advisory.<sup>44</sup>

Nevada vests both its governor and local governments with the

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38. Model Code, *supra* note 26, § 7-201.

39. *Id.* § 7-203(1).

40. *Id.* § 7-203(3).

41. Colorado's statutory criteria are, however, much more restrictive than the Model Code categories. COLO. REV. STAT. §§ 24-65.1-102(4), 24-65.1-301(1) (Supp. 1976). Local governments may designate areas of state interest only from among the following categories: "(a) mineral resource areas; (b) natural hazard areas; (c) areas containing, or having a significant impact upon, historical, natural, or archeological resources of statewide importance; and (d) areas around key facilities in which development may have a material effect upon the facility or the surrounding community." *Id.* § 24-65.1-201. The scope of the Colorado categories is reduced by restrictive statutory definitions. *E.g.*, "Key facilities" include only airports, major facilities of a public utility, arterial highway interchanges, and rapid or mass transit stations. *Id.* § 24-65.1-104(7). "Natural resources of statewide importance" include only shorelands of major publicly-owned reservoirs and significant wildlife habitats. *Id.* § 24-65.1-104(12). "Historical or archeological resources of statewide importance" encompass only resources officially included in the national register of historic places or a list compiled by the state historical society, or designated by statute. *Id.* § 24-65.1-104(6).

42. *Id.* § 24-65.1-407.

43. *Id.* § 24-65.1-402.

44. *Id.* § 24-65.1-406.



power to designate "areas of critical environmental concern."<sup>45</sup> The extent to which the state may regulate such areas is not clear. If the governor or a local government finds an area to be of critical environmental concern, the state land use planning agency must provide planning assistance for the area in accordance with policies recommended by an appointive advisory council.<sup>46</sup> The recommended planning policies may include implementing land use regulations, but such regulations are effective only if approved by the governor.<sup>47</sup> Unfortunately, the Nevada legislation does not state whether the recommended planning policies are binding upon local governments.

The Wyoming legislature has conferred upon the Wyoming Land Use Commission<sup>48</sup> the power to designate areas "where uncontrolled or incompatible large-scale development could result in damage to the environment, life or property, . . . and such additional areas as the Commission determines to be of more than local concern."<sup>49</sup> The significance of this broad grant of power is diminished by the lack of strong statutory controls over designated areas. The Wyoming Commission, like its counterpart in Nevada, must establish development guidelines and provide planning assistance to local governments in a designated area.<sup>50</sup> The Wyoming act does not, however, specify whether local governments in such an area are bound by the guidelines. Moreover, the act does not provide for state review of local development regulations and decisions in designated areas.

Oregon also lacks a well-defined statutory process for designating and regulating critical areas. The Oregon Land Conservation and Development Commission, an appointive state board,<sup>51</sup> is empow-

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45. NEV. REV. STAT. § 321.770(1) (1977). "Area of critical environmental concern" is defined as "any area in this state where there is or could develop irreversible degradation of more than local significance but does not include an area of depleting water supply which is caused by the beneficial use or storage of water in other areas pursuant to legally owned and fully appropriated water rights." *Id.* § 321.655(2).

46. *Id.* §§ 321.755, 321.770. The land use planning advisory council consists of 17 members appointed by the governor. Members must be either elected officials or representatives of local political subdivisions. *Id.* §321.740.

47. *Id.* § 321.770(4), (5).

48. WYO. STAT. § 9-19-202(a) (1977) provides in part: "The Commission shall consist of nine (9) members appointed by the governor."

49. *Id.* §§ 9-19-102(a)(ii), 9-19-203(a)(ix).

50. *Id.* § 9-19-203(a)(ix)-(x).

51. OR. REV. STAT. § 197.030(1) (Supp. 1977) establishes the "Land Conservation and Development Commission consisting of seven members appointed by the Governor, subject to confirmation by the Senate."

ered to recommend "designation of areas of critical state concern" to the state legislature, which may then make the designation and establish a regulatory system for the area.<sup>52</sup> Probably because legislative approval is required, the Oregon statute neither restricts the categories of areas that may be designated nor provides for a regulatory process of general applicability to all designated areas.<sup>53</sup> Therefore, the Oregon act only institutionalizes the ad hoc regional approach to managing critical areas.

Only Florida and Minnesota have detailed state administrative processes for both designating and regulating critical areas. The critical areas legislation of each state closely tracks the Model Code proposal, although the Minnesota system is slightly more deviant than the Florida version. The Minnesota act<sup>54</sup> authorizes the governor, pursuant to the recommendation of a state agency, to designate "areas of critical state concern" from among statutory categories similar to those contained in the Model Code and the Florida act.<sup>55</sup> It does not, however, provide for state administrative review of land development decisions in as many areas as the Florida and Model acts.<sup>56</sup> On the other hand, in a significant advance beyond the Florida and model acts, the Minnesota act requires the preparation of land use plans by each local government in a critical area and provides for binding state administrative review of local plans.<sup>57</sup> The Model

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52. *Id.* § 197.405(2)-(5).

53. *See id.*

54. MINN. STAT. ANN. § 116G.06 (West Supp. 1977). The Minnesota Environmental Quality Board, composed of various state officials and four members appointed by the governor, has statutory responsibility for recommending critical area designations to the governor. *Id.* §§ 116G.03, 116G.03(2), 116G.06(1).

55. The Minnesota statute allows designation of critical areas having the following characteristics: "(1) an area significantly affected by, or having a significant effect upon, an existing or proposed major government development which is intended to serve substantial numbers of persons beyond the vicinity in which the development is located and which tends to generate substantial development or urbanization. (2) An area containing or having a significant impact upon historical, natural, scientific, or cultural resources of regional or statewide importance." *Id.* §§ 116G.05, 116G.06(1). Compare the Minnesota categories with those of the Model Code, *supra* note 26, § 7-201(3), and Florida, FLA. STAT. § 380.05(2) (1977).

56. *See* MINN. STAT. ANN. § 116G.01 to .14 (West Supp. 1977). The Model Code's provisions for state administrative review are found at Model Code, *supra* note 26, § 7-501 to -503. Florida's statutory provisions for state administrative review are found at FLA. STAT. § 380.07 (Supp. 1978).

57. MINN. STAT. ANN. § 116G.07 (West Supp. 1977).

Code does not impose a planning requirement,<sup>58</sup> and the Florida system, while containing a mandatory local planning requirement, does not provide for binding state review of local plans.<sup>59</sup>

### C. *The Florida Critical Areas Program*

This Article analyzes Florida's experience with the critical areas technique. Although Florida has used its critical areas process sparingly, its experimentation with the comprehensive statewide technique exceeds that of any other state with the possible exception of Colorado. Three of the states, Oregon,<sup>60</sup> Nevada,<sup>61</sup> and Wyoming<sup>62</sup> have not designated any critical areas pursuant to their comprehensive legislation. Minnesota has employed its comprehensive apparatus to designate two critical areas; however, one designation has already lapsed and no regulations have been approved for the other.<sup>63</sup> Although numerous local governments in Colorado have designated one or more areas,<sup>64</sup> the Colorado system, with its rejection of a strong state role, is atypical of the comprehensive statewide approach envisioned by the Model Code and implemented in Florida.

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58. See Model Code, *supra* note 26, § 7-201 to -208.

59. See notes 136-137, 147 and accompanying text *infra*.

60. Interview with Lloyd Chapman, Plan Review Specialist, Oregon Department of Land Conservation and Development, in Salem, Oregon (August 15, 1978). According to Mr. Chapman, it is unlikely that the Oregon critical areas legislation will ever be implemented because of the scope and success of the state's comprehensive state and local planning program. *Id.* The Oregon state and local planning legislation is found at OR. REV. STAT. § 197.005 (Supp. 1977).

61. Telephone interview with Robert Erickson, Administrator, Division of State Lands, Department of Conservation and Natural Resources, State of Nevada, Carson City, Nevada (Oct. 17, 1978).

62. Interview with Peter Willing, Director, Office of Land Use Administration, State of Wyoming, in Cheyenne, Wyoming (Aug. 8, 1978). The Wyoming Land Use Commission officially tabled the state's critical areas process in 1978 without ever adopting any rules of implementation or designating any areas. *Id.*

63. Telephone interview with Cliff Aichinger, Critical Area Program Coordinator, Minnesota Environmental Quality Board, Minneapolis, Minnesota (October 13, 1978). The first designation, the Lower St. Croix River, lapsed after three years pursuant to MINN. STAT. ANN. § 116G.06(2)(C) (West Supp. 1977). The second designation, the Mississippi River corridor in the Minneapolis-St. Paul area, is still in effect, but local regulations and plans have not been reviewed and approved by the state board. Interview with Aichinger. *supra*.

64. Interview with Ted Rodenback, Principal Planner, Colorado Land Use Commission, in Denver, Colorado (Aug. 21, 1978).

In sharp contrast to the dearth of experience with the critical areas technique in other states, Florida has officially designated three critical areas. In each area the statutorily prescribed regulatory framework has been established, thereby providing a basis for some tentative conclusions as to the efficacy of the comprehensive critical areas technique. Moreover, Florida is the first jurisdiction in which the constitutionality of a comprehensive statewide critical areas program has been judicially determined and in which amendatory legislation has been enacted to cure constitutional deficiencies. Thus, of the existing comprehensive statewide programs, the Florida critical areas process is the most promising candidate for fruitful analysis.

Part II of this Article describes and analyzes the various phases of Florida's original critical areas process. The critical areas technique has three discrete phases: designation, regulation and adjudication. The institutional arrangements and the procedural requirements devised by the Florida legislature for implementing each of these phases are examined in detail.

Part III analyzes Florida's implementation of the critical areas technique. Three areas, the Big Cypress Swamp, the Green Swamp, and the Florida Keys, have been officially designated as areas of critical state concern. A fourth area, the Appalachicola River Valley, has been proclaimed by the Florida Division of State Planning as an unofficially designated critical area. This part describes each of the critical areas, evaluates the land development regulations adopted in each of the areas, and analyzes the adjudication of conflicts resulting from application of the regulations.

The Florida critical areas technique subjects land use regulation, traditionally considered by many local governments to be their exclusive domain, to state control. It also singles out some private property for special regulatory treatment, and authorizes an administrative agency to exercise the legislative power of designation. Constitutional and other legal challenges by municipalities and private land owners to the validity of such controls are, therefore, inevitable.

A Florida appellate court recently responded to such attacks by declaring that certain designation provisions of the state's critical areas legislation constituted an unconstitutional delegation of legislative power. On appeal, the Florida Supreme Court affirmed. Using these judicial decisions as a vehicle, Part IV examines the non-delegation doctrine as a barrier to implementation of comprehensive crit-

ical area controls and discusses the Florida legislature's response to these decisions.

Several conclusions emerge from this analysis. The comprehensive approach, as conceived by the Model Code and implemented in Florida, imposes much less potent controls on critical areas than do most of the ad hoc approaches. Moreover, unlike the ad hoc approach, which results in immediate designation and regulation of critical areas, the comprehensive statewide approach simply establishes an administrative mechanism requiring further implementation in order to subject critical areas to state or regional supervision. As the Florida experience amply demonstrates, activation of such mechanisms is not an easy matter. Florida has succeeded in officially designating only three critical areas, one of which was designated by the state legislature rather than by the appointed state agency. Moreover, with the notable exception of the Florida Keys, Florida has used its critical areas technique primarily as a natural resource management tool in largely undeveloped, rural areas. Finally, the Florida experience suggests that reliance on an administrative apparatus for designating critical areas creates legal and political problems that possibly can be minimized, if not completely avoided, by legislative designation. Thus, despite the considerable achievements of the Florida program, other states should study it carefully before rejecting an ad hoc approach in favor of a more comprehensive solution to the critical areas problem.

## II. THE STATUTORY FRAMEWORK OF FLORIDA'S CRITICAL AREAS TECHNIQUE

Critical area controls consist of three distinct processes: designation, regulation and adjudication. The first process entails the official designation of a discrete geographical area as one of critical state concern. After the designation becomes final, a regulatory system for the area must be devised and implemented. Finally, disputes arising out of the designation and regulatory processes must be resolved in accordance with established adjudicatory procedures.

The Florida technique has its genesis in the Florida Environmental Land and Water Management Act of 1972<sup>65</sup> (Environmental Land Act) which provided for each of the three essential processes. Like its

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65. 1972 Fla. Laws ch. 72-317 (codified at FLA. STAT. § 380.012 to .12 (1977) and (Supp. 1978)) [hereinafter referred to as the Environmental Land Act].

prototype, Article 7 of the Model Code, the Environmental Land Act did not make planning a prerequisite to regulation of critical areas. The original regulatory system, however, has been supplemented by state and local mandatory planning legislation.<sup>66</sup> While the planning legislation has not been implemented fully, it will eventually affect the regulatory process in critical areas. This section analyzes the statutory framework, as created by the original Environmental Land Act and the planning legislation, for implementing the Florida critical areas technique.

### A. *Designation*

The Environmental Land Act authorizes the Administration Commission, a state administrative agency consisting of the Florida governor and cabinet, to designate areas of critical state concern.<sup>67</sup> The cabinet is a constitutional body consisting of six popularly elected state officers.<sup>68</sup> Thus, by vesting the designation power in elected officials, the Environmental Land Act departed from the Model Code which would authorize an appointive state land planning agency to make designations.<sup>69</sup> Given the essentially legislative nature of a critical area designation and its potential impact on local governments, the Florida arrangement is preferable to the ALI proposal. As popularly elected state officials, the governor and cabinet have a greater measure of direct political accountability to the state citizenry and, therefore, can confer a greater degree of legitimacy on critical area designations than appointive officials.

The Administration Commission's power to designate is subject both to significant substantive limitations and procedural requirements. Substantively, under the original Act, the Commission's power to designate was limited to the following broad area categories:

- (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.
- (b) An area significantly affected by, or having a significant

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66. See notes 96-97, 118-150 and accompanying text *infra*.

67. FLA. STAT. § 380.031(1), 05(1)(b) (1977).

68. FLA. CONST. art. IV, § 4.

69. Model Code, *supra* note 26, §§ 7-201, 8-101. The Model Code proposes that the state land planning agency be located within the governor's office and headed by a director appointed by the governor. *Id.* § 8-101(2).

effect upon, an existing or proposed major public facility or other area of major public investment.

(c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.<sup>70</sup>

The Environmental Land Act provides no other designation guidelines nor does it require the Administration Commission to promulgate administrative standards for exercising the designation power.<sup>71</sup> As discussed in Part IV, these omissions figured prominently in judicial consideration of the Act's constitutionality.

Florida's original critical area categories represented a modest expansion of the Model Code categories. While the first category is essentially identical to its Model Code counterpart,<sup>72</sup> Florida's "major public facility" standard is somewhat broader than that of the Model Code. The Code defines "major public facility" as "any publicly owned facility of regional significance" but excludes from this definition several significant public facilities.<sup>73</sup> By contrast, the Florida act defines "major public facility" as "any publicly owned facility of more than local significance."<sup>74</sup>

On paper, Florida's original "proposed area of major development potential" was also much more inclusive than the Model Code's new community standard.<sup>75</sup> The Florida terminology, which was re-

70. FLA. STAT. § 380.05(2) (1977).

71. *See id.*, § 380.05 (1977). The Model Code also does not require promulgation of administration standards for exercise of the designation power. *See* Model Code, *supra* note 26, § 7-201 to -208. *Cf.*, MINN. STAT. ANN. §§ 116G.05, 116G.06(1) (West Supp. 1977) (requiring the Minnesota Environmental Quality Board to make critical area recommendations to the governor in accordance with criteria prepared and adopted pursuant to the Minnesota Administrative Procedure Act).

72. *Compare* FLA. STAT. § 380.05(2)(a) (1977) with Model Code, *supra* note 26, § 7-201(2)(b), which reads as follows: "an area having a significant impact upon historical, natural or environmental resources of regional or statewide importance."

73. Model Code, *supra* note 26, § 7-201(3)(a). The excluded public facilities are: (a) any public facility operated by a local government, or an agency created by it, primarily for the benefit of the residents of that local government; (b) any street or highway except an interchange between a limited access highway and a frontage access street or highway; (c) any airport that is not to be used for instrument landings; or (d) any educational institution serving primarily the residents of a local community.

74. FLA. STAT. § 380.031(10) (1977).

75. *Compare* FLA. STAT. § 380.05(2)(c) (1977) with Model Code, *supra* note 26, § 7-201(3)(c), which states: "a proposed site of a new community designated in a State Land Development Plan, together with a reasonable amount of surrounding land."

pealed in 1979, was broad enough to encompass areas surrounding and including major developments such as utility plants, airports, port facilities and highway systems, as well as new community sites and other areas, such as inner city urban renewal or rehabilitation sites, that are likely to attract major developments. The apparent breadth of this category may, however, have been deceptive. Only areas of major development potential that are "designated in a state land development plan" fell within the scope of this standard. Florida's state comprehensive plan,<sup>76</sup> the only state land development plan currently in existence, does not designate such areas. Although in 1978 the Florida Bureau of Comprehensive Planning was engaged in a project to identify areas of major development potential,<sup>77</sup> presumably this project was terminated by repeal of this category.

Florida's original critical area standards fail to match or exceed those of the Model Code in only one respect. The ALI proposal permits designation of land within the jurisdiction of a local government not having an effective development ordinance within three years after the critical areas technique has been adopted.<sup>78</sup> Florida chose not to adopt this provision. This deviation from the Model Code, however, is rendered largely insignificant by Florida's subsequent enactment of a mandatory planning and regulation requirement for all local governments.<sup>79</sup>

The breadth of Florida's critical area categories is diminished by a significant quantitative restriction: at any given time designated critical areas collectively may not exceed five percent of the state's land area.<sup>80</sup> Clearly, this arbitrary restriction, not imposed by the Model

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76. See text accompanying notes 118-32 *infra*.

77. In 1978, the Florida Bureau of Comprehensive Planning was engaged in a project to identify areas of major development potential, but its completion was expected to take two or three more years. Interview with Estus Whitfield, Senior Planner and Project Leader for Land Development, Bureau of Comprehensive Planning, Division of State Planning, State of Florida, in Tallahassee, Florida (July 19, 1978).

78. Model Code, *supra* note 26, § 7-201(3)(d).

79. See notes 136-43 and accompanying text *infra*.

80. FLA. STAT. § 380.05(17) (1977). Five percent of Florida's land area amounts to only about 1.8 million acres. Interview with Stephen Fox, Senior Planner and Critical Areas Section Leader, Bureau of Land and Water Management, Division of State Planning, State of Florida, in Tallahassee, Florida (July 20, 1978). The Administration Commission was also prohibited from designating more than 500,000 acres as critical areas within the initial 12-month period following the effective date of the Environmental Land Act. FLA. STAT. § 380.05(17) (1977). Additionally, the Administration Commission was prohibited from designating any critical area until an inventory of state-owned lands was prepared, *id.* § 380.05(1)(a), and "until a favorable



Code, reflects a legislative fear of administrative overuse of the critical areas technique. Whether by accident or design, it also constitutes a safeguard against misuse of the technique since the Administration Commission will be unable to apply it to genuinely critical areas if the five percent quota is wasted on less important areas. Regardless of the motivation or the wisdom of the restriction, it significantly reduces the potential application of the technique in Florida.

