Land-Use Management in Delaware's Coastal Zone

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LAND-USE MANAGEMENT
IN DELAWARE'S COASTAL ZONE

The vastness and variety of the resources of this nation's coastal area have in the past generally been sufficient to support a number of different land uses. Recreational, commercial, and industrial facilities have developed together,\(^1\) generally at the expense of the natural environment.\(^2\) These land uses, however, including the natural environment in its unused form, no longer simply coexist, but now actively vie for the limited coastal area remaining.\(^3\) The legislatures of several states have attempted to resolve this conflict in a variety of ways. In June of 1971 the Delaware General Assembly enacted the Coastal Zone Act (CZA),\(^4\) a measure regulating the uses of the coastal zone either by permit or by outright prohibition. This note examines similar legislation which states other than Delaware have enacted and then discusses the CZA. Because of the significance of the Delaware Act, other states may be tempted to emulate its basic pattern. They should do so, however, only after considering that the CZA may be peculiarly appropriate to Delaware. Furthermore, the reasonableness of the CZA's prohibition of heavy industry from the coastal zone may be more tenuous for states other than Delaware.

I. STATE REGULATION OF THE COASTAL ZONE

Nearly all states with shorelines bordering the oceans or the Great Lakes have legislated some regulation or planning study of their respective coastal zones.\(^5\) The purpose of the regulation is to

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\(^1\) One authoritative study catalogues the following major uses of the coastal zone: housing, industry, harbors, recreation, generation of power, fisheries, aquaculture, oil and mineral exploration, and transportation. Although some of these activities take place on shore and others offshore, the most intensive use of the coastal zone is at the water's edge. *Report of the Commission on Marine Science, Engineering and Resources, Our Nation and the Sea: A Plan for National Action* 52-56 (1969) [hereinafter cited as *The Stratton Commission*].


\(^3\) *Id.* at 337-40.

\(^4\) Coastal Zone Act, Del. Code Ann. tit. 7, § 7001 et seq. (1971) [hereinafter cited as Coastal Zone Act or CZA].

\(^5\) Although it is generally the states which provide for the administrative agencies to regulate the use of the coastal zone, land planning and management programs carried out
mediate the conflict engendered by the several users who seek to occupy the same coastal area, or who will occupy different regions of the area with detrimental effects on other occupants. Although the means of conflict resolution vary from state to state, they generally have been enacted to promote the public health, safety, and welfare. For example, the Connecticut statute quite specifically articulates that state's concern: present and future despoliation of coastal areas adversely affects marine life, commercial fishing, recreation, and aesthetic enjoyment in the vicinity; furthermore, this despoliation will impair natural flood control and result in the silting of channels of navigation. These invocations of appropriate rationales for the exercise of the state police power are no doubt intended to legitimate the actions of the state in restricting the rights of private landowners. For while there is no doubt that the preservation of coastal areas is an essential task for the states to undertake, the question remains as to which methods of resolving conflicting uses of the coastal zone will satisfy the totality of public needs.

by interstate agencies created by interstate compacts are playing an increasingly significant role. 3 When several land users compete for a single area of land, it may become the role of the government to mediate among their claims. Sax, Takings and the Police Power, 74 Yale L.J. 36, 62 (1964). Professor Sax describes this governmental role by distinguishing it from the role the government plays as a participant in the conflict.

The National Estuarine Pollution Study, supra note 2, at 283, emphasized the need for a continuing system to resolve conflicting claims to the coastal zone:

Institutional management copes with the problems of responsibility and authority in achieving maximum multiple use of the estuarine resource. With this comprehensive framework technical management must resolve the problems surrounding conflicts of use, competition for the resources of the estuarine zone, and environmental damage. The primary objective of technical management is to achieve the best possible combination of uses to serve the needs of society while protecting, preserving, and enhancing the biophysical environment for the continuing benefit of present and future generations.

For an informative discussion of injuries resulting from conflicting uses, see id. at 35-38, 283-312.


But see State v. Johnson, 265 A.2d 711 (Me. 1970), in which the Maine Supreme Judicial Court held that a denial by the Main Wetlands Control Board of a permit for improvements was an unreasonable exercise of the police power. Id. at 716. While the court found the actions of the state in implementing the statute quite commendable, it found that the ensuing diminution in value which the landowner would suffer was too severe to be borne by him without compensation. Id.

For an interesting and original view of this uncompensated taking problem, see generally Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971).

10 The Stratton Commission, supra note 1, at 57, recommended that Congress enact both policy objectives for the management of the coastal zone and a system of grants-in-aid to implement management by the states.

