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## Book Review

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## BOOK REVIEW

STATE LAND-USE PLANNING AND REGULATION. BY THOMAS G. PELHAM. Lexington, Mass.: Lexington Books, 1979. Pp. xii, 212. \$22.95.

*State Land-Use Planning and Regulation* establishes Professor Thomas G. Pelham as one of the leaders of the emerging third generation of bright young law professors to tackle land-use planning issues. The book is appropriately dedicated to a member of the first generation, Professor Charles M. Haar, and many of the ideas of Professor Daniel R. Mandelker, of the second generation, are explored at length. The end result is a book that should be as well-received as both Professor Haar's and Professor Mandelker's noteworthy works.

The content of Professor Pelham's book is of value to a varied group of readers. For the academician and land-use practitioner, Pelham frequently cites secondary authority. The appearance of the extensive footnotes at the conclusion of each chapter, however, does not detract from the high level of readability.<sup>1</sup> The book is also well-arranged for general reader exposure to the four major land-use planning mechanisms: State Regulation of Selected Activities, such as Power Plant Siting or Industrial Siting; Developments of Regional Impact; Areas of Critical State Concern; and State and Local Comprehensive Planning.

Professor Pelham prudently places considerable emphasis upon the experience of the State of Florida, because Florida's adoption of a statute largely rooted in the Model Land Development Code (Model Code) has made it "truly the nation's chief land-use laboratory" (p. 6). Florida's pioneering in the area of land-use legislation bears out the author's premise that the state of Florida in particular "merit[s] microscopic scrutiny" (p. 6).

Although Pelham's exhaustive analysis of Florida's land-use planning makes his book an indispensable research tool for those specifically interested in that state's progress, the planning and regulation systems of numerous other states are also examined at length. For example, the land-use regulatory approaches of Colorado, Massachusetts, Minnesota, New York, Oregon, Texas, Vermont, and Wyoming are all discussed. As a re-

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1. An inevitable feature of writing a book in a rapidly changing area of the law is that very often the statutory and case citations become outdated while the book is being published. For example, footnote 67 on page 66 of the text should now refer to FLA. STAT. § 380.05(17) instead of § 380.05(14). Similarly, 1979 Fla. Laws ch. 79-190, § 48, at 887 transferred to the Florida Department of Community Affairs the various powers and duties of the Florida Division of State Planning under the Florida Environmental Land and Water Management Act. No matter how recent the article or book, a reader in an area of law that is evolving as quickly as land-use planning should recognize the inherent transiency of some citations.

sult of the author's comparative approach, the usefulness of the book depends, however, not upon the particular state discussed, but rather upon the in-depth exposition of each state's experiences and the various mechanisms used to achieve state land-use goals.

While Professor Pelham effectively presents several recurring themes, one theme is perhaps predominant: the tension that exists between any new land-use regulation mechanisms and the "traditional local government control of the land-use decision-making process" (p. 41). For example, Pelham notes that in the context of Florida's Local Government Comprehensive Planning Act, a "serious weakness of . . . [the] coordinating mechanism is the purely advisory nature of state, regional, and county review of local plans" (p. 108). As the author states, "[W]hile state land-use controls generate much controversy because of their imposition of tighter restrictions on the use of private property, far more serious political and legal problems are engendered by their encroachment on the traditional prerogatives of local government and their utilization of state-administrated agencies" (p. 6).

In the Developments of Regional Impact (DRI) context, for example, the Model Code prescribes detailed administrative procedures at the local level. They include "many of the practices usually associated with formal administrative hearings, such as the right to examine and cross-examine witnesses under oath, the prohibitions of ex parte communications between parties and the decisionmakers, and the maintenance of a complete record of the proceedings" (p. 44). Florida rejected that portion of the Model Code, however, apparently to prevent "encroachment on the traditional prerogatives of local government" (p. 44). The result is that "local DRI decision-making in Florida proceeds without any uniform, minimum procedural standards" (p. 44). Ironically, as Professor Pelham points out,

[i]n the absence of an adequate record, effective review by the adjudicatory Commission<sup>2</sup> of the local DRI order requires a de novo proceeding in which the decision of the local government is entitled to little, if any, weight. Consequently, the failure to impose minimum procedural requirements on the local regulatory process undermines rather than preserves local control of land use (p. 44).

Professor Pelham's focus on this struggle between local government control and new land-use regulation provides a lucid explanation of the decision of the Florida Supreme Court in *Askew v. Cross Key Waterways*.<sup>3</sup> In that decision the court held that Florida's "areas of critical state concern" designation process was unconstitutional because it amounted to an unlawful delegation of legislative power.<sup>4</sup> Professor Pelham introduces his discussion of the *Cross Key Waterways* decision with rather traditional language concerning the doctrine of nondelegation: "The Florida nondelegation doctrine derives from the state constitutional admonition

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2. The adjudicatory commission is the body to which an appeal is taken from the decision of the local government concerning a development order for a DRI.