Procedurally, the Administration Commission's power to designate is subject to the requirements of both the Environmental Land Act and the Florida Administrative Procedure Act (APA).<sup>81</sup> The former stipulates that the Administration Commission may designate critical areas only upon the recommendation of the Division of State Planning.<sup>82</sup> In formulating its recommendation, the Division of State Planning must consider the recommendations of the various regional planning agencies which in turn are required to solicit the suggestions of local governments within their respective jurisdictions.<sup>83</sup> The Division's recommendation to the Administration Commission must describe the boundaries of the proposed critical area, explain why the area is of critical state or regional concern, state the dangers that would result from uncontrolled development of the area and the advantages to be derived from coordinated development of the area, and recommend specific standards for guiding development of the area.<sup>84</sup>

Within forty-five days of the recommendation's receipt, the Administration Commission must either reject the proffered recommen-

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vote at a referendum on a state bond program for the acquisition of lands of environmental importance to the state or region." 1972 Fla. Laws, ch. 72-317, § 13. These conditions were satisfied. *See* Cross Key Waterways v. Askew, 351 So. 2d 1062, 1066-67 (Fla. Dist. Ct. App. 1977).

81. The Environmental Land Act provides that "the Administration Commission shall . . . by *rule* designate the area of critical state concern." FLA. STAT. § 380.05(1)(b) (1977) (emphasis added). The Florida Administrative Procedure Act, FLA. STAT. § 120.50 to .73 (1977), establishes detailed requirements for state agency rulemaking proceedings. *See* notes 88-94 and accompanying text *infra*.

82. FLA. STAT. § 380.05(1)(a) (1977). The Division of State Planning (the Division) is the state land planning agency designated by Florida law to undertake statewide comprehensive planning. *Id.* § 23.012.

83. *Id.* § 380.05(3). If the Division does not designate areas recommended by a regional planning agency or local government, it must give a written explanation of its decision to the regional or local entity. *Id.*

84. *Id.* § 380.05(1)(a).

dation or adopt it, with or without modification, and must also designate the area as one of critical state concern by administrative rule.<sup>85</sup> In addition to designating the area, the rule must set forth "principles for guiding the development of the area." There are no statutory standards for delineating these guiding principles except for the requirement that the economic impact of the principles on current development in the area must be considered.<sup>86</sup> While the Commission may provide that the guiding principles shall apply to development commenced subsequent to the designation but prior to adoption of local critical area land development regulations, the Commission has no authority to impose a moratorium on development in the area.<sup>87</sup>

In adopting a designation rule, the Administration Commission must also comply with the procedural requirements of the APA. While an exhaustive treatment of the APA is beyond the scope of this Article,<sup>88</sup> several of the Act's requirements, as they relate to the designation process, should carefully be noted. Since designation is by administrative rule, a designation can be made only in accordance with the APA's rulemaking provisions. The Administration Commission must give the statutorily prescribed notice of its intention to adopt a proposed designation rule,<sup>89</sup> prepare a detailed statement of the rule's economic impact,<sup>90</sup> give affected persons who so request an

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85. *Id.* § 380.05(1)(b).

86. *Id.*

87. *Id.* This restriction is totally inconsistent with the critical areas concept. *Cf.* Model Code, *supra* note 26, § 7-202 (providing for a moratorium on issuance of local development permits during the period between notice to a local government of a proposed designation rule and adoption of the rule).

88. For extensive discussions of the Florida APA, see England & Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749 (1977); Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617 (1975).

89. FLA. STAT. § 120.54(1) (1977). The notice must contain: a short and plain explanation of the purpose and effect of the proposed rule, a summary of the proposed rule, the specific legal authority under which its adoption is authorized, and a summary of the estimate of the economic impact of the proposed rule on all persons affected by it.

*Id.*

90. *Id.* § 120.54(2)(a). The economic impact statement must include:

(1) An estimate of the cost to the agency of the implementation of the proposed action, including the estimated amount of paperwork; (2) An estimate of the cost or the economic benefit to all persons directly affected by the proposed action; (3) An estimate of the impact of the proposed action on competition and the open

opportunity to present evidence and argument pertaining to any issue raised by the proposed rule,<sup>91</sup> and schedule and conduct a public hearing in accordance with the APA upon the request of any affected person.<sup>92</sup> In addition any substantially affected person may, within fourteen days after publication of the notice of intent to adopt a designation rule, request an administrative determination that the proposed rule is an invalid exercise of the agency's delegated legislative authority. An administrative decision of invalidity, if judicially affirmed, prevents adoption of a proposed designation rule.<sup>93</sup> Finally, any adversely affected party may seek judicial review of a designation rule.<sup>94</sup> Thus, while the APA's panoply of procedural safeguards provides protection against arbitrary agency action, it may also constitute formidable obstacles to the designation of critical areas in Florida.<sup>95</sup>

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market for employment, if applicable; and (4) A detailed statement of the data and method used in making each of the above estimates.

*Id.* An agency's failure to prepare an adequate economic impact statement is a sufficient ground for declaring a rule invalid if the issue is raised in either an administrative or judicial proceeding within one year of the rule's effective date. *Id.* § 120.54(2)(c).

The economic impact statement requirement, adopted by the Florida legislature in 1976, 1976 Fla. Laws, ch. 76-276, was not in existence when the Administration Commission designated the Green Swamp and the Florida Keys as areas of critical state concern. See notes 198-99, 213 and accompanying text *infra*.

91. FLA. STAT. § 120.54(3) (1977).

92. *Id.*

93. *Id.* § 120.54(4). This procedure was used to challenge the proposed land development regulations for the Green Swamp area of critical state concern. See text accompanying notes 199-202 *infra*.

94. FLA STAT. § 120.68(1) (1977) provides in part: "A party who is adversely affected by final agency action is entitled to judicial review." The Administration Commission's adoption of a designation rule constitutes final agency action. *City of Key West v Askew*, 324 So. 2d 655, 657 (Fla. Dist. Ct. App. 1975).

95. The APA rulemaking provisions greatly complicated the Administration Commission's designation of the Green Swamp as an area of critical state concern. See notes 199-202 and accompanying text *infra*. In emergency situations the Administration Commission could use the APA's emergency rulemaking provisions to circumvent temporarily the normal rulemaking procedures. FLA. STAT. § 120.54(9)(a) (1977) provides that "[i]f an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger by an procedure which is fair under the circumstances and necessary to protect the public interest." *Id.* However, emergency rules must not exceed "that action necessary to protect the public interest under the emergency procedure" and must be adopted in accordance with procedures that at a minimum comport with state and federal constitutional requirements. *Id.* Moreover, emergency rules are not effective for more than 90 days and are not renewable. *Id.*

## B. *Regulation*

The Florida critical areas regulatory process is derived from three separate acts: the Environmental Land Act, the Florida State Comprehensive Planning Act of 1972,<sup>96</sup> and the Florida Local Government Comprehensive Planning Act of 1975.<sup>97</sup> Since passage and implementation of the three acts have not coincided, their requirements have not yet crystalized into a well-coordinated regulatory system. Nevertheless, each act supplies an important component of the regulatory process that will emerge ultimately in each of Florida's critical areas. Therefore, the requirements of each act, and their relationship to each other, must be considered.

1. *The Environmental Land Act.* Essentially, the parent act, like the Model Code, provides only for state review of locally adopted land development regulations in critical areas. Within six months after designation of a critical area, each local government within the designated area must submit to the Division of State Planning either its existing land development regulations or newly prepared and adopted regulations.<sup>98</sup> If a local government submits regulations within the specified time, the Division must by rule approve the regulations if they comply with the guiding principles contained in the designation rule. If a local government, however, fails to submit development regulations within the six-month period, or submits regulations that do not comply with the guiding principles, the Division must within 120 days submit to the Administration Commission recommended regulations applicable to the defaulting local government's portion of the critical area. Within forty-five days after receipt of the Division's recommendation, the Commission must either reject or accept, with or without modification, the recommended regulations and by rule establish land development regulations for the local government.<sup>99</sup>

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§ 120.54(9)(c). Consequently, as one Florida court has noted, the APA emergency rule-making provisions are not adequate for the purposes of the critical areas technique. *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1069 n.16 (Fla. Dist. Ct. App. 1977).

96. FLA. STAT. ANN. § 23.011 to .0193 (West Supp. 1979). The Act is discussed in the text accompanying notes 118-35 *infra*.

97. FLA. STAT. § 163.3161 to .3211 (1977). The Act is discussed in the text accompanying notes 138-50 *infra*.

98. FLA. STAT. § 380.05(5) to (8) (1977).

99. *Id.* § 380.05(8). Adoption of regulations by the Administration Commission

Critical area regulations, whether proposed by local governments and approved by the Division or imposed by the Commission, must be adopted within twelve months after adoption of the designation rule. Failure to comply with this requirement results in the automatic termination of the critical area designation. In addition, no part of the area can be redesignated as critical until one year after the date of termination. This limitation is not imposed in cases where the Commission by rule voluntarily terminates, either wholly or partially, the designation of any area.<sup>100</sup>

The Administration Commission's power to adopt land development regulations is coextensive with that of the local government to which the regulations are applicable with one important exception. The Commission cannot adopt any rule providing for a moratorium on development even if the local government in question is vested with such power.<sup>101</sup> Otherwise, the Commission may adopt "any type of regulation that could have been adopted by the local government."<sup>102</sup> Thus, the scope of the regulatory power available to the Commission varies with the powers of the local governments located within the critical area. Given the widely divergent powers of home rule cities, general law counties and charter counties in Florida,<sup>103</sup> this restriction on the Commission's regulatory powers could result in significantly different sets of regulations within a single area of criti-

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does not preclude a local government from proposing its own regulations at a later date. If such regulations are approved by the Division of State Planning, they supersede the state-imposed regulations. *Id.* § 380.05(10).

100. *Id.* § 380.05(12), (18).

101. *Id.* § 380.05(1)(b). This limitation is criticized and compared with the Model Code's provisions at note 87 *supra*.

102. *Id.* § 380.05(8).

103. Under the Florida constitutional municipal home rule provision, "municipalities . . . have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." FLA. CONST. art. VIII, § 2(b). FLA. STAT. § 166.021 (1977), which implements the constitutional home rule provision, provides in part: "(1) As provided in article VIII, section 2(b) of the state constitution, municipalities . . . may exercise any power for municipal purposes, except when expressly prohibited by law. (2) 'Municipal purpose' means any activity or power which may be exercised by the state or its political subdivisions."

Counties with noncharter governments "have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact . . . county ordinances not inconsistent with general or special law." FLA. CONST. art. VIII, § 1(f). Counties with charter governments "have all powers of local self-government not inconsistent with general law

cal state concern, a possibility that seems wholly inconsistent with the critical areas concept.<sup>104</sup>

A comprehensive regional approach to critical area regulations is also hindered by the Environmental Land Act's exemption of development in critical areas from the development of regional impact (DRI) regulatory process. DRI, defined by the Act as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county,"<sup>105</sup> is subject to a special regulatory process. An application for permission to undertake DRI must be reviewed by a regional planning agency which prepares and submits to local government a regional impact statement. Local government must consider the regional impact statement in rendering its decision on the application.<sup>106</sup> The local DRI decision, if timely appealed by an appropriate party, is then subject to review by a state agency having power to affirm, modify or reverse the local order.<sup>107</sup> Thus, the DRI technique is intended to ensure that local DRI decisions take into consideration and accommodate state and regional interests.

Since areas of critical state concern by definition are affected with state and regional interests, there is even more justification for subjecting DRI in such areas to the DRI regulatory process than there is for DRI in non-critical areas. Nevertheless, the Environmental Land Act inexplicably exempts DRI in critical areas from the DRI regulatory requirements.<sup>108</sup> Pursuant to its rulemaking power, the Division has attempted to close the statutory gap in the regulatory process by providing that DRI in critical areas shall be subject to the DRI review process "when the rule designating the area of critical state con-

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. . . . The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law." *Id.* § 1(g).

For an analysis of local governmental powers in Florida, see Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. FLA. L. REV. 271 (1973).

104. For a similar criticism of the Model Code's critical area provisions, see Mandelker, *supra* note 1, at 76-77.

105. FLA. STAT. § 380.06(1) (1977). For a more detailed analysis of the Florida DRI process, see Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977).

106. FLA. STAT. § 380.06(7), (8), (11) (1977).

107. *Id.* § 380.07.

108. See FLA. STAT. § 380.05(13), .06(5)(b). The Model Code also exempts DRI in critical areas from the DRI regulatory process. See Model Code, *supra* note 26, § 7-207.

cern so provides.”<sup>109</sup> However, neither of the designation rules for Florida’s first two administratively designated critical areas provided that DRI in these areas shall be subject to the DRI process.<sup>110</sup>

Administration of critical area regulations is the exclusive responsibility of local government. All land development regulations, whether adopted by the Administration Commission or by local governments with the approval of the Division, must “be administered by the local government as if the regulations constituted, or were part of the local land development regulations.”<sup>111</sup> Thus, when a developer applies for a development permit, local government processes the application exactly as it would have prior to the critical area designation with a few minor procedural changes. Local government must give notice to the Division, and to other classes of persons specified by the Division, of any application for a development permit.<sup>112</sup> If local government denies an application for a development permit, it must specify in writing its reasons for denial “and indicate any changes in the development proposal that would make it eligible to receive the permit.”<sup>113</sup> Finally, if local government issues a development order, it must transmit a copy of the order to the Division as well as to the developer.<sup>114</sup>

The effectiveness of any regulatory system depends upon its enforcement. Two enforcement mechanisms are established by the Environmental Land Act. First, if the Division determines that development orders issued by local governments are not compatible with local land development regulations, the Division may appeal the order to a state reviewing agency for administrative review of the local decision and then to an appropriate court for judicial review.<sup>115</sup> Adjudication of land development decisions in critical areas is discussed in a following section. Second, if the Division determines that local administration of development regulations “is inadequate to protect the state or regional interest,” the Division “may institute appropriate judicial proceedings to compel proper enforcement of the

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109. 8 FLA. ADMIN. CODE 22F-1.30.

110. See *id.* 22F-5 (Green Swamp designation rule); *Id.* 22F-8 (Florida Keys designation rule).

111. FLA. STAT. § 380.05(8) (1977).

112. *Id.* § 380.05(16).

113. *Id.* § 380.08(3).

114. *Id.* § 380.07(2).

115. *Id.* § 380.07(2), (4).

. . . regulations.”<sup>116</sup> While the statutory language is ambiguous, this provision apparently refers to situations in which local governments either do not require developers to comply with development regulations prior to undertaking development or fail to ensure developer compliance with the regulations after a development order permitting development has been issued. Effective use of this mechanism requires extensive monitoring by the Division of local governments and development within the critical area. Obviously, the Division’s ability to perform this essential function is contingent upon adequate staff and budgetary resources.<sup>117</sup>

Standing alone, the Environmental Land Act’s critical area’s regulatory scheme is woefully inadequate. It is based exclusively on the Model Code’s system of state review of local regulations and it provides for little formal state participation in the administration of local regulations. Clearly, it pales by comparison with the regulatory systems imposed by most ad hoc regional mechanisms for controlling critical areas. Under the Environmental Land Act and the Model Code, the development of a comprehensive regional approach to critical area management would be purely accidental. Fortunately, Florida has moved beyond the Model Code by enacting state and local comprehensive planning legislation which may cure some of the deficiencies of the original critical areas regulatory system.

2. *The Florida State Comprehensive Planning Act.* Although enacted in the same legislative session as the Environmental Land Act, the Florida state planning act was not implemented until 1978.<sup>118</sup> Originally, the Act required the Division to prepare and submit a proposed state comprehensive plan to the Governor “for his consideration and action”.<sup>119</sup> The purpose of the plan was to “provide long-range guidance for the orderly social, economic, and physical growth of the state by setting forth goals, objectives, and policies.”<sup>120</sup>

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116. *Id.* § 380.05(9).

117. The Florida official responsible for supervising the state’s critical areas program states that enforcement is potentially the biggest problem with the program because of staff and budget limitations. Interview with James May, Chief, Bureau of Land & Water Management, Division of State Planning, State of Florida, in Tallahassee, Florida (July 21, 1978).

118. Interview with Helge Swanson, Chief, Bureau of Comprehensive Planning, Division of State Planning, State of Florida, in Tallahassee, Florida (July 19, 1978).

119. FLA. STAT. § 23.012(1), .013(1) (1977).

120. *Id.* § 23.0114(1).



After approval by the Governor, the proposed plan was to be submitted to the Florida legislature for its approval. If approved by the legislature, the plan was to be effective as state policy.<sup>121</sup>

When the proposed plan was finally submitted for legislative approval in 1978,<sup>122</sup> the Florida legislature declined to give it legally binding status. Rather, the legislature amended the state planning act to define the state plan as "the goals, objectives, and policies contained within the state comprehensive plan prepared by the Division,"<sup>123</sup> and to provide that the plan "shall be advisory only, except as specifically authorized by law."<sup>124</sup> Furthermore, the legislature decreed that no part of the state plan, "[e]xcept as specifically authorized by law, . . . shall be implemented or enforced by any executive agency."<sup>125</sup> Hence, only those portions of the plan previously authorized by law currently have legal status.

The state plan consists of fourteen sections covering various aspects of Florida's social, economic and physical growth.<sup>126</sup> Each section contains three types of policy statements of varying degrees of specificity: goals, objectives and policies. A goal is defined as "a broad statement of purpose, intended to define an ultimate or desired end."<sup>127</sup> An objective is the statement of "a specific accomplishment, or series of accomplishments, necessary to the satisfactory pursuit of a goal."<sup>128</sup> A policy suggests "specific ways to achieve objectives."<sup>129</sup> For each modified or new policy set forth in the plan, a recommendation of the action required to implement the policy is also made.<sup>130</sup>

Of the plan's fourteen sections, each of which potentially affects

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121. *Id.* § 23.013(1), (2).

122. DIVISION OF STATE PLANNING, FLORIDA DEP'T OF ADMINISTRATION, THE FLORIDA STATE COMPREHENSIVE PLAN i-ii (1978) [hereinafter cited as FLORIDA STATE PLAN].

123. 1978 Fla. Laws, ch. 78-287, § 1 (codified at FLA. STAT. ANN. § 23.0112(5) (West Supp. 1979)).

124. *Id.* § 2 (codified at FLA. STAT. ANN. § 23.014(1) (West Supp. 1979)).

125. *Id.* § 3 (codified at FLA. STAT. ANN. § 23.013(2) (West Supp. 1979)).

126. The 14 sections are agriculture, economic development, education, employment and manpower, energy, growth management, health, housing and community development, land development, recreation-leisure, social services, transportation, utilities and water. FLORIDA STATE PLAN, *supra* note 119, at iii.

127. *Id.* at 3.

128. *Id.*

129. *Id.*

130. *Id.* at 4, 8-9.

critical areas, the land development section obviously has the most immediate impact upon the regulation of land use in such areas. A major premise of this section is that land is a finite resource which has not been developed in Florida in accordance with an overall management strategy. The land development section is conceived as the first step toward such a strategy.<sup>131</sup> Following its delineation of several overall goals, objectives and policies, the section sets forth specific objectives and policies for twelve land-related resource categories: air, uplands, wetlands, water, soils, agriculture, minerals, amenities, beaches and dunes, natural hazard areas, transportation facilities and electrical power facilities.<sup>132</sup>

A true understanding of the land development section can be gained only by studying the objectives and policies for each of the plan's twelve components. For illustrative purposes, the objective and policies for management of wetlands, a land resource of special significance to Florida's three officially designated critical areas, are set forth here:

## WETLANDS

### OBJECTIVE I: PROTECTION

The values and functions of wetlands and submerged lands should be retained and protected.

### POLICIES

Encourage the development and use of wetlands and submerged lands for only those purposes which are compatible with their natural values and functions.

Encourage the use of wetlands, commensurate with their natural functions and capabilities, as a substitute for or supplement to technology and structures.

Encourage the reestablishment of wetlands in previously drained areas, where feasible.

Allow intensive use of wetlands and submerged lands for only those major developments of state significance that, by their general purpose, require location in these areas.

Enable wetlands to be reasonably used by individuals for purposes which will not adversely affect the values and functions of these resources.