11 For example, one of the catalysts for the enactment of the CZA was the announcement by Shell Oil Company of its intent to build a large refinery at Smyrna, along the Delaware coast. Lindsay, Showdown on Delaware Bay, Saturday Rev., Mar. 18, 1972, at 34. It is certainly arguable that the public requires the products of the petroleum
The coastal zone itself is generally defined to be the land area between mean low tide and mean high tide, but definitions may also be expressed in terms of varying distances from the shoreline. This regulated zone is variously known as shorelands, wetlands, or salt marshes. Moreover, while most states regulate all lands in the coastal zone, a few restrict only those activities conducted on public lands. States whose shorelines border on the Great Lakes regulate those areas within a certain distance from high-water elevations.

A common form of state regulation is to require one who will carry on certain activities to apply for a permit or license. The regulated activities tend to be those which impair the ability of the coastal area to support marine life, commercial fishing, and recreation. Activities requiring permits include dredging and filling, draining, depositing sanitary sewage, and constructing improve-
ments,\textsuperscript{24} mining of mineral deposits,\textsuperscript{25} and damaging or removing sand dunes.\textsuperscript{26}

The agency from which an applicant may seek a permit is often a local governmental board, whose approval is subject to an agency of the state government.\textsuperscript{27} This procedure allows permits to be issued in accord with a statewide plan for centralized monitoring of regulated uses in the coastal zone. The standards governing the granting or denial of a permit insure that the conflicting interests in the coastal zone will be considered.\textsuperscript{28} Appeal from the first determination is to a specific review board\textsuperscript{29} or a court with proper jurisdiction.\textsuperscript{30} If the appellate court deems denial of a permit to be an unreasonable exercise of the police power, constituting an uncompensated taking, the court may acquire an interest in the property by eminent domain.\textsuperscript{32} The common sanction for the violation of the permit system is a fine.\textsuperscript{33}

The imposition of a permit scheme commonly does not affect existing operations which, if initiated in the future, would require permits.\textsuperscript{34} Several states provide that agencies may regulate by

\textsuperscript{24}ORE. REV. STAT. § 390.640(1) (1971); FLA. STAT. ANN. § 161.041 (Supp. 1972).
\textsuperscript{25}N.Y. PUB. LANDS LAW § 3(5) (McKinney Supp. 1971); HAWAII REV. STAT. § 205-33(a) (Supp. 1971).
\textsuperscript{26}N.C. GEN. STAT. § 104B-4(a) (1972).
\textsuperscript{27}See, e.g., MASS. ANN. LAWS ch. 130, § 27A (1972), authorizing the local board of selectmen or licensing agency, the Department of Public Works, and the Director of Marine Fisheries to impose conditions when application is made for a permit. Nevertheless, the locality may still have the ability to prohibit construction, in spite of approval by the agencies regulating coastal activities, through the legitimate exercise of its zoning powers. Golden v. Board of Selectmen, - Mass. - , 265 N.E.2d 573 (1970). See also N.C. GEN. STAT. § 104B-6 (1972), giving counties powers of administration. But see N.J. STAT. ANN. 13:9A-4(c) (Supp. 1972), requiring an applicant to seek a permit from the state's Commissioner of Environmental Protection; and ORE. REV. STAT. § 390.650(1) (1971), designating the State Highway Engineer as the appropriate agency.
\textsuperscript{28}See, e.g., MD. ANN. CODE art. 66C, § 721 (1970) requiring the Board of Public Works to decide in accord with the "best interests of the State, taking into account the varying ecological, economic, developmental, recreational and aesthetic values each application presents . . . ." See also ME. REV. STAT. ANN. tit. 12, § 4702 (Supp. 1972); ORE. REV. STAT. § 390.655 (1971).
\textsuperscript{29}See, e.g., N.C. GEN. STAT. § 113-229(f) (Supp. 1971).
\textsuperscript{30}See, e.g., CONN. GEN. STAT. ANN. § 22-7n (Supp. 1972).
\textsuperscript{31}See, e.g., Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 108-10, 206 N.E.2d 666, 670-71 (1965) (case remanded to determine whether diminution in value was so significant as to require compensation). For a discussion of diminution of value and uncompensated takings, see also Sax, supra note 6, at 50-61.
\textsuperscript{33}See, e.g., TEX. REV. CIV. STAT. ANN. art. 5415g, § 14 (Supp. 1971); CONN. GEN. STAT. ANN. § 22-7o (Supp. 1972). See also R.I. GEN. LAWS ANN. § 11-46.1-1 (Supp. 1972), making the disturbance of the ecology of intertidal salt marshes a criminal offense, the penalty for which is a fine and costs of restoration.
\textsuperscript{34}E.g., the requirement of a permit by the San Francisco Bay Conservation and Development Commission does not apply to existing uses. CAL. GOV'T CODE § 66654 (West Supp. 1972).
administrative order those existing activities which decrease the value of the coastal zone, but those who are regulated may nevertheless contest an order on the ground that it is an uncompensated taking. In at least one state, regulation of privately owned wetlands is by order alone.