3. 372 So. 2d 913 (Fla. 1978).

4. *Id.* at 924.

that "[N]o person belonging to one branch [of government] shall exercise any power appertaining to either of the other branches'" (p. 119). The reader is likely to be surprised that the author makes no mention here of the general decline in vitality suffered by the nondelegation doctrine in recent years. For example, the New Jersey Supreme Court has not held unconstitutional a legislative delegation of power to an administrative agency since 1954,<sup>5</sup> despite the fact that the pertinent language in New Jersey's Constitution is virtually identical to that in the Florida Constitution.<sup>6</sup>

Although Professor Pelham does not preface his discussion with a comprehensive history of the nondelegation doctrine in Florida, he goes on to provide one of the best of the many explanations of the *Cross Key Waterways* decisions:

Permeating the lower court's application of the conventional nondelegation 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 ELWMA [The Environmental Land and Water Management Act], by shifting "ultimate regulatory authority from the county courthouse and city hall to the capitol," touched "sensibilities as old as the Revolution itself."

[T]he 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 supreme court's opinion. . . . [T]he supreme court carefully cloaked its apprehension in the terminology of the nondelegation doctrine. It characterized the designation of a critical area as a "fundamental and primary policy decision" which, therefore, cannot be delegated by the legislature. 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 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 nondelegation doctrine which ensures that reallocations of power between the state and local governments will be made only by the legislature (pp. 124-25).

As a result of the *Cross Key Waterways* decision, the Florida Legislature

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5. *Weiner v. Borough of Stratford*, 15 N.J. 295, 104 A.2d 659 (1954).

6. N.J. CONST. art. 3, § 1 states: "The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in the Constitution."

amended the procedure for designating areas of critical state concern. Professor Pelham very correctly suggests, however, that the amended procedure may run afoul of the *Cross Key Waterways* decision. The new procedure continues to provide an administrative body with the power to designate by rule those critical areas. The change is that such a rule must be submitted to both houses of the Florida Legislature, which can "reject, modify, or take no action relative to the adopted rule."<sup>7</sup> As noted by Professor Pelham, however, the legislature always had the inherent power to reject or modify any administrative rule, and he does not believe that the new procedure provides the "affirmative legislative action seemingly contemplated by *Cross Key Waterways*" (p. 127).

Another underlying theme in *State Land-Use Planning and Regulation* is the importance of the nexus between planning and regulation. Professor Pelham offers an in-depth analysis of state and local comprehensive planning legislation in Oregon, Florida, and Wyoming. Once again his analysis is applicable both to those three states and beyond. Concerning a state's decision to require consistency between local plans and implementing regulations, Professor Pelham notes, "unlike Florida and Oregon, states that consider imposition of the consistency requirement in the future will have the benefit of . . . judicial decisions [from those and other jurisdictions] and may be able to establish by statute some guidelines for applying the consistency requirement" (p. 181).

Finally, *State Land-Use Planning and Regulation* urges a balanced view towards land-use planning. While Pelham's concern for long-term ecological preservation is obvious, he suggests that there has been an "inordinate preoccupation with physical environment values to the exclusion of other equally important social concerns" (p. 63). For example, he relates a DRI decision in Florida that involved wetlands that provided a valuable wildlife habitat. According to the author, "[C]onstruction of the DRI would eliminate the . . . property as a part of the habitat. On the other hand, the DRI included a center for geriatric medicine to be operated for public benefit" (p. 63). Although the hearing officer determined that the center "would be a significant benefit to Palm Beach County, the region, the state . . . and indeed to society as a whole,"<sup>8</sup> the officer's subjective hierarchy of the competing considerations led to revocation of approval for the center (p. 63).<sup>9</sup> The author's position urges that the inevitability of growth and inherent scarcity of land compels active state land-use planning not only for immediate benefits, but to deliver the environment from what otherwise would befall it: a hodge-podge of incompatible uses.

Pelham's objective approach and his recognition that there are competing valid concerns on each side of most land-use issues make his book refreshing. *State Land-Use Planning and Regulation* is informative reading

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7. FLA. STAT. § 380.05(1)(c) (1979).

8. Appeal of Fox Properties, No. 74-18, slip op. at 6-8 (FLWAC Feb. 20, 1979).

9. Citing *id.* at 17.

and an invaluable research source for all concerned with increased efficiency in the use of land.

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