Discourage the discharge into wetlands and submerged lands

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131. *Id.* at 103.

132. *Id.*

of pollutants or materials in amounts which would destroy or significantly harm their values and functions.

Discourage the drainage of wetlands and submerged lands.

Prohibit commercial, industrial, residential, and other development from locating on state-owned or submerged lands when, by their general purpose, such developments need not be located on these lands.

Give maximum protection to wetlands and submerged lands that have been designated as having special significance to the state.

Require that development in adjacent upland areas be located, designed, and constructed so as to minimize the adverse impacts on the values and functions of wetlands and submerged lands.

Encourage research designed to assess the relative values of various wetlands and submerged lands in the state.<sup>133</sup>

Clearly, such policies, if fully implemented, will significantly restrict development in wetland areas.

How will the state comprehensive plan affect the regulation of critical areas? Since the state plan is not a regulation, it has no direct effect on land use. To the extent that its provisions are specifically authorized by law, a fact that will be difficult to ascertain, given the voluminosity of the plan document,<sup>134</sup> the state plan can be implemented and enforced in critical areas. How such implementation and enforcement will be achieved is not clear since neither the Environmental Land Act nor the two current critical area designation rules link the regulatory process to the state comprehensive plan.<sup>135</sup> However, all local governments in Florida are required to adopt comprehensive plans which must be coordinated with the state plan and with which all local land development regulations must be consistent. Theoretically, therefore, state planning policies, if implemented through local plans, can indirectly influence land use in critical areas. To fully comprehend how this process is intended to operate, it is necessary to examine Florida's local planning requirements.

3. *The Florida Local Government Comprehensive Planning Act.* The central requirement of the Florida local planning Act is that all local

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133. *Id.* at 110-111.

134. The plan document consists of 208 pages. *See* FLORIDA STATE PLAN, *supra* note 122.

135. *See* FLA. STAT. § 380.05 (1977); 6 FLA. ADMIN. CODE 22 F-5, 22F-8.

governments, with a few minor exceptions, must prepare and adopt a comprehensive plan in accordance with the Act's provisions no later than July 1, 1979.<sup>136</sup> Failure to comply with the mandatory planning requirement invokes harsh penalties. If a municipality fails to adopt a plan within the statutory period, it will be governed by the comprehensive plan of the county in which it is located. If a county defaults on its statutory responsibility, the Division is required to prepare a plan for such county and any defaulting local governmental units within it and recommend the plan to the Administration Commission which has the authority to adopt it.<sup>137</sup> Thus, as in the case of state-imposed critical area regulations under the Environmental Land Act, the threat of control by a higher level of government should provide a powerful incentive for each local government to adopt a comprehensive plan.

Another major feature of the local planning Act is its prescription of local plan content. The Act imposes three types of substantive requirements: mandatory general elements, mandatory specific elements, and optional specific elements.<sup>138</sup> Among the mandatory general elements is the stipulation that each local plan must include a specific policy statement of the relationship between the locality's development and the comprehensive plans of the county, adjacent municipalities and counties, the region, and the state.<sup>139</sup> The nine mandatory specific elements for each local plan include a future land use element, a conservation element, a housing element, and an inter-governmental coordination element.<sup>140</sup> In addition to the mandatory

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136. FLA. STAT. § 163.3167(2), (3) (1977).

137. *Id.* § 163.3167(4), (5).

138. *Id.* § 163.3177.

139. *Id.* § 163.3177(4). The other mandatory general elements are (1) the plan must consist of descriptive materials, written or graphic, that prescribe principles, guidelines, and standards for development of the area; (2) the various elements of the plan must be consistent with each other; (3) the plan must be economically feasible and the economic assumptions on which it is based must be analyzed and included as part of the plan; and (4) the plan and its various elements must contain policy recommendations for their implementation. *Id.* § 163.3177(1)-(3), (5).

140. *Id.* § 163.3177(6). The other mandatory specific elements are a traffic circulation element, a general sanitary sewer, solid waste, drainage, and potable water element, a recreation and open space element, a coastal zone protection element (for local governments located in part or whole in the coastal zone), and a utility element. *Id.* In addition, comprehensive plans of local government units with populations greater than 50,000 must also include a mass transit element, and a port, aviation and related facilities element, both of which may be included within the mandatory traffic circulation element. *Id.* § 163.3177(6)(j), (7)(a)-(b).

general and specific elements, each local government has the option of including other specific elements in its plan.<sup>141</sup>

A third significant aspect of the local planning act is the legal relationship which it creates between local plans and local land development regulations. The Act establishes the local comprehensive plan as the primary instrument for regulating land use in Florida. After the adoption of a local plan, all local land development regulations and all local development orders must be consistent with the local plan.<sup>142</sup> Local governments cannot evade the consistency requirement by electing not to regulate land use. The local planning Act requires each local government to implement its comprehensive plan through "the adoption and enforcement of appropriate local regulations on the development of land and waters."<sup>143</sup>

How does the local planning process interact with the state comprehensive plan and the Environmental Land Act's regulatory process in critical areas? The development of a well-coordinated comprehensive planning and regulatory strategy is highly desirable and probably essential if state and regional values are to be promoted and protected in critical areas. Formulation and implementation of such a strategy is not easily accomplished since each critical area is likely to encompass several local governmental entities. As previously mentioned, the Environmental Land Act's reliance solely on state review of locally prepared regulations is not consistent with the need for a comprehensive regional approach. Similarly, the local planning act's mandate of local rather than regional plans presents a potential barrier to an effective area-wide approach in critical areas. Fortunately, however, the local planning act, unlike the Environmental Land Act, recognizes the need for state, regional and local coordination.

An express purpose of the local planning act is "to encourage and assure coordination" of the planning activities of local governments,

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141. Optional elements expressly mentioned by the act are mass transit, port and aviation facilities, nonautomotive traffic circulation, off-street parking, public services and facilities, public buildings, community design, area redevelopment, safety, historical and scenic preservation, and an economic plan. *Id.* § 163.3177(7)(a)-(k). Additionally, the Act provides that the plan may include "[s]uch other elements as may be peculiar to, and necessary for, the area concerned and as are added to the comprehensive plan by the governing body upon the recommendation of the local planning agency." *Id.* § 163.3177(7)(1).

142. *Id.* § 163.3194(1).

143. *Id.* § 163.3201.

regional agencies and the state.<sup>144</sup> To this end, the Act requires that each proposed comprehensive plan, plan element, and most plan amendments be submitted to the Division of State Planning and the appropriate regional planning agency for review and comment on the proposed plan's possible effects on the state, regional and county comprehensive plans.<sup>145</sup> In the case of municipalities the proposed plan must also be submitted to the county for review and comment. Within sixty days after receipt of the local proposal, each of the reviewing agencies must submit to local government its written comments, including any objections and recommended modifications. The local government must respond in writing to any such objections within four weeks after their receipt.<sup>146</sup>

A serious weakness of this coordinating mechanism is the purely advisory nature of state, regional and county review. Local government is not required to modify its plan proposals to satisfy the objections of the reviewing agencies. The comments, recommendations and objections of the reviewing agencies and the local response, however, become a part of the public record of the matter and are admissible in any proceeding in which the comprehensive plan is at issue.<sup>147</sup> Conceivably, therefore, state, regional, and county objections could constitute a potent weapon for attacking the validity of a local plan. Notwithstanding this possibility, a more direct and binding form of state or regional review seems appropriate, especially in critical areas where officially recognized state and regional interests are at stake.

The Environmental Land Act may provide a more effective means for enforcing coordination of state, regional and local plans in critical areas. In designating a critical area, the Administration Commission is required to adopt principles for guiding development in the area. Assuming this authorization does not constitute an unlawful delegation of legislative authority, an issue discussed in Part IV, it is broad enough to permit adoption of the principle that all local plans must be consistent or coordinated with the state and regional plans and with each other.<sup>148</sup> The state's authority to review and disapprove local plans for compliance with such a principle may be questionable

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144. *Id.* § 163.3161(4).

145. *Id.* § 163.3184(1), (2).

146. *Id.* § 153.3184(2).

147. *Id.* § 163.3184(5).

148. The only statutory restriction on the Administration Commission's duty and

since the Act provides only that the Division shall review locally prepared "land development regulations" which are not defined to include local comprehensive plans.<sup>149</sup> Pursuant to its power to disapprove local regulations, though, the Division could accomplish indirectly what it is not authorized to do directly. A possible ground for disapproving local regulations might be that the regulations are not based on an adequately coordinated local plan as required by the guiding principles. If a local government failed to submit acceptable regulations, the Administration Commission could then impose regulations based on the state comprehensive plan.

Since each local government is required to adopt land development regulations that are consistent with its comprehensive plan, it is anomalous to provide for binding state review of such regulations in critical areas without similar review of the underlying plan.<sup>150</sup> The Environmental Land Act should be amended to provide that the guiding development principles shall require local plans and regulations to be consistent with the state comprehensive plan and with each other and for binding state or regional review of local comprehensive plans, as well as development regulations, in critical areas. In the absence of such provisions, it will be difficult for the requirements of the three acts to coalesce into a well-coordinated, comprehensive system for regulating critical areas.

### C. Adjudication

The final phase of the Florida critical areas process is the resolution of disputes arising out of local government's administration of state approved land development regulations. Like the Model Code, Florida rejected direct judicial review of local regulatory decisions in favor of intermediate state administrative review. But in sharp contrast to the Model Code, which proposes creation of an independent, appointed state review board,<sup>151</sup> the Environmental Land Act vests the adjudicatory function in the Florida governor and cabinet mem-

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power to adopt "principles for guiding development of the area is the prohibition against development moratoria. *Id.* § 380.05(1)(b).

149. *Id.* § 380.05(5), (6). "Land development regulations" are defined to "include local zoning, subdivision, building, and other regulations controlling the development of land." *Id.* § 380.031(7).

150. For a similar criticism of the Model Code's critical areas regulatory process, see D. MANDELKER, *supra* note 1, at 72-74.

151. MODEL CODE, *supra* note 26, § 7-501-504.

bers, the same officials who designate critical areas. When reviewing local regulatory decisions, the governor and cabinet sit as the Florida Land and Water Adjudicatory Commission.<sup>152</sup>

While Florida's plural executive body may be well-suited for the legislative role of critical areas designator, it is not an appropriate repository of the adjudicatory power. As previously observed, the governor and cabinet, as publicly elected political figures with a broad range of official duties, have neither the time nor the expertise for making highly complex and specialized land use adjudications.<sup>153</sup> While the Commission's use of hearing officers renders its designation as adjudicator less objectionable on competency grounds, it also effectively transforms the Commission into a rubber stamp for the recommended orders of administrative hearing officers who have no more time, staff or expertise in such matters than judicial judges.<sup>154</sup>

Furthermore, designating the governor and cabinet as the Adjudicatory Commission creates a highly politicized institutional arrangement for reviewing local decisions. The governor and cabinet also constitute the Administration Commission, a part of the Florida Department of Administration in which the Division of State Planning is located.<sup>155</sup> The Division, which has the duty to make critical area recommendations to the Administration Commission, also has the power to appeal local critical area development decisions to the Ad-

152. FLA. STAT. § 380.031(1), .07 (1977).

153. Pelham, *supra* note 102, at 829-30.

154. Proponents of state administrative review of local land use decisions have contended that the judiciary lacks the time, staff, and expertise required to resolve complex land use problems. *See, e.g.,* Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 524-26 (1957).

155. FLA. STAT. §§ 20.31(2)-(3), 380.031(1). The Reporters' Notes to § 7-501 of the Model Code, *supra* note 26, state: "It is important that the [State Land Adjudicatory] Board be independent of the State Land Planning Agency so that the Board may examine the position taken by all parties on an impartial basis without being subject to undue influence by the Agency." It seems equally important that the State Land Planning Agency be independent of the State Land Adjudicatory Board, a situation that did not currently exist in Florida prior to July 1, 1979.

After this Article entered the publication process, the Florida legislature enacted legislation reorganizing the various state agencies involved in the critical areas process. Effective July 1, 1979, the powers, duties, and functions of the Division of State Planning were transferred from the Department of Administration to the Department of Community Affairs, 1979 Fla. Laws, ch. 79-190, §§ 48, 153. Since the Department of Community Affairs is headed by a Secretary appointed by the Governor alone rather than by the Governor and cabinet, *see* FLA. STAT. ANN. § 20.18(1) (West Supp. 1978), this arrangement should give the State Land Planning Agency greater independence.



judicatory Commission.<sup>156</sup> Consequently, the Division may frequently be a party to adjudicatory proceedings before its administrative superiors, a situation which does not encourage independent and unbiased action by the Division. Utilization of hearing officers does not eliminate the potential for conflict of interest and political pressure inherent in this arrangement. The Division of Administrative Hearings, which supplies the hearing officers, is also located within the Department of Administration and headed by a director appointed by the Administration Commission.<sup>157</sup> Clearly this arrangement is not conducive either to the actual or apparent fairness and impartiality that is essential to the integrity and legitimacy of the adjudicatory process.

The Administration Commission has jurisdiction to review all local development orders issued in areas of critical state concern.<sup>158</sup> As defined by the Environmental Land Act, "development order" includes "any order granting, denying or granting with conditions an application for a development permit."<sup>159</sup> "Development permit," in turn, is defined broadly to include "any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development."<sup>160</sup>

Despite this express statutory conferral of jurisdiction over zoning, the issue generated much controversy during the initial stages of the Act's implementation, with the Division of State Planning taking the surprising position that the Commission lacked jurisdiction over local zoning.<sup>161</sup> A recent court decision involving a local DRI development order, however, seems to reject the Division's position. In *Gen-*

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156 *Id.* § 380.05(1)(a), .07(2).

157 *Id.* §§ 20.31(3)(f), 120.65(1).

Note, however, that FLA. STAT. ANN. § 120.66(1) (West Supp. 1978) prohibits *ex parte* communications from an agency head or member to the hearing officer or to the agency head after the agency head receives a recommended order from the hearing officer. Also note that in 1979 the Florida Legislature amended FLA. STAT. § 120.65(1) (1977) to provide that the Division of Administrative Hearings "shall not be subject to control, supervision, or direction by the Department of Administration." 1979 Fla. Laws, ch. 79-190, § 45.

158 *Id.* § 380.07(2) provides, in part, that whenever a "local government issues any development order in any area of critical state concern," an appropriate party "may appeal the order to the Florida land and water adjudicatory commission."

159. *Id.* § 380.031(2).

160. *Id.* § 380.031(3).

161. See Pelham, *supra* note 105, at 831-32.

*eral Electric Credit Corp. v. Metropolitan Dade County*,<sup>162</sup> the court expressly held that an appeal from local DRI development orders, including DRI zoning decisions, to the Commission is a prerequisite to judicial review,<sup>163</sup> thereby impliedly ruling that the Commission has jurisdiction to review local zoning orders. Moreover, in the first and only appeal taken from a local critical area development order thus far, the Adjudicatory Commission accepted jurisdiction over a local zoning decision.<sup>164</sup>

The Commission's jurisdiction may be invoked by the filing of a notice of appeal by a proper party within thirty days after the local order is rendered.<sup>165</sup> Only four parties are expressly permitted by the Environmental Land Act to appeal local critical area development orders to the Commission: the Division of State Planning, the regional planning agency, the owner, and the developer.<sup>166</sup> Attempts to expand the statutory boundaries of standing through judicial con-

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162. 346 So. 2d 1049 (1977). The case involved Dade County's denial of an application for rezoning and development approval of a DRI. Prior to taking an appeal to the Adjudicatory Commission, the developer petitioned the Dade County Circuit Court for judicial review of the denial. Holding that denial of development permits, including rezonings, for DRI must be appealed to the Adjudicatory Commission prior to judicial review, the circuit court dismissed the petition for failure to exhaust administrative remedies. The developer then appealed the lower court's dismissal which was subsequently affirmed by the appellate court. *Id.* at 1051-52, 1055.

163. *Id.* at 1053-54. In rejecting the developer's contention that appeals to the Adjudicatory Commission are optional, the court stated:

Were we to hold that appeals to the . . . Adjudicatory Commission are simply options to be utilized or ignored according to the whim of individual owners or developers, we would frustrate the obvious intent of the Legislature, which was to allow the fullest possible input by regional and state authorities into areas of development which will have extra-local impact.

*Id.* at 1054.

164. In re City of Key West Ordinance Nos. 76-8 and 76-12, No. 76-9 (FLWAC, filed November 29, 1977) (A docket of all critical area appeals filed with the Florida Land and Water Adjudicatory Commission (FLWAC) is maintained in the offices of the Department of Administration in Tallahassee, Florida). This case is discussed in the text accompanying notes 222-226 *infra*.

According to the Chief of the Florida Bureau of Land and Water Management, the Division has now receded from its earlier position that the Adjudicatory Commission lacks jurisdiction over local zoning decisions. Interview with James May, *supra* note 117.

165. Fla. Stat. § 380.07(2) (1977). "Rendered" has been judicially construed to mean the date on which the local government transmits by mail or otherwise the order to the Division or the affected owner or developer. *Fox v. South Fla. Regional Plan. Council*, 327 So. 2d 56, 58, *cert. denied*, 336 So. 2d 1181 (Fla. 1976).

166. *Id.*

struction of the Act have failed.<sup>167</sup> Thus, the statutory limitation on standing, much stricter than the standing requirements of the Model Code and other similar state legislation,<sup>168</sup> diminishes the significance of the Commission's broad grant of jurisdiction.

After the filing of a timely appeal by a proper party, the initial question is whether review by the Adjudicatory Commission shall be *de novo* or on the record. Although this issue has important procedural and substantive implications, the Environmental Land Act supplies no definitive answer. It provides only that the Adjudicatory Commission shall hold a hearing pursuant to the provisions of the Florida Administrative Procedure Act, and "that the Commission shall encourage the submission of appeals on the record made below in cases in which the development order was issued after a full and complete hearing before the local government."<sup>169</sup> This ambiguous provision has created confusion since it is not clear whether the duty to "encourage" includes the power to require appeals on the record if a *de novo* hearing is requested by the appellant. Substantively, the issue is significant because the Commission's power to review, reverse or modify local decisions is much greater in a *de novo* proceeding than in a record appeal. Hopefully, this vital issue has been resolved

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167. *See* *Sarasota County v. General Dev. Corp.*, 325 So. 2d 45, 47 (Fla. Dist. Ct. App. 1976) (holding that a county does not have standing to appeal a municipal development order rendered by a municipality located within the county); *Sarasota County v. Beker Phosphate Corp.*, 322 So. 2d 655, 658 (Fla. Dist. Ct. App. 1975) (holding that a county has no standing to appeal a local development order issued by another county approving a development located entirely within the latter county).

168. Under the Model Code, *supra* note 26, §§ 7-502(2), 9-103(1)-(2), the owner or applicant, the local government, and any other person who became a party at the local hearing has standing to appeal. Several categories of persons, including owners of land within 500 feet of the development site, are entitled to become parties as of right at the local hearing. *Id.* § 2-304(5). Additionally, the presiding officer at the local hearing is authorized to permit any other person to appear as a party upon a showing of a "significant interest" in the matter. *Id.* § 2-304(5). *Cf.* OR. REV. STAT. § 197.300(1)(a)-(d) (Supp. 1977) (permitting a county, city, special district, state agency, or a "person or group of persons whose interests are substantially affected" to appeal any local comprehensive plan provision or implementing regulation to the state reviewing agency).

169. FLA. STAT. § 380.07(3) (1977). *Cf.* MODEL CODE, *supra* note 26, § 7-503(1), which provides: "A State Land Adjudicatory Board shall grant or deny development permission on the record made before the Land Development Agency." The Model Code Reporters elaborate on this provision in their Notes: "It is not the intent . . . to authorize the taking of additional evidence by the Board. If additional evidence is needed the proceeding should be remanded to the Land Development Agency with directions to hear such evidence." *Id.* at 289.

by the recent case of *General Development Corp. v. Florida Land and Water Adjudicatory Commission*,<sup>170</sup> in which the court held that the Commission's hearing officer may order a de novo hearing if the local proceeding is not conducted in accordance with the Florida APA.<sup>171</sup>

The substantive criteria for evaluating local critical area decisions are deficient. In reviewing local decisions the Adjudicatory Commission is limited to a determination of whether the local order is consistent with the guiding principles and implementing regulations.<sup>172</sup> As Professor Daniel Mandelker, in his trenchant analysis of the Model Code has observed, these principles and regulations probably do not give the state review agency sufficient guidance and should be supplemented by independent substantive review standards similar to those established for local DRI decisions.<sup>173</sup> Requiring all local plans, reg-

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170. 386 So. 2d 1323 (Fla. Dist. Ct. App. 1979). The case arose out of an appeal to the Adjudicatory Commission, by a regional planning agency and the Division of a favorable municipal DRI order. The regional planning agency's request for a de novo hearing was opposed by the developer. In a prehearing order the hearing officer granted the regional agency's request on the ground that the local hearing did not satisfy the requirements of the APA. The developer then petitioned the appellate court for review of the prehearing order. *Id.* at 1324-25.

171. *Id.* at 1325-26. While noting that ELWMA does provide that the Commission shall *encourage* record appeals, the court also observed that the act *requires* the Commission to hold hearings pursuant to the APA. The APA makes no provision for appellate review proceedings by administrative agencies; rather, it establishes procedures, including sworn testimony, cross-examination, and the submission of any relevant evidence, which govern all administrative hearings. Accordingly, the court concluded that the Commission's hearing officer may require a full evidentiary hearing in all DRI appeals. However, the court also ruled that testimony and exhibits given under oath and subject to cross-examination in local DRI hearings must be admitted into evidence at the appellate hearing, and suggested that in appropriate cases the record of a full and complete local hearing might be the only evidence necessary to a decision by the Commission. *Id.*

172. The Environmental Land Act contains no other substantive criteria for evaluating local critical area decisions. *See* FLA. STAT. § 380.05 (1977). In *City of Key West Ordinance Nos. 76-8, 76-12*, *supra* note 164, the first appeal of a local critical areas decision, the Adjudicatory Commission concluded as a matter of law that the guiding development principles and the regulations adopted pursuant thereto are the sole criteria for local development orders. *Id.* Final Order, at 8.

Similarly, the Model Code provides no other substantive criteria for state review of local critical area decisions. *See* MODEL CODE, *supra* note 26, § 7-207. The absence of independent substantive review standards has been criticized by Mandelker, *supra* note 1, at 79, who points out that the guiding development principles and regulations "may not give the [state review] board enough precise guidance in conducting its review of local development control decisions."

173. D. MANDELKER, *supra* note 1, at 79.

ulations and development orders to conform to the state comprehensive plan, a recommendation put forth in the previous section, would alleviate this problem. As suggested in Part IV, in the absence of additional statutory standards or a provision for legislative review of the guiding development principles, the delegation of adjudicatory power to the Commission is probably unconstitutional.

In reviewing local decisions, the Adjudicatory Commission will always be bound by the substantial evidence rule.<sup>174</sup> If the appeal is conducted on the local record, the Commission's hearing officer can recommend reversal of the local order only upon a finding that the order is not supported by substantial competent evidence. If the appeal is *de novo*, the hearing officer issues a recommended order based upon the preponderance of the evidence adduced at a new administrative trial, a procedure that allows the hearing officer to reweigh the evidence and render a decision independent of the decision made by local government. In either event, the Adjudicatory Commission itself is bound by the substantial evidence rule; it can reject the hearing officer's findings of fact only by determining, after a review of the entire record, that the findings are not supported by substantial competent evidence.<sup>175</sup>

Within the constraints of the substantial evidence rule, the Commission's remedial powers are coextensive with those of local government in issuing the initial development order. Both the Commission and local government are authorized to grant or deny permission to develop in critical areas pursuant to the standards of the Environmental Land Act and may impose conditions on the granting of a permit.<sup>176</sup> As a practical matter, the Commission's powers may exceed those expressly granted by statute. The administrative appellate process gives the Commission, and those who invoke its jurisdiction,

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174. See Pelham, *supra* note 105, at 836-37 (discussing the substantial evidence rule).

175. FLA. STAT. ANN. § 120.57(1)(b) (West Supp. 1974-78) provides in part: The agency may adopt the recommended order as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law

See also Pelham, *supra* note 105, at 837.

176. FLA. STAT. § 380.031(2), .07(2) & (5) (1977).

the leverage to negotiate settlements imposing conditions and restrictions that might not be supported by the weight of the evidence adduced in an adjudicatory proceeding. Actually, therefore, the adjudicatory process may frequently consist of a series of negotiating sessions that, if successful, dispense with the need for a formal adjudication of the dispute by the Commission.<sup>177</sup>

The Adjudicatory Commission's decisions are subject to judicial review as provided in the Florida APA. The scope of such review is limited to the record compiled before the Adjudicatory Commission. Moreover, in reviewing the administrative record, the court is bound by the substantial evidence rule.<sup>178</sup> Hence, the judiciary's major contribution to individual critical area development decisions probably will be the prevention of wholly arbitrary and unreasonable decisions by the Adjudicatory Commission.<sup>179</sup>

### III. IMPLEMENTATION OF THE FLORIDA CRITICAL AREAS TECHNIQUE

The seven-year history of the Florida critical areas technique is a checkered one. Utilization of the technique has ranged from legislative designation to official administrative designation to unofficial administrative designation. The scope and complexity of the regulatory

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177. For a discussion of how most DRI appeals have resulted in negotiated settlements prior to a final hearing before the Adjudicatory Commission, see Pelham, *supra* note 105, at 838-40.

178. FLA. STAT. ANN. § 120.68(5) (West Supp. 1974-78) provides that judicial review of agency action is limited to the agency's written order and the record compiled by the agency in accordance with the APA.

*Id.* § 120.68(10) provides in part:

If the agency's action depends on any fact found by the agency . . . , the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding that is not supported by competent substantial evidence in the record.

179. The author has previously made a similar observation about the role of the judiciary in reviewing individual DRI decisions rendered by the Adjudicatory Commission. Pelham, *supra* note 105, at 848. While Florida courts have not yet had occasion to review the merits of a critical areas or DRI decision, they have not been reluctant to reverse other agency decisions not based upon substantial competent evidence. *See, e.g.*, *City of Plant City v. Mayo*, 337 So. 2d 966, 975 (Fla. 1976) (setting aside an order of the Florida Public Service Commission on the ground that it was not supported by competent substantial evidence in the record as required by the APA).

systems established in the designated areas also vary widely. Consistency characterizes only one aspect of the Florida program: with one notable exception, the state has used its critical areas technique as a natural resource management tool in primarily rural, environmentally sensitive areas. An examination of each of the areas not only illustrates the difficulties of implementing, but also illuminates some of the strengths and weaknesses of the comprehensive approach to critical area management.

#### A. *Legislative Designation: The Big Cypress*

The administrative designation process described in Part II is cumbersome and time-consuming. Assembling the information necessary to support a recommendation by the Division of State Planning and a designation by the Administration, with due consideration given to the five-percent limitation, cannot be speedily accomplished. Persuading the Administration Commission of both the merits and political feasibility of a proposed designation may further prolong the process. Additionally, even if the Administration Commission officially designates an area of critical state concern, the adoption of critical area development regulations in accordance with the Environmental Land Act, which does not permit development moratoria or interim controls, may take twelve months. Thus, the administrative designation process is not well-suited for emergency situations, a reality that was implicitly recognized by the Florida legislature only one year after its enactment of the Environmental Land Act.

The Big Cypress presented an emergency situation in 1973. Consisting of 1.5 million acres in southwest Florida, the Big Cypress contains an abundance of natural resources of state and national importance. First, the area is underlaid by the shallow aquifer of southwest Florida which provides a source of fresh water for urbanizing communities along Florida's southwest coast, irrigation water for agricultural use, and surface water for the Everglades National Park. Second, the area includes the Federal Big Cypress National Fresh Water Reserve and the Everglades National Park; the former contains over 500,000 acres of important wildlife habitat and the latter possesses unique biological, historical, educational, and recreational resources which attract almost two million visitors a year. Third, the area encompasses estuarine fisheries and related ecosystems that comprise the most important commercial and sport fishing

grounds in Florida.<sup>180</sup> These resources faced imminent danger in 1973 from a variety of development pressures, including the proposed location of an interstate highway through the area.<sup>181</sup> Given the urgency of the area's problems, the administrative critical areas process did not offer a satisfactory solution.

Thus, in 1973 the Florida legislature partially by-passed the administrative process by directly conferring critical area status on the Big Cypress and exempted it from the five-percent limitation.<sup>182</sup> Finding that the Big Cypress "is an area containing and having a significant impact upon environmental and natural resources of regional and statewide importance,"<sup>183</sup> the legislature, by amendment to the Environmental Land Act, commanded the Administration Commission to establish definitive boundaries for the area pursuant to the recommendations of the Division.<sup>184</sup> In addition, the legislature exempted the Big Cypress designation from the statutory procedures for submission and approval of local regulations and authorized the Administration Commission to adopt, with or without modification, land development regulations proposed by the Division simultaneously with its boundary recommendation.<sup>185</sup>

In recommending precise boundaries for the area, the Division was guided only by the statutory definition of the Big Cypress as the area depicted on a specifically referenced boundary map "together with such contiguous land and water areas as are ecologically linked with the Everglades National Park, . . . the estuarine fisheries of South Florida, or the freshwater aquifer of South Florida."<sup>186</sup> The Division construed this language broadly. In its initial recommendation to the Administration Commission, the Division recommended that three-fourths of the entire Big Cypress watershed, containing about 1.2 million acres and several municipalities, be included in the critical area

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180. DEPARTMENT OF ADMINISTRATION, DIVISION OF STATE PLANNING, STATE OF FLORIDA, FINAL REPORT AND RECOMMENDATIONS FOR THE BIG CYPRESS AREA OF CRITICAL STATE CONCERN 13-23 (October 1973) [hereinafter cited as BIG CYPRESS FINAL REPORT].

181. See L. CARTER, *THE FLORIDA EXPERIENCE* 246-48 (1974). This book is an excellent study of Florida's environmental problems, including those in the Big Cypress.

182. FLA. STAT. § 380.055(3), (4) (1977).

183. *Id.* § 380.055(2).

184. *Id.* § 380.055(3).

185. *Id.* § 380.055(4).

186. *Id.* § 380.055(3).



and that stringent development regulations be imposed on the area. Following a storm of protest from private citizens, state legislators, and state executive officials, the recommendation was withdrawn.<sup>187</sup> Subsequently, the Division submitted a substantially scaled-down recommendation.

As finally adopted by the Administration Commission, the boundaries of the Big Cypress critical area encompassed lands in three counties constituting only about fifty percent of the total Big Cypress area. All municipalities and urbanizing areas were excluded.<sup>188</sup> Reflecting the narrow natural resource considerations that prompted designation, the land development regulations adopted by the Commission are extremely limited in scope, focusing almost exclusively on the quantity, quality and flow of water in the area. Within these parameters, the regulations are fairly restrictive.<sup>189</sup> Because the area has experienced little development since the designation, however, there has been little permitting activity and no appeals from local decisions to the Adjudicatory Commission.<sup>190</sup>

The Big Cypress was not a true test of the Florida administrative critical areas technique. Legislative designation eliminated many of the political and legal problems encountered in subsequent administrative designations. Furthermore, administrative exclusion of all urbanizing areas from the designated boundaries reduced substantially the potential impact of, and political opposition to, the designation. Nonetheless, the intense opposition to a more extensive designation was an ominous portent for using the administrative designation process.

### B. *Administrative Designation*

Administrative designation has proceeded slowly but steadily in

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187. L. CARTER, *supra* note 181, at 249-54.

188. BIG CYPRESS FINAL REPORT, *supra* note 180, at 24, 66. Fewer than 50,000 people reside in the Big Cypress area. *Id.* at 10.

189. See 8 FLA. ADMIN. CODE 22F-3.06 to .09 (Big Cypress development regulations establishing performance standards for site alteration, drainage, transportation, and structure installation in the area). *Id.* 22F-3.06 is typical of the regulations; it limits site alteration to 10% of the total site size with "total site" defined as "land which is under common ownership or is part of a common plan of development, rental, advertising or sale." *Id.* 22F-303(8).

190. Interview with Stephen Fox, Senior Planner and Critical Areas Section Leader, Division of State Planning, Bureau of Land & Water Management, Division of State Planning, State of Florida, in Tallahassee, Florida (July 21, 1978).

Florida. During the first five years of the program, the Division of State Planning received seventy-nine critical area nominations. Proceeding without any officially promulgated administrative standards for designating critical areas, the Division concluded that about forty of the nominated areas could not be addressed under the Environmental Land Act. After requesting additional information, the Division rejected about fifteen more nominations for the same reason. Two nominated areas were officially designated as critical areas by the Administration Commission, one was unofficially designated by the Division, and six have been combined into one nomination which the Division may recommend for official designation by the Commission after the constitutionality of the program has been settled. Approximately fifteen nominations are still pending as potential critical areas.<sup>191</sup>

1. *Official Administrative Designation No. 1: The Green Swamp.* Florida's first administratively designated critical area is another experiment in natural resource management. Located in the central highlands of Florida, the Green Swamp area "is a composite of swamps separated by flatwoods, low hills and ridges" encompassing wholly or partially five counties and five municipalities.<sup>192</sup> As in the case of the Big Cypress, natural resource considerations prompted designation of the Green Swamp as a critical area. The Green Swamp is a major recharge area for the Floridan Aquifer. It annually contributes over eighty-one billion gallons of ground-water recharge to this important aquifer which underlies the entire state and supplies about seventy percent of all the ground water consumed in Florida.<sup>193</sup> Equally important are the wetlands, comprising about fifty percent of the area, in which five major rivers originate, surface waters are retained, water quality is improved through natural filtering characteristics, and valuable wildlife habitat are located.<sup>194</sup> An additional consideration was the existence of water-management facilities which represent a public investment of 114 million dollars and provide flood protection and a wide variety of recreational opportu-

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191. *Id.*

192. DEPARTMENT OF ADMINISTRATION, DIVISION OF STATE PLANNING, STATE OF FLORIDA, FINAL REPORT AND RECOMMENDATIONS FOR THE PROPOSED GREEN SWAMP AREA OF CRITICAL STATE CONCERN 2, 17-18 (June 1974) [hereinafter cited as *The GREEN SWAMP REPORT*].

193. *Id.* at 20, 22-23.

194. *Id.* at 25-27.

nities.<sup>195</sup>

Uncoordinated development posed a serious threat to these resources and investments. Development of the area would entail substantial drainage, which could lower water levels, decrease available aquifer recharge water, reduce the water retention and filtering capabilities of the wetlands, destroy wildlife habitat and recreational facilities, and necessitate redesigning and reconstruction of water-management facilities.<sup>196</sup> Therefore, since existing local land development regulations were deemed inadequate to eliminate such adverse impacts, the Administration Commission in 1974 designated a portion of the Green Swamp consisting of about 320,000 acres in two counties as an area of critical state concern. Like the Big Cypress designation, the Green Swamp critical area contains no municipalities.<sup>197</sup>

Following adoption of the designation rule on July 16, 1974,<sup>198</sup> the Florida APA rulemaking provisions combined with the Environmental Land Act's self-destruct mechanism to deal the Green Swamp designation a potentially mortal blow. Under the Environmental Land Act's time table, critical area regulations must become effective within twelve months after the designation. Otherwise, the designation automatically terminates.<sup>199</sup> When the two constituent county governments failed to submit acceptable regulations within six months after the Green Swamp designation, the Division prepared and recommended regulations to the Administration Commission.<sup>200</sup> Adoption of the proposed rules by the Commission was delayed by the filing under the APA of an administrative challenge to the validity of the proposed rules. Consequently, the regulations did not become effective until July 20, 1975, twelve months and four days after adoption of the designation rule.<sup>201</sup> Previously, on July 15, 1975, the

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195. *Id.* at 28, 30.

196. The GREEN SWAMP REPORT, *supra* note 192, at 23-24, 27-28, 30-31. Much of the development in the vicinity of the area is attributable to the location of the Disneyworld complex on about 30,000 acres of land less than five miles east of the Green Swamp. *Id.* at 17.

197. *Id.* at 32, 35-36, 46-47; 8 FLA. ADMIN. CODE 22F-5. In 1970 less than 12,000 people resided in the Green Swamp area. *Id.* at 15.

198. 8 FLA. ADMIN. CODE 22F-5 (the Green Swamp designation rule).

199. FLA. STAT. § 380.05(12) (1977).

200. Interview with Stephen Fox, *supra* note 80.

201. *Postal Colony Co., Inc. v. Askew*, 348 So. 2d 338, 341 (Fla. Dist. Ct. App. 1977).

Administration Commission had attempted to prevent the striking of the "statutory doomsday clock" by adopting the proposed regulations as emergency rules pursuant to the APA,<sup>202</sup> a desperation tactic which failed to save the Green Swamp designation.

Parties to the rule making proceedings before the Adjudicatory Commission sought judicial review of the regulations in *Postal Colony Co., Inc. v. Askew*.<sup>203</sup> Although constitutional objections to the regulations were raised, the court disposed of the matter on statutory grounds. First, giving full force and effect to the statutory twelve-month requirement, the court held that the regulations were invalid because of the Administration Commission's failure to effectuate them within twelve months after adoption of the designation rule. The designation was thus automatically and irrevocably terminated.<sup>204</sup> Second, the court held that the Commission's attempt to accelerate the effective date of the regulations by adopting them as emergency rules pursuant to the APA was also ineffective. According to the Court, the Commission's finding of immediate danger to the public health safety, or welfare, a statutory prerequisite to adoption of emergency rules, was not supported by sufficient evidence.<sup>205</sup>

Subsequently, in a petition for rehearing the Administration Commission requested the court to reconsider its decision because timely effectuation of the regulations had been prevented by the intervening administrative rule challenge. While recognizing the significance of this circumstance, the court declined to consider it because it had not been called to the courts attention either in the briefs or oral argument.<sup>206</sup> Additionally, however, the court stated that a reconsideration was precluded by its decision in another case that the statutory critical areas designation provisions were unconstitutional.<sup>207</sup> Thus,

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202. *Id.* at 341-42. The APA emergency rulemaking provisions are discussed at note 95 *supra*.

203. 348 So. 2d 338 (Fla. Dist. Ct. App. 1977).

204. *Id.* at 339-40.

205. *Id.* at 340, 342. According to the court, the record was devoid of any evidence of immediate danger to the central Florida water supply, the future condition of which motivated designation of the Green Swamp. Rather, the only "immediate danger" cited by the Adjudicatory Commission was its failure to adopt timely the critical area regulations. Thus, stated the court, "When as here the legislature has clearly specified the consequence of delay, emergency created wholly by an agency's failure to take timely action cannot justify extraordinary suspensions or extensions of the statutory schedule." *Id.* at 342.

206. *Id.* at 343.

207. *Cross Key Waterways, Inc. v. Askew*, 351 So. 2d 1062 (Fla. Dist. Ct. App.

the Green Swamp designation was placed in limbo pending a final determination by the Florida Supreme Court of its constitutionality.<sup>208</sup>

As discussed in Part IV, the Green Swamp designation was invalidated by the Florida Supreme Court. Nevertheless, since the designation has been reinstated by the legislature, the Green Swamp regulatory system merits some attention. The guiding development principles adopted by the Administration Commission are primarily concerned with protection of the area's water resources. Eleven objectives and an equal number of regulatory guidelines for minimizing the adverse impact of site alteration, soils, ground water, storm water runoff, solid waste and structures on water resources comprise the principles.<sup>209</sup> Essentially, the state-imposed regulations establish a permit system and performance standards for development activities in the area.<sup>210</sup> As of July, 1978, neither of the two constituent counties had adopted comprehensive plans,<sup>211</sup> so it remains to be seen what impact Florida's state and local planning legislation will have on the Green Swamp.

As in the Big Cypress, little regulated development activity is currently taking place in the Green Swamp. Similarly, no appeals of local development decisions in the area have been filed with the Ad-

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1977), rendered on the same day as the court's opinion on the petition for rehearing, 348 So 2d at 343, declared portions of the Environmental Land Act unconstitutional. For a detailed analysis of the case, see text accompanying notes 243-45, 289-92 *infra*.

208. The lower court's decision in the Postal Colony case was appealed to the Florida Supreme Court and consolidated with the appeal in the Cross Key case, No. 52, 251 (Fla., petition for writ of certiorari filed August 18, 1978).

209. 6 FLA. ADMIN. CODE 22F-5.03. Representative objectives are: "(1) Minimize the adverse impacts of development on resources of the Floridan Aquifer, wetlands, and flood-detention areas; (2) Protect the normal quantity, quality and flow of ground water and surface water which are necessary for the protection of resources of state and regional concern." *Id.* 22F-5.03(A) (1) & (2). The regulatory guideline for site platting illustrates the primary thrust of the guidelines: "The platting of land should be permitted only when such platting commits development to a pattern which will not result in the alteration of the natural surface water flow regime and which will not reduce the natural recharge rate to the platted site." *Id.* 22F-5.03(B) (1).

210. *See id.* 22F-6.08, .09 (establishing minimum development standards and permitting requirements for Polk County); 22F-7.07 & .08 (establishing development performance criteria and a permitting system for Lake County).

211. Interview with Robert Kessler, Senior Planner, Bureau of Comprehensive Planning, Division of State Planning, State of Florida, in Tallahassee, Florida (July 19, 1978). Mr. Kessler is responsible for reviewing proposed local comprehensive plans pursuant to the Florida Local Government Comprehensive Planning Act. *See* text accompanying notes 144-47 *supra*.

judicatory Commission.<sup>212</sup> Hence, it is too early to assess the effectiveness of the regulatory and adjudicatory process in this critical area.

2. *Official Administrative Designation No. 2: The Florida Keys.* The Administration Commission significantly expanded the horizons of the Florida critical areas program in 1975 by officially designating the Florida Keys, a rapidly developing area, as the state's third area of critical concern.<sup>213</sup> A 130-mile long archipelago of 97 islands lying off the southeastern tip of Florida, the Keys are an internationally famous island paradise which has attracted growing numbers of tourists and permanent residents and rapid development. Inevitably, the Keys have begun "to suffer . . . from their own success."<sup>214</sup>

As noted by the Division of State Planning in its recommendation of critical area status, rapid and largely uncoordinated growth and development have seriously impaired the ability of constituent local governments to provide essential urban services and protect the unique environment of the Keys. Protection of various environmental, natural and historical resources and substantial public investments require a coordinated approach to land management which has not previously existed in the area. Water quality, coral reef communities, and mangrove areas are among the more important natural resources affected by development activity. Public investments include the overseas highway, constituting an investment of over 164 million dollars, water supply facilities, costing more than 35 million dollars, waste treatment facilities, valued at about 22 million dollars, and the Key West Historical Preservation District, a valuable tourist attraction which is one of only four areas in Florida designated by the state legislature as an historical district.<sup>215</sup>

As designated by the Administration Commission, the Florida Keys critical area contains about 70,000 acres in south Monroe County, Florida. Included within the designated area are four municipalities.<sup>216</sup> Thus, the critical area includes not only rapidly developing unincorporated areas but also four incorporated towns. These

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212. Interview with Stephen Fox, *supra* note 80.

213. 6 FLA. ADMIN. CODE 22F-8.

214. DEPARTMENT OF ADMINISTRATION, DIVISION OF STATE PLANNING, STATE OF FLORIDA, FINAL REPORT AND RECOMMENDATIONS FOR THE PROPOSED FLORIDA KEYS AREA OF CRITICAL STATE CONCERN 2, 13-15, 23-26 (1974).

215. *Id.* at 28-30.

216. *Id.* at 42. In 1973 the estimated population of Monroe County, only a part of

facts made the Florida Keys the most controversial of the state's critical areas and produced a broad scale constitutional attack on the Environmental Land Act and the Florida Keys designation.

Not surprisingly, the guiding principles and land development regulations adopted for the Florida Keys are much more comprehensive and complex than those for the Big Cypress and the Green Swamp. The guiding principles address not only natural resources such as water quality and tidal mangroves but also historical resources and public investments. They require each local government within the area to adopt a plan and policies for future land use, a community impact assessment ordinance for major developments,<sup>217</sup> and site alteration regulations. In addition, the guidelines direct affected local governments to create special zoning districts around the Key West Naval Air Station and require the City of Key West to adopt an historical preservation plan for the Key West Historical Preservation District.<sup>218</sup> Each of the local governments in the area have adopted regulations complying with the guiding principles;<sup>219</sup> however, as of July, 1978, only one local government had adopted any part of the comprehensive plan required by the Florida local planning Act.<sup>220</sup>

The Florida Keys have a much higher level of development and

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which is encompassed within the Florida Keys critical area, was only about 56,000. *Id.* at 14.

217. 6 FLA. ADMIN. CODE 22F-8.03B.(1)(d) sets forth as a guiding development principle that

[a] community impact statement should be submitted and approved prior to the issuance of zoning and rezoning orders or site plan approval for the following developments: 1. any development which includes building in excess of 45 feet in height; 2. any intensive land uses including residential uses of 10 or more dwellings per acre or 50 or more total dwelling units; and 3. all business, commercial or industrial uses or 5 or more acres.

The purpose of the statement is "to enable local governmental officials to determine the proposed development's favorable or unfavorable impact on the environment, natural resources, economy and the potential of the project to meet local or regional housing needs." *Id.* Thus, this requirement could partially alleviate at least in the Florida Keys, the Environmental Land Act's failure to subject DRI in critical areas to the DRI regulatory process, a problem discussed in the text accompanying notes 105-110 *supra*.

218. *Id.* 22F-8.03.

219. *See id.* 22F-9 (regulations for Monroe County); 22F-10 (regulations for City of Key Colony Beach); 22F-11 (regulations for City of Layton); 22F-12 (regulations for City of Key West); 22F-13 (regulations for City of North Key Largo Beach).

220 Monroe County had completed the land use element of its comprehensive plan. None of the four municipalities had adopted any plan element. Interview with Robert Kessler, *supra* note 211.

regulatory activity than do the Big Cypress and the Green Swamp. Nevertheless, according to one state official, most potential problems in the area have been resolved on an informal basis. Following its review of local development orders, the Division has been successful with one exception, in persuading local governments to modify objectionable orders without the necessity of an appeal.<sup>221</sup>

The exception was *In re City of Key West Ordinance Nos. 76-8 and 76-12*,<sup>222</sup> the first appeal of a local critical areas development order to the Adjudicatory Commission. The case arose out of the enactment of two local ordinances, one granting a rezoning and the other a variance for property located within the Key West Historic Preservation District. Located on a street which served as a buffer between the historical district and an adjacent light industrial district, the property was rezoned from HP-2 (historical preservation district) to M-1 (light industrial and warehousing district) so that it could be used by the owner for outdoor storage of lumber and building supplies in connection with its lumber yard in the adjoining M-1 district. The variance permitted the owner to construct a wall around the property in contravention of the city's setback requirements.<sup>223</sup> Alleging that the two ordinances violated the guiding development principles for the Florida Keys and the critical area regulations of the City of Key West regarding historic preservation, the Division appealed the two ordinances to the Commission.<sup>224</sup>

The Commission denied the appeal. While acknowledging that a rezoning to M-1 "could per se violate the integrity of the historical preservation district if it were done in another portion of the district," the Commission found that the rezoning in question did not violate the spirit of the district because of the property's location on the boundary between the historic and light industrial districts.<sup>225</sup> In response to the state's contention that approval of the local actions could lead to further violations of the district's integrity by the owner, the Commission observed that construction of new structures or dismantling of existing ones would require additional local permits, the issuance of which could also be appealed by the Division. Consequently, the Commission concluded that the Division had failed to

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221. Interview with Stephen Fox, *supra* note 80.

222. No. 76-9 (FLWAC, Nov. 29, 1977).

223. *Id.* Slip opinion at 3-4.

224. *Id.* at 1-2, 4-5.

225. *Id.* at 6.



establish that the local ordinances violated the applicable guiding development principles and critical area regulations.<sup>226</sup>

*In re City of Key West* is hardly an auspicious beginning for the critical areas adjudicatory process. Given the relatively minor deviations from existing zoning patterns in the area and the innocuousness of the proposed uses, one wonders why the Division chose this particular case to inaugurate the state administrative review process for critical areas. Perhaps it was intended as a signal to local government that the Division will be vigilant in policing local development actions in the Florida Keys. Whatever the Division's motivation and notwithstanding the undistinguished factual background, the case illustrates the potential of the state review mechanism for protecting state interests in areas of critical state concern.

3. *Unofficial Administrative Designation: The Apalachicola River and Bay System.* In 1977, the Division announced a fourth albeit unofficial critical area designation—the Apalachicola River and Bay System (“the System”).<sup>227</sup> Comprising about 2,000 square miles in six counties in the central panhandle of Florida, the system extends from the Alabama and Georgia-Florida boundaries to barrier islands off the Florida Gulf coast.<sup>228</sup> Since the area is predominately rural, its designation marks the advent of another experiment in resource management although some resource-related public investment considerations are also present. The System, a highly integrated network of “uplands, freshwater swamps, coastal lowlands, and one of the most productive bays in Florida,” contains an abundance of natural resources, including commercial fisheries, wildlife habitat and beaches. Major public investments in the area include a state and federally financed oyster bar rehabilitation program in Apalachicola Bay, a navigable, heavily traveled channel in the river which is maintained by the U.S. Army Corps of Engineers, thousands of acres of environmentally endangered lands recently purchased from private landowners by the State of Florida, and numerous public parks and recreational facilities.<sup>229</sup>

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226. *Id.* at 7, 9.

227. See DEPARTMENT OF ADMINISTRATION, DIVISION OF STATE PLANNING, STATE OF FLORIDA, *THE APALACHICOLA RIVER & BAY SYSTEM: A FLORIDA RESOURCE* (April 1977) [hereinafter cited as *THE APALACHICOLA RIVER REPORT*].

228. *Id.* at 41-42.

229. *Id.* at 4-18, 21.

Although the System was nominated for official designation as a critical area by the Florida Department of Pollution Control,<sup>230</sup> the Division concluded that an official designation was premature, despite increased development pressures, construction of an interstate highway through the area, and the proposed construction of a dam across the river by the Corp of Engineers.<sup>231</sup> Ostensibly, the Division's decision was based on the perceived inability of local governments in the area to comply with critical area regulatory requirements, the devotion of eighty percent of the land in the system to agricultural and forestry uses which are exempt from critical area regulations, and the slow pace of development changes in the area.<sup>232</sup> Undoubtedly, however, the political controversy and the legal challenges generated by the Florida Keys designation were prominent factors in the Division's decision.<sup>233</sup>

In lieu of an official designation, the Division proposed a joint state and local voluntary resource management program.<sup>234</sup> To coordinate the program, the Apalachicola Committee, consisting of representatives of state and regional agencies and each of the constituent counties, was created. Thus far, the program has concentrated primarily on assisting local governments in preparing comprehensive plans and development regulations and studying the economic development potential of the area.<sup>235</sup>

As an unofficial, voluntary land management project, the Apalachicola plan is not subject to Florida's statutory critical areas regulatory procedures. Therefore, its success depends entirely upon the willingness of local officials to cooperate with state and regional agencies in solving the area's problems. The threat of an official designation for the area, an option that theoretically is still available to the state, may prompt local governments to supply the cooperation necessary to the success of the plan. Although the Division is already promoting the plan as a legitimate and successful "working alternative" to official

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230. Fox, *Florida's Areas of Critical State Concern: An Update*, 5 FLA. ENV'T'L & URB. ISSUES 6, 9 (April 1978).

231. THE APALACHICOLA RIVER REPORT, *supra* note 227, at 2.

232. *Id.* at 33-44.

233. The critical areas section leader in the Division of State Planning acknowledges that these were important considerations in the Division's decision not to recommend official designation. Interview with Stephen Fox, *supra* note 80.

234. THE APALACHICOLA RIVER REPORT, *supra* note 277, at 33-88.

235. Fox, *supra* note 230, at 9-10.

designation.<sup>236</sup> It is much too early to evaluate the success of this approach. If the plan achieves even modest successes, it will demonstrate effectively how the mere existence of state critical area controls can induce local governments to act voluntarily to protect state and regional interests without the necessity for official implementation of such controls.

#### IV. THE NON-DELEGATION DOCTRINE AS A BARRIER TO IMPLEMENTATION OF THE FLORIDA CRITICAL AREAS TECHNIQUE: ASKEW V. CROSS KEY WATERWAYS

The critical areas technique touches sensitive nerves in the traditional American system of local land use legislation. It singles out privately owned land within a designated area for regulatory treatment generally more stringent and extensive than that previously accorded such land and that currently given to land outside the critical area. Additionally, the technique, which generally transfers land regulatory powers from local to regional and state entities, invades an area that customarily has been considered the province of local government. Hence, allegations by affected private landowners and municipalities of discriminatory, unreasonable land use regulation, and state usurpation of local power are inevitable.

Despite their inevitability, such attacks, whether aimed at legislatively or administratively designated critical areas, seem doomed to failure. Numerous court challenges to legislative designations based on due process, equal protection and home rule provisions have met with little, if any, success.<sup>237</sup> Similarly, in the first and only court decision involving the state constitutionality of an administratively designated critical area, these three lines of attack proved to be un-

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236. *Id.* at 10.

237. Due Process: *See, e.g., Meadowlands Regional Dev. Agency v. State*, 112 N.J. Super. 89, 128-130, 270 A.2d 418, 439-40 (1970), *aff'd*, 63 N.J. 35, 304 A.2d 545 (1973), *appeal dismissed*, 414 U.S. 991 (1973) (holding that the Hackensack Meadowlands Reclamation and Development Act did not violate the due process clause of the Fourteenth Amendment to the Federal Constitution because its "substantive provisions are clearly related to the legislative ends sought to be achieved"); *Horizon Adirondack Corp. v. State*, 88 Misc. 2d 619, 622-24, 388 N.Y.S.2d 235, 237, 238-39 (1976) (holding that the comprehensive system of land use controls imposed by the Adirondack Park Agency Act do not constitute a taking of private property for which compensation must be paid). *But see Jacobson v. Tahoe Regional Plan. Agency*, 558 F.2d 928, 934, 937-38 (1977) (holding in part that private landowners' allegations that the Tahoe comprehensive regional land use ordinance deprived them of all beneficial

successful.<sup>238</sup> Thus, under the developing case law, due process, equal protection and home rule considerations should pose no threat to critical area designations.

The non-delegation doctrine is an entirely different matter. Based upon constitutional separation of power provisions, this doctrine prohibits delegation of legislative authority to an administrative agency unattended by sufficient standards for guiding administrative exercise of the delegated power.<sup>239</sup> The administrative approach to critical area designation is a prime candidate for application of the non-delegation doctrine. Unlike the legislative approach, which entails designation of critical areas by the state legislature, the administrative technique involves delegation of the legislative designation power to an administrative agency. *Askew v. Cross Key Waterways*,<sup>240</sup> the first state supreme court decision to consider the constitutionality of this technique, suggests that the non-delegation doctrine is a formidable barrier to implementation of critical-areas legislation based on the Model Code, which relies on administrative designation.

*Cross Key Waterways* arose from the designation of the Florida Keys as an area of critical state concern. Various parties (petitioners) to the administrative rule-making proceeding, including the City of

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use of their property stated a cause of action under the due process clause of the Fifth Amendment to the Federal Constitution).

Equal Protection: *See, e.g.,* *Meadowlands Regional Dev. Agency v. State*, 112 Super. at 128, 270 A.2d at 439 (holding that the Hackensack Meadowlands Act does not violate the federal equal protection clause because the meadowlands are sufficiently different from the rest of the state to justify their special regulatory treatment); *Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, 81 (Tex. Civ. App. 1977) (holding in part that statute creating Subsidence District with regional regulatory powers did not violate the Texas equal protection clause because the state legislature has "wide discretion in determining whether laws shall operate statewide or only in certain counties.").

Home Rule: *See, e.g.,* *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 498, 362 N.E.2d 581, 582-83 (1977), 393 N.Y.S.2d 949, 954 (holding that the Adirondack Park Agency Act does not violate New York's constitutional home rule provisions because the park is a matter of state concern); *People ex rel Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 560-61, 487 P.2d 1193, 1199-1200 (1971) (holding that the Tahoe Regional Planning Compact does not violate California's constitutional home rule provisions because Lake Tahoe "is of regional, rather than local, concern").

238. See notes 241-42 and accompanying text *infra*.

239. For discussions of the non-delegation doctrine, see K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.00 to .17 (1970 Supp.); 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 31-91 (1965).

240. *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

Key West and numerous Florida Keys residents and property owners, sought judicial review of the designation rule via a petition raising numerous constitutional and statutory objections.<sup>241</sup> After resolving all other issues against the petitioners,<sup>242</sup> the lower court held that certain designation provisions of the Environmental Land Act constituted an unlawful delegation of legislative power and, therefore, the Florida Keys designation rule must be quashed. More specifically, the lower court declared two of the statutory critical area categories unconstitutional because they did not contain any standards for evaluating and selecting the various resource areas subject to designation and for identifying local governments that have not protected state and regional interests in such areas.<sup>243</sup> Subsequently, the Administration Commission appealed the lower court's decisions in both *Cross Keys Waterways* and *Postal Colony Co.* to the Florida Supreme Court which, after consolidating the cases for review, affirmed.<sup>244</sup>

The fulcrum for the supreme court's decision, which expressly re-

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241. *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1063-65, 1070-71 (Fla. Dist. Ct. App. 1977).

242. *Id.* at 1063. Observing that the Environmental Land Act contains numerous provisions limiting regulation of private property, the lower court rejected arguments that the Act's critical area provisions unconstitutionally violate private rights. Among the statutory provisions cited by the court were the preservation of all existing private property rights in accordance with the Florida and federal constitutions, FLA. STAT. § 380.021 (1977), the protection of vested rights, *Id.* § 380.05 (15), the prohibition of any state-imposed moratorium on development in critical areas, *Id.* § 380.05(1)(b), and the prohibition of any rule or order that is "unduly restrictive or constitutes a taking of property without the payment of full compensation," *Id.* § 380.08(1). Given these statutory restrictions, the court had little difficulty in concluding that the Environmental Land Act "does not unconstitutionally take private property without compensation, deprive persons of property without due process of law, or abridge the basic right to acquire, possess and protect property." 351 So. 2d at 1065.

The lower court also summarily dismissed contentions that the Environmental Land Act's critical areas process violates Florida's constitutional home rule provisions. While acknowledging the traditional "primacy of local government jurisdiction in land development regulation," the court stated that Florida counties and municipalities "have no constitutionally vested jurisdiction" over this matter. Rather, "[t]he power exercised or withheld by those governments is the state's power, appropriately delegated." *Id.* at 1065. In addition, the court noted that under the Florida constitution, the powers of Florida counties and municipalities are subject to modification by law. *Id.*

243. *Id.* at 1063, 1069-70.

244. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 914, 918 (Fla. 1978); *Postal Colony Co.* is discussed in the text accompanying notes 203-208 *supra*.

frained from passing upon any of the other issues presented,<sup>245</sup> was the non-delegation doctrine. The Florida non-delegation doctrine derives from the state constitutional admonition that “[n]o person belonging to one branch [of government] shall exercise any power appertaining to either of the other branches.”<sup>246</sup> In prior decisions construing this separation of powers provision, the Florida Supreme Court had enunciated several controlling principles for determining whether a delegation of legislative power is violative of the constitutional prohibition. Essentially, “[t]he legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion applying a law.”<sup>247</sup> If the statutory delegation of legislative power is stated in excessively vague or broad terms, without statutory standards or guidelines sufficient to enable a court or administrative agency to determine with certainty the meaning of the terms, what constitutes a violation of the law, or the boundaries of an agency’s power to promulgate rules for implementing the statutory grant of power, the statute violates the non-delegation doctrine.<sup>248</sup> The requisite specificity of the statutory standards, however, varies with the subject matter of the legislation and the degree of difficulty involved in drafting detailed standards.<sup>249</sup>

In *Cross Key Waterways* the central issue was whether the relevant designation provisions of the Environmental Land Act complied with

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245. 372 So. 2d at 918. The lower court had resolved all other issues against the petitioners. See note 242 and accompanying text *supra*. Among the points appealed to, but not decided by, the supreme court were whether the statutory critical area provisions and the two designation rules constituted a taking of private property without due process of law or just compensation, whether the designations discriminated against the affected landowners in violation of the state equal protection clause, and whether the statute and rules unlawfully encroached upon the constitutional home rule powers of local governments. See 372 So. 2d at 918. Brief of Appellant Florida Administration Commission, at 11-12.

246. FLA. CONST. art. II, § 3 provides: “Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

247. *State v. Atlantic Coast Line Ry. Co.*, 56 Fla. 617, 636-37, 47 So. 969, 976 (1908).

248. See *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1958); *Sarasota County v. Barg*, 302 So. 2d 737 (Fla. 1974).

249. See *State Dept. of Citrus v. Griffin*, 239 So. 2d 577, 580-81 (Fla. 1970), in which the court stated that the tests for determining the validity of a delegation of legislative authority “must be tempered by due consideration for the practical context of the problem sought to be remedied, or the policy sought to be effected.” *Id.*

these principles. Designation of the Florida Keys was based on only two of the Act's three critical areas criteria: areas "containing, or having a significant impact" on various resources of state or regional importance and areas "significantly affected by, or having a significant effect" on major public facilities or other major public investment areas.<sup>250</sup> The presence of the terms *critical* state concern, *significant* impact, and *significant* effect and the absence of guidelines for agency selection, within the five-percent limitation, from among the numerous areas and resources eligible for designation were obvious reference points for the lower court's application of the non-delegation doctrine. In urging the supreme court to reverse the lower court's decision, the Administration Commission contended that (1) the statutory provisions satisfied the principles enunciated in prior Florida Supreme Court decisions and that (2) in any event Florida should abandon the traditional nondelegation doctrine in favor of the more modern approach which emphasizes administrative standards and safeguards rather than statutory standards.<sup>251</sup>

The supreme court concurred in the lower court's opinion that the statutory standards in question were deficient under the traditional non-delegation doctrine as formulated and applied by the court in its prior decisions. Applying the controlling principles of that doctrine to the statutory provisions, the court concluded that the two critical area criteria were "constitutionally defective because they reposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."<sup>252</sup> Since this delegation of authority was unattended by any statutory guidelines, a reviewing court could not determine whether the Commission's critical area designations comported with the legislature's intent. Hence, the Commission became "the lawgiver rather than the administrator of the law" in violation of the non-delegation doctrine.<sup>253</sup>

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250. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 914 (Feb. 1978). For the full text of the two critical areas criteria, which appear at FLA. STAT. § 380.05(2)(a)-(b) (1977), see text accompanying note 70 *supra*.

251. 372 So. 2d at 918.

252. *Id.* at 919.

253. *Id.* The court described the relationship between the non-delegation doctrine and judicial review as follows:

A corollary of the doctrine of unlawful delegation is the availability of judicial review. In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature.

Following the lead of the lower court, the supreme court did not find the Environmental Land Act deficient because of its use of the vague and undefined terms, "critical area," "significant effect," and "significant impact," despite the existence of ample precedent for such a holding. In *Sarasota County v. Barg*,<sup>254</sup> the Florida Supreme Court in 1974 considered the constitutionality of a legislative act<sup>255</sup> creating a special conservation district. The statute prohibited, within the district boundaries, "undue or unreasonable dredging, filling or disturbance of submerged bottoms" and "unreasonable destruction of natural vegetation . . . in a manner which would be harmful or significantly contribute to air and water pollution."<sup>256</sup> Observing that the Act did not define the descriptive terms or otherwise provide any guidelines to assist any court or agency in construing them, the Supreme Court held that these statutory provisions violated the non-delegation doctrine.<sup>257</sup>

While acknowledging the obvious similarity between the terms in issue and those condemned in *Barg*, the supreme court in *Cross Key Waterways* concluded that the use of such terms did not render the critical areas designation criteria unconstitutional. The court recognized that such "'approximations of the threshold of legislative concern' are . . . a practical necessity in legislation."<sup>258</sup> But even more important, according to the court, such terms are now susceptible to administrative refinement through adoption of agency rules pursuant to the 1974 Florida APA which became effective after *Barg* was decided.<sup>259</sup>

The fatal flaw was the Act's failure to provide any guidelines for evaluating and choosing among the various resources subject to

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When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

*Id.*

254. 302 So. 2d 737 (Fla. 1974).

255. 1971 Fla. Laws ch. 71-904.

256. *Id.* §§ 6, 7. See also 302 So. 2d at 739.

257. 302 So. 2d at 742.

258. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 919 (Fla. 1978) .

259. *Id.* The lower court reached the same conclusion. See 351 So. 2d at 1069. For purposes of the Florida APA rulemaking procedures, see notes 37-94 and accompanying text *supra*, "[r]ule" is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy." FLA. STAT. ANN. § 120.52(14) (West Supp. 1974-78).



designation. This omission contrasted sharply with "the specificity of the Big Cypress designation," the Act's restriction of "area of major development potential" designations to those indicated in a legislatively approved state land development plan, and the Act's provision for adoption of administrative guidelines and standards as a prerequisite to regulation of DRI.<sup>260</sup> Since similar standards were not included for the two critical area categories under consideration, the court, in an extensive quote from the lower court's opinion, concluded that "[t]he Act treats alike, as fungible goods, disparate categories of environmental, historical, natural and archeological resources of regional or statewide importance and all of Florida's manifold resources within those vast categories."<sup>261</sup> Hence, under the court's analysis, selection from among these resources is left to the unbridled discretion of the Administration Commission in violation of the non-delegation doctrine.<sup>262</sup>

Curiously, the court did not expressly address the lower court's condemnation of the Act's failure to provide sufficient standards for identifying "local governments whose stewardship of valued resources is to be deemed inadequate to protect state and regional interests."<sup>263</sup> As construed by the lower court, the Act makes the unresponsiveness of local governments to broader areal interests an important consideration in critical area designations.<sup>264</sup> Thus, delegation of the designation power must be accompanied by statutory standards for assessing the responsiveness of local governments.

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260. 372 So. 2d at 919. FLA. STAT. 380.06(2)(a) (1977) provides, in part, that the Division of State Planning "shall recommend to the Administration Commission" and the "Commission shall adopt guidelines and standards to be used in determining whether particular developments shall be presumed to be of regional impact." The original guidelines and standards and any modifications thereto are subject to legislative review and approval. *Id.* § 380.06(2)(a) .10(2).

261. *Id.* The result, according to the court, is that up to the 5% limit: the Commission is empowered to supercede as it chooses the local governments regulating development in historic Pensacola or St. Augustine, or at the shores of the Atlantic and Gulf of Mexico to a depth of a thousand feet, or in all acreage on the Suwanee and St. Johns and their tributaries, or indeed, in all the Florida Keys. If Cedar Key, Ybor City, Palm Beach and the path of the King's Road are found to be historic resources of satisfactory importance, they too may be designated

*Id.*

262. *Id.* at 919-20.

263. *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1069-70 (Fla. Dist. Ct. App. 1977).

264. *Id.* at 1070.

While recognizing that the specificity of statutory standards may properly vary directly with the complexity of the subject matter, the lower court observed that nothing in the text or legislative history of the Act evidenced a determination that formulation of more precise standards for assessing local responsiveness is beyond the legislature's competence. Consequently, the lower court held that this omission violated the non-delegation doctrine.<sup>265</sup>

Two reasons for the Supreme Court's failure to deal with this issue seem readily apparent. First, the lower court's emphasis on the identification of unresponsive local governments was misguided. No provision of the Act makes the unresponsiveness of local governments "a substantial factor in the designation of critical areas" as the lower court contended.<sup>266</sup> While the perceived inability or unwillingness of local governments to regulate land use in a manner calculated to protect state and regional interests may have motivated enactment of the Environmental Land Act, designation of critical areas under the act is not predicated upon such a showing. The responsiveness of local governments does not become a factor in the critical areas process until the regulatory phase is instituted following a critical area designation. Although the statutory procedure for determining whether local development regulations are adequate to protect state and regional interests may give rise to another delegation problem,<sup>267</sup> it is unrelated to and independent of the designation process. Second, and perhaps more important, the court may have deemed it unnecessary to address this issue in view of its ultimate ruling that the Florida legislature, in some manner, must designate critical areas.<sup>268</sup>

Having concluded that the statutory provisions violated the traditional non-delegation doctrine, the court confronted the Administration Commission's contention that Florida should join those jurisdictions requiring administrative standards and safeguards instead of statutory standards. As the court acknowledged, the traditional doctrine, which is practically moribund at the federal level and in a minority of states,<sup>269</sup> has been harshly criticized. Professor Ken-

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265. *Id.*

266. *Id.* The lower court cited no provision of the Environmental Land Act in support of its construction of the statute.

267. See text accompanying notes 293-94 *infra*.

268. See text accompanying notes 282-83 *infra*.

269. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 922-23 (Fla. 1978). See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.00 to 2.04 (1976 ed.) for a discussion of the current status of the non-delegation doctrine in federal and state courts.

neth Culp Davis, the grim reaper of the non-delegation doctrine, sternly preaches that the doctrine "had to fail, should have failed, and did fail" because the complexity of contemporary society requires the delegation of broad grants of legislative power to administrative agencies unattended by meaningful statutory standards.<sup>270</sup> For the traditional requirement of statutory standards, Professor Davis would substitute a requirement of administrative standards and safeguards which can be used by the judiciary to compel administrators "to do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through not only standards but also principles and rules."<sup>271</sup> In other words, administrative agencies should be required to fill in legislative "blank checks" with administrative standards promulgated in accordance with statutorily prescribed rule-making procedures.

Adoption of Professor Davis' revised non-delegation doctrine would not have produced a total victory for the Administration Commission. While application of the revised doctrine might have saved the statutory critical area provisions, it would not have salvaged the Florida Keys and Green Swamp designations. Neither the Administration Commission nor the Division of State Planning refined the statutory critical area standards by adopting policy statements as rules under the Florida APA prior to designation of the two areas. Hence, while the agencies, in designating the two areas, may have structured "their discretionary power through appropriate safeguards" afforded by the APA rule-making procedures, they did not "confine and guide their discretionary power through standards, principles and rules" promulgated prior to their contested actions.<sup>272</sup> This omission would have resulted in invalidation of the two designation rules even under the Davis approach.<sup>273</sup>

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270. K. DAVIS, *supra* note 239, §§ 2.00-3.00.

271. *Id.* §§ 2.00-5.00.

272. Among the changes proposed by Professor Davis to make the non-delegation doctrine effective is "a judicially-enforced requirement that administrators must do what they reasonably can do to develop and make known the needed confinements of their discretionary power through standards, principles, and rules as well as to structure their power through procedural safeguards." K. DAVIS, *supra* note 239, §§ 2.00-6.00.

273. For a case involving a state administrative agency's failure to refine inadequate statutory criteria by promulgating administrative standards, see *Texas Antiquities v. Dallas County Community College Dist.*, 554 S.W.2d 924 (Tex. 1977). The Texas Antiquities Code, TEX. REV. CIV. STAT. ANN. art. 6145-9, §§ 1-22 (Vernon 1970), provided for a state Antiquities Committee and authorized it to designate State

An amicus curiae urged the court to uphold the statutory provisions and the two critical area designations by treating the Division's report and recommendations for each of the two areas as subsidiary administrative standards.<sup>274</sup> Under this approach, if the court, in reviewing both the statutory standards and the subsidiary administrative standards, could have determined that the disputed agency action promoted an ascertainable legislative policy, the two designations would have been upheld. Reliance on subsidiary administrative standards, for which there is sparse precedent in federal law and even less in Florida law,<sup>275</sup> has all of the characteristics of a "boot strap"

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Archeological Landmarks, defined in part as "[a]ll . . . buildings . . . and locations of historical . . . interest." *Id.* § 6. The Antiquities Committee did not adopt any rules or standards stating criteria for buildings of historical interest prior to designating such a structure. 554 S.W.2d at 927. In an action challenging the constitutionality of the statute, the Texas Supreme Court held that the historical buildings provision violated the traditional non-delegation doctrine. *Id.* at 927-28. To the state agency's argument that the court should adopt Professor Davis' approach, the court responded:

Professor Davis concludes that the nondelegation doctrine in federal courts has been less than successful, but he would not abolish all standards. . . . Instead he would substitute administrative standards in the form of published rules and regulations for statutory standards. . . . We have, in this case, no standard or criteria either by statute or rule which affords safeguards for the affected parties.

*Id.* at 928.

274. *Askew v. Cross Key Waterways*, 372 So. 2d 912 (Fla. 1978), Brief of Amicus Curiae Governor Reuben O'D Askew, at 22-23.

275. One of the few federal cases which discusses the concept of subsidiary administrative standards is *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971). In upholding the constitutionality of § 202 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904, the court rejected the appellant's non-delegation attack as follows:

Another feature that blunts the 'blank check' rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action. . . .

*The requirement of subsidiary administrative policy*, enabling Congress, the courts and the public to assess the Executive's adherence to the ultimate legislative standard, is in furtherance of the purpose of the constitutional objective of accountability. This 1970 Act gives broadest latitude to the Executive. Certainly there is no requirement of formal findings. But there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective. This requirement is underscored by the consideration that the exercise of wide discretion will probably call for "imaginative interpretation, leaving the courts to see whether the executive, using its experience, 'has fairly exercised its discretion within the vague, penumbral bounds' of the broad statutory standard.

argument. It permits agency action that does not comply with the requirement of prior administrative standards to satisfy the requirement. Nevertheless, given the difficulty of formulating administrative standards for designating critical areas prior to experimentation with the technique, this approach, however illogical, may be a realistic one.

Judicial consideration of the issue of administrative standards was unnecessary since the court rejected Professor Davis' revised non-delegation doctrine. While recognizing that the Davis approach has merit, the court concluded that its adoption in Florida is precluded by the state constitutional separation of powers provision.<sup>276</sup> Unlike the federal and some state constitutions, which vest legislative authority in the legislative branch without prohibiting its delegation to another branch,<sup>277</sup> the Florida Constitution expressly forbids exercise

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*Id.* at 758-59 (citations omitted and emphasis added).

In *Askew v. Cross Key Waterways*, 372 So. 2d 912 (Fla. 1978), an amicus curiae cited *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. Dist. Ct. App. 1977) for the proposition that Florida has adopted the concept of subsidiary administrative standards. *Id.* Brief of Amicus Curiae Rueben O'D Askew, at 22-23. However, while *McDonald* holds that *incipient agency policy which is not of general applicability* may be established through the *adjudication of individual cases* rather than through the APA rulemaking process, 346 So. 2d at 581, this holding does not seem broad enough to permit the establishment of critical areas criteria of general statewide applicability through the designation of specific critical areas under the *rulemaking process*.

276. *Askew v. Cross Key Waterways*, 372 So. 2d at 924. For the full text of the Florida constitutional provision, see note 246 *supra*.

277. U.S. CONST. art. 1, § 1 provides, in relevant part, that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

An example of a similar state constitutional provision is Wash. Const. art. 2, § 1 which states: "[t]he legislative authority of the State of Washington shall be vested in the legislature." The Washington Supreme Court, a leading state exponent of Professor Davis' revised nondelegation doctrine, has interpreted this provision as follows: [T]hese provisions of the Washington State and United States constitutions mean only that legislative power is delegated initially and *fundamentally* to the legislative bodies. We believe that one of the legislative powers granted by these provisions is the power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it by the legislature. To construe these provisions as confining the exercise of legislative power to the legislative bodies, would be to read them as limitations of power rather than as grants of power. We may assume that if the framers had intended to so limit the power of the legislative bodies, they would have done so expressly, rather than by implication.

*Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 500 P.2d 540, 544 (Wash. 1972).

In *Cross Key Waterways*, the Florida Supreme Court noted that, unlike the United States and Washington constitutions, Article II, Section 3, of the Florida Constitution,

of the legislative power by a member of another branch of government. Thus, according to the court, until the constitutional provision is amended, the traditional non-delegation doctrine will prevail in Florida.<sup>278</sup>

The question remains whether the Environmental Land Act can be amended to provide sufficient statutory standards for administrative designation of critical areas. Logically, if the non-delegation doctrine is the sole basis of the judicial invalidation of the statutory designation provisions, the legislature should be able to cure the statutory deficiency by supplying adequate administrative designation guidelines. Clearly, the lower court's opinion did not foreclose the possibility of curative legislation.<sup>279</sup> Similarly, much of the Florida Supreme Court's opinion suggests that administrative designation is contingent only upon sufficient statutory criteria. Indeed, the high court's extended analysis of both the traditional and revised non-delegation doctrines is rendered irrelevant if provision of adequate statutory standards for administrative designation is deemed a legal impossibility.<sup>280</sup>

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"does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government." 372 So. 2d at 924.

278. 372 So. 2d at 925.

279. Unlike the Florida Supreme Court, which ruled that critical area designations must be made by the state legislature, *see* notes 281-83 and accompanying text *infra*, the lower court held only that the challenged statutory provisions lacked adequate statutory standards and therefore violated the Florida Constitution. 351 So. 2d at 1062. The following passage from the lower court's opinion is one of several indicating that the court considered development of adequate standards to be within the legislature's competence:

We are mindful that the required particularity of statutory limitations on administrative discretion may be greater or less, depending on the subject and the difficulty of the task. . . . We have scoured the text and legislative history of Chapter 380 [Environmental Land Act] for evidence that the legislature considered formulation of standards for the political judgments required by Section 380.05 [critical areas section] to be beyond its competence. Our search was in vain.

*Id.* at 1070 (citations omitted).

280. During its discussion and application of the traditional nondelegation doctrine, the supreme court stated: "The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest." 372 So. 2d at 919. The clear implication is that if the legislature had delineated such priorities, the Administration Commission could have chosen from among them. Such statements are inconsistent with the Court's ultimate ruling that the legislature itself must designate critical areas.

Nevertheless, the court held that critical area designations in Florida must be accomplished legislatively. According to the court, to fulfill its constitutional mandate to conserve and protect the state's natural resources and scenic beauty<sup>281</sup>

the legislature need only exercise *its constitutional prerogative and duty to identify and designate those resources and facilities*. It may be done in advance as with the Big Cypress area of critical state concern, . . . or through ratification of administratively developed recommendations as in the case of the California Coastal Zone Conservation Plan. . . . In either case the ultimate selection of priorities for areas of critical state or regional concern will rest with representatives of our government charged with such responsibilities under our Constitution.<sup>282</sup>

In a brief opinion denying the Administration Commission's petition for rehearing, the court, while stating that the Big Cypress and California Coastal Zone Commission approaches are not exclusive remedies for the constitutional defects, did not recede from its holding that the legislature has a constitutional duty to identify and designate critical areas.<sup>283</sup> Thus, the clear import of the quoted language is that

281. FLA. CONST. art. II, § 7 states: "Natural Resources and scenic beauty.—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

282. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978) (citations omitted).

283. *Id.* at 926.

In denying the Administration Commission's Petition for Rehearing or Clarification, the court stated:

Appellants maintain that the quoted language [*see* text accompanying note 282 *supra*] can be construed to limit the legislature to the two alternatives suggested in its attempt to devise legislation to protect and conserve our natural resources while not violating the separation of powers doctrine.

Because of the significance of this issue, we deem it appropriate, in this instance, to disavow the construction attributed by appellants to the above-quoted language. The examples outlined in the opinion present obvious remedies for the deficiencies found in section 380.05; however, it was not our purpose to indicate that the alternatives stated are exclusive.

*Id.*

Proponents of a pure administrative designation mechanism seized upon this language to support their contention that *Cross Key Waterways* does not preclude administrative designation without some form of legislative approval. *See, e.g., Stroud, Areas of Critical State Concern: Legislative Options Following the Cross Key Decision*, 6 FLA. ENV'T & URB. ISSUES 4, 6 (April 1979). This argument ignores several important considerations. First, the court denied the Commission's petition which requested the court to clarify the *Cross Key Waterways* opinion so as to permit "further legislative efforts to delegate to the Administration Commission authority to desig-

the legislative power to designate cannot be delegated unconditionally to an administrative agency regardless of the specificity of the statutory standards. Since *Cross Key Waterways* is a case of first impression, both in Florida and nationally, the court cited no authority for its holding. It observed, however, that its review of other critical areas legislation, including the Martha's Vineyard Act which is also based on the Model Code, disclosed no instance of an unconditional delegation of the designation power to an administrative agency.<sup>284</sup>

The internal logic and consistency of the court's opinion is seriously flawed. Rejection of the revised non-delegation doctrine did not prevent the court from approving delegations of legislative power attended by such vague standards as "significant impact" and "significant effect." Recall that, according to the court, such statutory standards are subject to clarification and refinement by adoption of administrative standards,<sup>285</sup> a pronouncement which, parenthetically, bears a striking resemblance to the revised non-delegation doctrine rejected by the court. As the lower court observed, the delegation of the designation power was not entirely devoid of statutory standards because the Environmental Land Act required each of the Division's critical area recommendations to include "the reasons why the particular area proposed is of critical concern," the advantages of designation, the dangers of uncoordinated development, and guiding development principles for the area.<sup>286</sup> If terms such as "significant

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nate critical areas." *See Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). Petition for Rehearing or Clarification, 2-3. Second, the court did not disavow its original ruling that the legislature has a "constitutional duty" to designate critical areas, *see* text accompanying note 282 *supra*, and that designation of critical areas is a "fundamental and primary policy decision" that can only be made by the legislature, *see* text accompanying note 292 *infra*. Third, as the introductory portion of this Article illustrates, there are numerous approaches by which the legislature may designate critical areas either in advance or by ratification of administrative proposals. *See* text accompanying notes 9-59 *supra* for a description of some of these approaches. The Big Cypress and California coastal zone approaches mentioned by the court are only two examples of the many ways in which the legislature itself may confer critical area status on particular areas. In view of the first two considerations, all the court has done in its brief opinion on rehearing is to reject the notion that these two examples are the only constitutional means by which the Florida legislature may designate critical areas.

284. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920, 923 (Fla. 1978). The court also noted that other state cases upholding delegations of regulatory power over critical areas to administrative agencies involved legislatively designated areas. *Id.* at 920-22.

285. *See* text accompanying notes 254-59 *supra*.

286. 351 So. 2d at 1066.



impact” and “significant effect” can be sufficiently clarified and refined through the administrative rule-making process, then certainly these more detailed provisions are also susceptible to similar refinement.<sup>287</sup>

What is the explanation for the seeming inconsistency in the court’s application of the non-delegation doctrine? The answer lies in the nature of the case. *Cross Key Waterways* is no ordinary delegation case. It involves not only a delegation of the legislative power to regulate land use to an administrative agency but also a reallocation of that power between state and local governments. The delegation issue presents a classic case for application of the nondelegation doctrine’s requirement of sufficient statutory standards. The reallocation issue, on the other hand, involves fundamental social, political and legal concerns which transcend the narrow separation of power considerations underlying the non-delegation doctrine and which, therefore, cannot be completely alleviated by the most detailed statutory standards.

These concerns are manifest in the opinions of both reviewing courts. Permeating the lower court’s application of the conventional non-delegation doctrine is a profound concern for the status of local government and the appropriate means of altering its traditional role in Florida’s governmental structure. The lower court observed that the Environmental Land Act, by shifting “ultimate regulatory authority from the county courthouse and city hall to the capitol,” touched “sensibilities as old as the Revolution itself.”<sup>288</sup> Nevertheless, the court concluded that the Florida legislature is competent to decide that all or some local governments have not adequately protected state or regional interests and that a legislative reallocation of land use regulatory powers from local governments to the state is not barred by Florida’s constitutional home rule provisions.<sup>289</sup> The fundamental error of the Environmental Land Act was its vesting of the

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287. The lower court deemed the considerations set out in these provisions to be inadequate statutory standards because their source is either the Administration Commission itself or its subordinate agency, the Division of State Planning. *Id.* at 1066. By contrast, the lower court considered “significant” to be a sufficient standard because it can be administratively refined by the Commission or Division. *Id.* at 1069. Since the Commission or Division is the source of the refinement, and, therefore, for all practical purposes, the sole determiner of what is significant, the distinction seems more imaginary than real.

288. 351 So. 2d at 1065.

289. *Id.* at 1070.

reallocation power in an administrative agency. "More precisely," according to the lower court, "the statute delegates to the Commission the power to say who in Florida the lawgiver shall be, whether local government or the Commission itself, and it does so virtually without statutory discipline. *What is at stake here is not the extent of government regulation of private property but the structure of Florida's government.*"<sup>290</sup> In the lower court's view, reordering of that structure cannot constitutionally be left to the discretion of the Adjudicatory Commission, however prudent that body may be in exercising its power. Rather, "changing the seats of political power" from the local to the state level "is a function of Florida's Constitution and laws, for which 'the political sensitivity of the final administrative decision-makers' is an unacceptable substitute."<sup>291</sup> These passages clearly indicate that the lower court's primary concern was not delegation of legislative regulatory power over land use to an administrative agency but the distribution of that power between state and local governments.

A similar concern is reflected in the Florida Supreme Court's opinion. But unlike the lower court, which temporarily shed its non-delegation garb to express concern about the political implications of an administrative reallocation of power between state and local government, the Supreme Court carefully cloaked its apprehension in the terminology of the non-delegation doctrine. It characterized the designation of a critical area as a "fundamental and primary policy decision" which, therefore, cannot be delegated by the legislature.<sup>292</sup> The court nowhere explains why the actual designation of a critical area is a "fundamental and primary policy" decision. Nor did the court explain why it did not select another more conventional decisional avenue: the general legislative determination that there are critical areas requiring special regulation is the primary policy decision which can be validly implemented by administrative designation

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290. *Id.* at 1068 (emphasis partly in original and partly supplied).

291. *Id.* at 1070. Professor Gilbert Finnell, in his introductory essay on the Environmental Land Act, contended:

the political sensitivity of the final administrative decisionmakers—the state's highest elected executive officers, the Governor and Cabinet, sitting as an Administrative Commission—should assure that the increased state role in land development regulation by means of the Critical Area technique will occur only when there is a compelling state interest backed by a strong public consensus.

Finnell, *supra* note 15, at 122.

292. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924-25 (Fla. 1978).

of particular areas pursuant to adequate statutory standards. The reason for the court's rejection of the more obvious route is not difficult to perceive. While the road not taken was perfectly consistent with the traditional nondelegation doctrine, it would have led to an administrative reordering of state and local government. Thus, the court opted for an application of the non-delegation doctrine which ensures that reallocations of power between the state and local governments will be made only by the legislature.<sup>293</sup>

*Cross Key Waterways* would have been the death knell of the regulatory and adjudicatory phases of Florida's original critical areas process. In addition to delegating the designation power to the Administration Commission, the original Environmental Land Act delegated to the Commission the power to adopt "principles for guiding the development" of critical areas and development regulations for any local government that failed to submit local regulations deemed by the Division of State Planning to be consistent with the guiding principles. Prior to its amendment in 1979, the Environmental Land Act contained no provision for legislative review of the guiding principles. Thus, as the lower court in *Cross Key Waterways* mentioned without discussion,<sup>294</sup> these statutory provisions also raised a delegation issue since the Act contained absolutely no standards governing the Commission's adoption of guiding development principles to which all local regulations must conform. Moreover, the guiding development principles, which provide the only standards for state agency review and adoption of development regulations, were not constitutionally sufficient for this purpose since they were derived solely from the Commission itself.<sup>295</sup> For the same reason, the guiding principles and implementing regulations, the only substantive cri-

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293 In a concurring opinion, Chief Justice Arthur England of the Florida Supreme Court stated that the non-delegation doctrine, as construed in the principal opinion, "guarantees that Florida's government will continue to operate only by consent of the governed." *Id.* at 925.

294. The lower court stated that under the Environmental Land Act "the power to select the sites of desirable regulation, as well as the power to regulate, is delegated to the Commission." 351 So. 2d at 1066 (emphasis added).

295. The Administration Commission argued to the Florida Supreme Court that the guiding development principles adopted simultaneously with a critical areas designation would prevent administrative abuse of the process. In rejecting this argument, the court stated:

the standard by which land development regulations are to be measured is not a standard articulated by the legislature but one determined by the Administration Commission through formulation of principles for guiding development. In short the primary policy decision of the area of critical state concern to be desig-

teria for state review of local critical area development decisions, were not sufficient standards for exercise of the Commission's adjudicatory power.<sup>296</sup> Consequently, the original Environmental Land Act's entire administrative structure for managing critical areas was probably unconstitutional.

The damage inflicted by *Cross Key Waterways* is not irreparable. Immediately following rendition of the decision, a special session of the Florida legislature temporarily designated the Green Swamp and the Florida Keys as critical areas and adopted the existing regulations pending further consideration of the problem during the next regular legislative session.<sup>297</sup> Subsequently, in 1979 the Florida legislature extended these two designations subject to repeal by the Administration Commission no later than July 1, 1982. Repeal of the designations, however, is contingent upon approval of the Division of State Planning of land development regulations and comprehensive plans adopted by the constituent local governments.<sup>298</sup> As a result of the

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nated as well as the principles for guiding development in that area are the sole province of an administrative body. From that determination all else follows. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978).

296. Amicus Curiae Reuben O'D Askew, in urging the supreme court to uphold the delegation of rulemaking authority to the Administration Commission, contended that Florida courts have been much more permissive when reviewing legislative delegations of rulemaking power than when reviewing delegations of adjudicatory authority. Hence, the amicus argued that *Sarasota County v. Barg*, discussed in text accompanying notes 253-258 *supra*, which involved a delegation of adjudicatory authority, should not be dispositive of *Cross Key Waterways* which involved a delegation of rulemaking power. *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), Brief of Amicus Curiae Governor Reuben O'D Askew, at 11-12, 18.

For a case in which the Florida Supreme Court held a delegation of adjudicatory authority unconstitutional, see *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273 (Fla. 1962). The statute in question authorized a state agency to impose restrictions on the transfer of automobile transportation brokerage licenses "where the public interest may be best served thereby." *Id.* at 275. In declaring this delegation unconstitutional, the court stated: "The Legislature cannot delegate to an administrative agency, even one clothed with certain quasi-judicial powers, the unbridled discretion to adjudicate private rights. It is essential that the act which delegates the power likewise defines with reasonable certainty the standards which shall guide the agency in the exercise of the power." *Id.* at 275 (citations omitted).

For general discussions of delegation of adjudicatory power to administrative agencies, see N. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 103-108 (6th ed. 1974); K. DAVIS, *supra* note 235, § 2.10.

297. 1978 Fla. Laws, ch. 78-627, §§ 1-2.

298. 1979 Fla. Laws, ch. 79-73, §§ 5-6. Neither the Green Swamp nor Florida Keys designations can be repealed prior to July 1, 1980. Moreover, upon recommendation by the Division of State Planning to the Administration Commission, the re-

legislature's action, the Green Swamp and Florida Keys designations have been insulated from further constitutional attacks based on the non-delegation doctrine.

Unfortunately, the Florida legislature failed to remove the non-delegation doctrine as a potential barrier to future critical area designations. The issue could have been eliminated by a simple statutory amendment requiring some form of legislative designation or ratification of critical areas. This approach not only would have satisfied *Cross Key Waterways* but it would have been consistent with the strong comprehensive legislation enacted in other states. For example, the Oregon statute requires legislative approval of administrative critical area recommendations, and the Minnesota act provides that administrative designations shall expire within three years unless ratified by the state legislature or the appropriate regional planning council.<sup>299</sup> Nevertheless, under intense pressure from proponents of a pure administrative designation mechanism,<sup>300</sup> the Florida legislature adopted an approach that leaves the constitutionality of Florida's critical areas legislation in serious doubt.

The Florida legislature's response to the non-delegation problem in the context of future designations is largely cosmetic. It combines more detailed statutory standards for identifying the types of resources and public facilities that can be administratively designated as critical areas with a weak form of legislative review. But while the new statutory provisions do describe with somewhat greater specificity the general areal categories from which critical areas may be designated, they are still so broad as to encompass almost any area of the

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peal may be effective for only a particular local government's portion of the critical areas. *Id.* §§ 5(3), 6(4). However, the City of Key West must be removed from the Florida Keys critical area immediately upon approval by the Division of State Planning of the land use element of the city's local comprehensive plan. *Id.* § 6(3).

299. See OR. STAT. § 197.405(2)-(5) (1977); MINN. STAT. ANN. § 116G.06(2)(c) (West 1977).

300. Governor Robert Graham, a member of the Environmental Land Management Study Committee which proposed the Environmental Land Act, strongly supported amendatory legislation providing for continued administrative designation without legislative ratification. See Minutes of Governor's Task Force on Resource Management Meeting 3-4 (March 7, 1978). The Governor's Task Force recommended to the 1979 Florida legislature that it amend the Environmental Land Act to provide for more detailed statutory standards for administrative designation without requiring legislative ratification. *Id.* at 1, 6. Proponents of this approach then mounted a campaign to convince the Florida legislature that the *Cross Key Waterways* decision did not foreclose administrative designation without legislative confirmation. See, e.g., Stroud, *supra* note 283.

state,<sup>301</sup> a possibility that was condemned in *Cross Key Waterways*.<sup>302</sup> Moreover, the revised standards do not establish any priori-

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301. See 979 Fla. Laws, ch. 79-73, § 4(2), in which the revised statutory standards are set forth as follows:

An area of critical state concern may be designated only for:

(a) An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance, including but not limited to state or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, Outstanding Florida Waters, and aquifer recharge areas, the uncontrolled private or public development of which would cause substantial deterioration of such resources. Specific criteria which shall be considered in designating an area under this paragraph include:

1. Whether the economic value of the area, as determined by the type, variety, distribution, relative scarcity and condition of the environmental or natural resources within the area, is of substantial regional or statewide importance.

2. Whether the ecological value of the area, as determined by the physical and biological components of the environmental system, is of substantial regional or statewide importance.

3. Whether the area is a designated critical habitat of any state or federally designated threatened or endangered plant or animal species.

4. Whether the area is inherently susceptible to substantial development due to its geographic location or natural aesthetics.

5. Whether any existing or planned substantial development within the area will directly, significantly and deleteriously affect any or all of the environmental or natural resources of the area which are of regional or statewide importance.

(b) An area containing, or having a significant impact upon, historical or archaeological resources, sites, or statutorily-defined historical or archaeological districts, the private or public development of which would cause substantial deterioration or complete loss of such resources, sites or districts. Specific criteria which shall be considered in designating an area under this paragraph include:

1. Whether the area is associated with events that have made a significant contribution to the history of the state or region.

2. Whether the area is associated with the lives of persons who are significant to the history of the state or region.

3. Whether the area contains any structure which embodies the distinctive characteristics of a type, period, or method of construction, or that represents the work of a master, or that possessed high artistic values, or that represents a significant and distinguishable entity whose components may lack individual distinction and which are of regional or statewide importance.

4. Whether the area has yielded, or will likely yield information important to the prehistory or history of the state or region.

(c) An area having a significant impact upon, or being significantly impacted by, an existing or proposed major public facility or other area of major public investment including, but not limited to, highways, ports, airports, energy facilities and water management projects.

Compare the new criteria with the old statutory standards which appear in the text accompanying note 70 *supra*.

302. For the court's condemnation of the virtually unlimited geographical scope of the original statutory standards, see note 260 and accompanying text *supra*.

ties for choosing among the resources encompassed by the critical area categories. Hence, as the Florida Supreme Court stated in invalidating the original categories, the new categories, standing alone, "are constitutionally defective because they reposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."<sup>303</sup>

Are these deficiencies in the statutory standards ameliorated by the provision for legislative review? In a tacit acknowledgment that something more than detailed statutory standards are required to satisfy the dictates of *Cross Key Waterways*, the new legislation provides for legislative review but not ratification of administrative designations. As under the original Environmental Land Act, the Administration Commission will continue by rule to designate, and adopt guiding development principles for, each critical area.<sup>304</sup> Although a designation rule becomes effective twenty days after filing with the Secretary of State, it must nevertheless be submitted to the presiding officer of each legislative house for review at least thirty days prior to the next regular legislative session.<sup>305</sup> While it "may reject, modify, or take no action relative to the adopted rule,"<sup>306</sup> the legislature is not required to ratify the rule. Thus, unlike Florida's administrative DRI guidelines, which become effective only if approved by the legislature,<sup>307</sup> administrative critical area designations, which cut much more deeply into the fabric of the state's system of local government, become effective without any legislative action.

This method of legislative oversight may not satisfy the requirements of *Cross Key Waterways*. Under this procedure the legislature will not exercise its judicially declared "constitutional prerogative and duty to identify and designate" critical areas. Rather, the Administration Commission will continue to identify and designate such areas. While some proposed designations may be rejected or modified by the legislature, others will become effective as the result of legislative inaction rather than upon the affirmative legislative action seemingly contemplated by *Cross Key Waterways*. Hence, since the legislature will neither directly designate the critical area in advance

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303. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 919 (Fla. 1978).

304. 1979 Fla. Laws, ch. 79-73, § 4.

305. *Id.*

306. *Id.*

307. *See* FLA. STAT. § 380.06(10) (1979).

nor indirectly designate the area through official ratification of administrative proposals, the new statutory provision may be unconstitutional.

Arguably, the legislature's failure to reject a designation rule constitutes an implied ratification which should satisfy *Cross Key Waterways*. This argument has several weaknesses. First, it was not sufficient to save the Green Swamp and Florida Keys designations. Since the legislature has the inherent power to repeal any administrative rule, either directly or indirectly, through repeal or modification of the enabling legislation, it could have repealed the Green Swamp and Florida Keys designation rules regardless of whether they were submitted for legislative review by the Administration Commission. Thus, according to the theory of implied ratification, the Florida legislature's failure to repeal the rules during three consecutive legislative sessions signaled its approval of the two designations. Nevertheless, the Florida Supreme Court invalidated the two designations.

Second, under Florida's legislative review procedure, it is impossible to ascertain when legislative ratification occurs. Unlike most federal and other state legislative veto statutes, which generally provide that administrative rules shall become effective only upon failure of the legislature to veto them within a specified period of time,<sup>308</sup> the Florida statute establishes no deadline by which the legislature must reject already effective designation rules. Thus, the legislature's failure to reject during the first legislature session following a rule's promulgation does not necessarily constitute an implied ratification since the legislature may consider the matter in a following session.

Finally, and most importantly, the assumption that a failure to reject constitutes legislative approval is itself a highly dubious one. It ignores the realities of the legislative process. While a majority of the members of either or both legislative houses may oppose a particular

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308. See generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977), which analyzes some of the federal statutes, and F. COOPER, 1 STATE ADMINISTRATIVE LAW 221-30 (1965), which discusses the state acts.

Interestingly, an earlier version of 1979 Fla. Laws, ch. 79-73 embodied this approach by providing that designation rules proposed by the Administration Commission "shall be submitted to the President of the Senate and the Speaker of the House for review no later than 30 days prior to the next regular session of the Legislature. Unless repealed or modified by the Legislature, the Commission rule shall become effective 10 days following the close of the session." H.B. 1150 (Second Engrossed, 1979 Sess.).



designation, they can be prevented by the committee system and a variety of parliamentary maneuvers from ever registering their opposition. Implying legislative confirmation from a failure to veto becomes even more difficult if one legislative house votes to reject a designation rule while the other makes no official action.<sup>309</sup> Given the nature of the legislative process, there is ample reason for rejecting the theory of implied ratification.

Ultimately, the constitutional fate of the 1979 amendments depends on whether the Florida Supreme Court has the courage of its *Cross Key Waterways* convictions. If the court adheres to the principles enunciated in that decision, challenges to future designations are likely to result in invalidation of the entire statutory scheme for managing critical areas. On the other hand, if the court yields to the legislative will and upholds the constitutionality of the new designation procedure, the other delegation problems inherent in the regulatory and adjudicatory phases of the original Florida critical areas process will also be eliminated. The guiding development principles, which provide the only standards for evaluating local development regulations and decisions, are now subject to legislative review in the same manner as proposed designations.<sup>310</sup> Although as a matter of public policy it still seems desirable to link critical area regulation and adjudication to the state comprehensive plan, the new legislative review procedure, if it passes constitutional muster, will remove the non-delegation doctrine as a barrier to future implementation of the Florida critical areas program.

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309 For discussions of these and other limitations of the legislative veto approach to controlling agency discretion, see Brust & Gellhorn, *supra* note 308, at 1414-20; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1978); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

Ironically, the difficulty of successfully traversing the legislative process was considered the major drawback to requiring legislative ratification of administratively designated critical areas. The author was invited to participate with various Florida officials in an informal discussion of the relative merits of various proposals to amend the Environmental Land Act in Tallahassee, Florida on March 15, 1979. During the course of the meeting, several participants expressed the opinion that legislative ratification would make it impossible to designate critical areas because opponents of particular designations could prevent the proposal from getting out of committee for a vote by the full membership of each legislative House. Author's Notes of March 15, 1979 meeting.

310. 1979 Fla. Laws, ch. 79-73, § 4(1)(c). The guiding development principles are not applicable to development in the critical area until legislative review of the designation rule is completed. *Id.*

Although *Cross Key Waterways* is undoubtedly a major disappointment to advocates of stronger state administrative controls over land use, serious students of American land use law should not be surprised by the decision which has a close historical parallel in the annals of local zoning. In *Eves v. Zoning Board of Adjustment of Lower Gwynedd Township*,<sup>311</sup> the Pennsylvania Supreme Court in 1960 considered the validity of a municipal floating zone ordinance. Basically, the ordinance created a new zoning district, F-1 Limited Industrial, and established detailed requirements conditions and restrictive uses for an "F-1" classification. However, instead of delineating the boundaries of specific "F-1" districts, the ordinance created a procedure whereby any landowner could apply to the local governing body for "F-1" zoning. After receiving the local plan commission's report and holding a public hearing, the local governing body was authorized to approve, approve with conditions, or deny the application.<sup>312</sup> The court invalidated the ordinance on the ground that it was not in accordance with a comprehensive plan. Moreover, according to the court, the procedure for creating "F-1" districts on a case-by-case basis without rigid statutory standards or a finally formulated plan entailed several secondary evils, including spot zoning and politically motivated decision-making.<sup>313</sup>

Essentially, area of critical state concern, as envisioned by the Model Code and implemented in Florida, is the floating zone technique writ large. To paraphrase one commentator's description of a floating zone, a critical area floats above the state in anticipation of

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311. 401 Pa. 211, 164 A.2d 7 (1960).

312. *Id.* at 213-14, 164 A.2d at 8-9.

313. *Id.* at 217-18, 164 A.2d at 11. As to the necessity for a comprehensive plan, the court stated:

The adoption of a procedure whereby it is decided which areas of land will eventually be zoned "F-1" Limited Industrial Districts on a case by case basis patently admits that at the point of enactment of ordinance 28 there was no orderly plan of particular land use for the community. Final determination under such a scheme would expressly await solicitation by individual landowners, thus making the planned land use of the community dependent upon its development. In other words, the development itself would become the plan, which is manifestly the antithesis of zoning in accordance with a comprehensive plan.

*Id.* at 217, 164 A.2d 11.

Local zoning law concepts have been utilized in other challenges to critical areas legislation. *See, e.g., Adirondack Park Agency v. Ton-Da-Lay Assoc.*, 61 A.D.2d 107, 109, 401 N.Y.S.2d 903, 905 (1978) (New York Supreme Court rejected a claim that the legislation designating the Adirondack Park for special regulatory treatment constituted unconstitutional spot zoning).

being brought down to earth at the time and place desired by the designating agency.<sup>314</sup> Consequently, to the extent that critical areas enabling legislation utilizing an administrative designation device does not contain sufficient statutory standards or link the designation power to a state comprehensive plan, the technique may encounter the same judicial hostility which has greeted the floating zone in some jurisdictions. Indeed, the lower court's criticism of the critical areas technique in *Cross Key Waterways* is reminiscent of the Pennsylvania court's condemnation of the floating zone in *Eves*. Although the Florida court did not expressly state that administrative critical area designations must be made in accordance with a legislatively approved state comprehensive plan, it strongly suggested that such a plan is prerequisite to valid implementation of that technique.<sup>315</sup> Hence, even in states where the nondelegation doctrine presents no obstacles to administrative designation of critical areas, legislatures should seriously consider a requirement that such designations be made in accordance with a state comprehensive plan.<sup>316</sup>

## V. CONCLUSION

Florida's experiment with critical area controls surpasses that of

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314 See 16 CATH. L. REV. 85, 87 (1966) (the floating zone "figuratively floats above the landscape in no fixed position, until it is brought down to earth by a boundary-change rezoning amendment").

315 The lower court unfavorably compared the two critical area categories under attack with the major development potential category which must be based on a state comprehensive plan. 351 So. 2d at 1069. See FLA. STAT. § 380.05(2)(c) (1977) (quoted in the text accompanying note 70 *supra*). The court observed that the two defective categories lack "the predictability of a legislatively approved comprehensive plan which confines" the major development potential category. *Id.* In a footnote to this passage, the court noted that while the Model Code does not make the adoption of a state comprehensive plan a prerequisite to designation of critical areas, the ALI proposal does recognize that selection of all critical areas within a state "would logically require a comprehensive study of the state's development patterns and natural resources." *Id.* at 1069 n.16. For the full text of the Model Code's discussion of the relationship between critical area designations and comprehensive planning, see the Reporters' Notes following Model Code, *supra* note 26, § 7-201.

316. The Model Code Reporters contend that requiring advance preparation of a legislatively approved state comprehensive plan might prevent effective regulation of areas of "immediate and critical importance." Model Code, *supra* note 26, § 7-201. In *Cross Key Waterways* the lower court in rejecting this argument, noted, with irrefutable logic, that "[i]f the immediacy or emergency nature of a critical state concern is thought to require designation power independent of priorities in a state plan otherwise required, standards for the exercise of emergency powers may be legislated." 351 So. 2d at 1069 n.16.

any other state. Between 1972, when Florida became the first state to adopt the Model Code's critical areas technique, and 1978, when the Florida Supreme Court invalidated portions of the state enabling legislation and two critical area designations, the state designated four areas of critical state concern. One area, the Big Cypress, was designated by the Florida legislature, two areas, the Green Swamp and the Florida Keys, were officially designated by the Administration Commission, and one area, the Apalachicola River and Bay System, was unofficially designated by the Division of State Planning. Prior to the Supreme Court's decision in *Cross Key Waterways*, the statutorily prescribed regulatory framework had been established in each of the three officially designated areas and a voluntary management system had been instituted in the unofficially proclaimed fourth area. Thus, the Florida experience provides a basis for evaluating the comprehensive administrative technique for regulating critical areas as proposed by the Model Code.

Closely tracking the Model Code, Florida's Environmental Land Act, as originally enacted, provided for a critical areas process comprised of three distinct phases: designation, regulation and adjudication. A state administrative agency consisting of the Florida governor and six popularly-elected cabinet members was assigned primary responsibility for implementing each of the three phases. Sitting as the Florida Administration Commission, these state officials were empowered to designate, and establish guiding development principles for, critical areas selected in accordance with broad statutory criteria. Following the official designation of a critical area, the Administration Commission was authorized to impose upon a constituent local government land development regulations prepared by its subordinate agency, the Division of State Planning, unless the local government prepared regulations deemed by the Division to be in compliance with the guiding principles. Finally, these same state officials, in their collective capacity as the Florida Land and Water Adjudicatory Commission, were given the power to adjudicate disputes arising from local development orders rendered pursuant to critical area regulations.

As the Florida experience graphically illustrates, legislative enactment of the Model Code's comprehensive administrative mechanism for controlling critical areas does not produce immediate regulation of all, or even very many, areas of critical state concern. Of Florida's four critical areas, only two—the Green Swamp and the Florida Keys—were the result of official administrative designations. More-

over, while the original Environmental Land Act, unlike the Model Code, permitted designation of both highly developed and rapidly urbanizing areas in order to combat a myriad of urban problems, it should be noted that with the exception of the Florida Keys, Florida has used its critical areas technique only to protect natural resources in largely undeveloped, environmentally sensitive areas. Nevertheless, even in the sparsely populated Big Cypress and Green Swamp areas, attempts to include municipalities within the designated areas encountered forceful opposition. Although the unofficially designated area, the Apalachicola River and Bay System, may illustrate how the mere existence of a comprehensive administrative mechanism can induce voluntary local land management programs, it also provides further evidence of the political difficulty of officially activating such mechanisms.

Other disadvantages also inhere in the comprehensive administrative approach. Administrative designation can be an extremely cumbersome and protracted process. Since designation is by administrative rule, a critical area must be designated in accordance with applicable administrative procedural requirements. In Florida, for example, even if the Division of State Planning, on the basis of its lengthy study of an area, persuades the Administration Commission of the merits and political feasibility of a critical area designation, adoption of the proposed designation rule by the Commission is subject to the notice, public hearing, rule challenge and judicial review provisions of the Florida APA. As the Green Swamp designation illustrates, these administrative procedural requirements not only prolong the designation process but may, in a given case, actually prevent designation. Such problems can be avoided by legislative designation as the Florida Legislature recognized when it by-passed the administrative process in directly conferring critical area status on the Big Cypress.

Even if the designating agency successfully traverses the administrative obstacle course, the regulatory system established for the critical area by ALI-derivative legislation will be much weaker than the critical area controls imposed under most of the ad hoc legislative approaches. Both the Model Code and the Environmental Land Act rely primarily on state agency review of local regulations and local development orders issued under the state-approved local regulations. Neither the ALI critical areas proposal nor its Florida offspring require advance preparation of a binding regional comprehensive plan to which local regulations must conform. Given

the extremely narrow scope of the regulations adopted in the Big Cypress and the Green Swamp, the lack of experience with the more extensive regulations adopted in the Florida Keys, and the appeal of only one local critical area development order to the Adjudicatory Commission, no meaningful conclusions can be drawn about the efficacy of this approach to critical area management. It seems unlikely, however, that a truly comprehensive regional approach can be developed under a pure Model Code system.

Fortunately, Florida has advanced beyond the Model Code by enacting state and local comprehensive planning legislation. Under the state's local comprehensive planning Act, all local governments, including those in critical areas, are required to adopt a local comprehensive plan with which all local regulations must be consistent. Moreover, each local plan must be coordinated with the plans of adjoining local governments and reviewed by the Division of State Planning, the appropriate regional planning agency, and, in the case of municipalities, the county for conformity with state, regional and county comprehensive plans. A weakness of this system is that state, regional and county review is purely advisory. Given the acknowledged importance of critical areas, a binding regional comprehensive plan for designated critical areas seems both desirable and necessary. At the very least the Florida Legislature, if it decides to retain the existing system of state review of locally prepared plans, should amend the state's planning legislation to require that local plans and regulations in critical areas be consistent with the state comprehensive plan and to provide for binding state review of local plans as well as regulations. Simultaneously, the legislature should provide that the standard for adjudicating disputes arising under local plans and regulations in critical areas should be the legislatively approved state comprehensive plan. These amendments would greatly facilitate development of a comprehensive regulatory strategy in critical areas and avoid future challenges to the critical areas program under the nondelegation doctrine.

In *Cross Key Waterways* the Florida Supreme Court held that two of the Environmental Land Act's designation provisions lacked adequate statutory standards and therefore constituted unlawful delegations of legislative power to an administrative agency in violation of the Florida Constitution. Although application of the non-delegation doctrine would suggest that the act could be cured by legislative enactment of statutory standards, the court held, somewhat illogically, that the legislature cannot delegate the power to designate critical ar-

reas to an administrative agency. Rather, the legislature has the "constitutional prerogative and duty to identify and designate those resources and facilities" of critical state concern.

While the court's application of the non-delegation doctrine in *Cross Key Waterways* may seem strained, its decision that the legislature in some fashion must designate critical areas is a wise one. Critical area controls encroach not only upon private property rights but also upon local governments which continue to occupy a special place in the American political system.<sup>317</sup> There is more than a grain of truth in Judge Robert Smith's perceptive observation in the lower court's opinion in *Cross Key Waterways* that the traditional primacy of local government over certain matters, including land use regulation, is inextricably linked to the constitutional right of access to government.<sup>318</sup> Thus, while state supersession of local regulation of land use may be necessary to protect vital public interests, the fundamental decision to reallocate the legislative power to regulate should be made by the legislature.

State legislatures are capable of making such decisions. As the introductory survey of ad hoc regional approaches illustrates, legislatures in numerous states have not been reluctant to directly impose

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317. Professor Robert Dahl, a prominent political scientist and a leading student of the role of local government in the American political system, has contended that local governments are much more important institutions of democratic self-government than are the states. According to Professor Dahl:

the average American is bound to be much less concerned about the affairs of his state than of his city or country. Too remote to stimulate much participation by their citizens, and too big to make extensive participation by their citizens, and too big to make extensive participation possible anyway, these units intermediate between city and nation are probably destined for a kind of limbo of quasi-democracy. . . . Doubtless we shall continue to use the states as important intermediate instruments of coordination and control—if for no other reason than the fact that they are going institutions. But whenever we are compelled to choose between city and state, we should always keep in mind, I think, that the city, not the state, is the better instrument of popular government.

Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967).

318. Judge Smith wrote that the Environmental Land Act: touches sensibilities as old as the Revolution itself, because it affects the right of access to government—the right of people effectively 'to instruct their representatives, and to petition for redress of grievances' on which other cherished rights ultimately depend. The primacy of local government jurisdiction in land development regulation has traditionally been, in this country, a corollary of the people's right of access to government. In a sense, therefore, the jurisdictional claim of local governments in these matters is based on historical preferences stronger than law.

351 So. 2d at 1065 (citation omitted).

land development controls on areas of critical state concern. Similarly, the Florida Legislature has demonstrated its willingness and ability to take such action by directly designating the Big Cypress and redesignating the Green Swamp and Florida Keys as critical areas. Requiring critical area designations to be made by the legislature does not necessarily involve the sacrifice of the planning expertise provided by a state land planning agency. For example, the Oregon legislation provides for the designation of critical areas by the state legislature pursuant to the report and recommendation of the state land planning agency.<sup>319</sup> This approach combines professional planning expertise with legislative oversight to ensure informed land use decisions while simultaneously avoiding the non-delegation doctrine.

Is *Cross Key Waterways* the deathknell of Florida's critical areas process? Recent actions by the Florida legislature suggest that the program is still alive but not necessarily well. By redesignating the Green Swamp and Florida Keys critical areas and adopting existing guiding development principles and regulations, the 1979 legislature insulated these two areas from further constitutional attacks based on the nondelegation doctrine. The legislature failed to eliminate, however, the doctrine as a potential barrier to future designations. Although the legislature amended the Environmental Land Act to provide slightly more detailed standards for designating critical areas and to require a weak form of legislative review of administrative designations, the amendments may not satisfy the requirements of *Cross Key Waterways*. Consequently, until the Florida Supreme Court determines the validity of the new legislation, implementation of the critical areas program will proceed under a constitutional cloud.

Several other provisions of the new legislation also do not bode well for the future utility of the critical areas technique. First, while it reinstates the Green Swamp and Florida Keys designations, the amendatory legislation provides for their termination no later than July 1, 1982, provided the constituent local governments have adopted a local comprehensive plan in conformity with the guiding development principles. It also requires the removal of the City of Key West, the most populous area of the Florida Keys, from that critical area designation immediately upon approval by the Division of State Planning of the land use element of the city's comprehensive

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319. See text accompanying notes 51-53 *supra*.



plan.<sup>320</sup> Second, all future designations must be repealed no later than three years after approval of critical area land development regulations.<sup>321</sup> Third, "area of major development potential" is abolished as a critical area category, thereby greatly restricting the potential scope of the technique.<sup>322</sup> Finally, and perhaps most significantly, the new legislation signals a move toward a more voluntary, cooperative approach by making appointment by the governor of a resource planning and management committee, similar to the Apalachicola River System council, a prerequisite to official designation.<sup>323</sup> Consequently, even if the Florida critical areas process survives *Cross Key Waterways*, future use of the technique, as originally conceived by the Model Code and the Environmental Land Act, is unlikely.

Whatever its future and despite its limitations, the critical areas technique has served a useful purpose in Florida. It has provided temporary protection to several areas vital to the state's welfare, and in the process, it has awakened the state's citizenry and local governments to the need for more effective management of Florida's land resources. In the words of one observer, it has served as an invaluable "attention getter" while the state attempts to implement a more comprehensive planning and regulatory system.<sup>324</sup>

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320. 1979 Fla. Laws, ch. 79-73, §§ 5-6.

321. *Id.* § 4(15). Note, however, that a repeal "may be limited to any portion of the area of critical state concern" and is contingent upon state-approved local land development regulations being in effect for at least 12 months and upon adoption by the local government of a comprehensive plan that conforms to the guiding development principles. *Id.* Note also that provision is made for redesignation if "administration of the local land development regulations within a formerly designated area is inadequate to protect the former area of critical state concern." *Id.* § 4(1)(d).

322. *See id.* § 4(2).

323. *Id.* § 2. "The objective of the committee shall be to organize a voluntary, cooperative resource planning and management program to resolve existing, and prevent future, problems which may endanger those resources, facilities, and areas" subject to designation. *Id.*

324. Interview with Robert M. Rhodes, former Chief, Bureau of Land and Water Management, Division of State Planning, State of Florida, in Tallahassee, Florida (March 13, 1979).