Regulation of coastal areas by zoning is distinguished from regulation by permit in that zoning affirmatively allows a particular activity in specified areas while proscribing that same activity in other areas. As a means of resolving conflicting land uses, zoning can balance the needs of those who use the coastal zone and give notice to users that they may locate only in certain areas, if anywhere. In order to establish the zoning plan, the state administrative agency inventories the subject coastal areas. The appropriate agency then de-

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39 Because agencies generally devise coastal zoning plans after a thorough inventory of the uses sought to be located in the coastal area, the zoning plan can be a plan which manages those uses throughout the coastal zone. E.g., MICH. COMP. LAWS ANN. §§ 281.631-.645 (Supp. 1972). This method of management by zoning is highly esteemed. THE STRATTON COMMISSION, supra note 1, at 49, pointed out that:

> The key to more effective use of our coastland is the introduction of a management system permitting conscious and informed choices among development alternatives, providing for proper planning, and encouraging recognition of the long-term importance of maintaining the quality of this productive region in order to insure both its enjoyment and the sound utilization of its resources. The benefits and problems of achieving rational management are apparent.

39 The zoning plan is generally enacted as an ordinance of the appropriate locality. The areas in which a regulated activity may be conducted should be apparent from the ordinance.

40 See, e.g., MICH. COMP. LAWS ANN. §§ 281.631-.654 (Supp. 1972) (originally enacted as the Shorelands Protection and Management Act of 1970). This act instructs the Michigan Water Resources Commission to undertake an engineering study to determine what areas of the state's shorelands are subject to erosion. MICH. COMP. LAWS ANN. § 281.633 (Supp. 1972). This act also requires the Department of Natural Resources to inventory those areas the preservation of which is necessary to the preservation of fish and wildlife as well as areas of marshes along and adjacent to shorelines. Id. § 281.634. The agencies which will have conducted these studies will then pass their findings on to the appropriate localities in order that the localities may zone these areas appropriately. Id. §§ 281.635-.639.

See also R.I. GEN LAWS ANN. § 2-1-15 (Supp. 1972).

41 WASH. REV. CODE ANN. §§ 90.58.010-.930 (Supp. 1971) (originally enacted as the Shoreline Management Act of 1971) codifies a program of cooperation between the state and local governments in regulating all shorelines of the state. The Washington Department of Ecology submits to local governments guidelines for zoning programs which will regulate most shoreline areas, including land abutting rivers and streams. WASH. REV. CODE ANN. §§ 90.58.030(2)(d), 90.58.060 (Supp. 1971). These local governments are to develop master programs in accordance with these guidelines; if a locality fails to do so, the Department of Ecology will promulgate the required program. Id. § 90.58.70. For certain designated areas, defined by the statute as "shorelines of state-wide significance"
signates by rule or order what activities and uses will be allowed in the inventoried areas. No one may obtain a permit for a use other than that specified in the plan. This method rationalizes the permit system, which, without the use of a statewide plan, would remain an essentially ad hoc device.

Rather than using direct regulation by permit or zoning, some jurisdictions have elected to resolve conflicting needs for the coastal zone by land planning programs. The most active and affirmative of these planning operations are programs which undertake to locate power generating facilities. By acquiring property or inventorying and preserving suitable locations in advance of the time at which power companies will purchase them, the state may be able to balance rationally the competing needs of the consumer of power, the supplier of power, and the environment.

Less direct planning activities include shoreline management studies inventorying coastal areas and setting guidelines, adherence to which is not always required by statute, and advisory councils,
possessed only of weak powers of review. Nevertheless, some degree of planning is better than none, and in time these latter agencies may be given enforcement powers.

Rather than empowering agencies to resolve conflicting land-use needs by an administrative mechanism like permits or master plans for regulations, a number of jurisdictions have enacted legislation which commits coastal areas to one particular use, generally recreation. For example, Texas has enacted a temporary moratorium on the sale or lease of submerged lands owned by the state. The Connecticut Department of Environmental Protection, in implementing its program of protecting tidal wetlands, may acquire a proprietary interest in wetlands using eminent domain if necessary. The Oregon legislature has vested ownership of the Oregon ocean shore, except for portions disposed of prior to 1947, in the state, declaring the ocean shore to be a state recreational area. Florida and Hawaii have established setback lines in coastal areas; certain activities, such as

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**Conn. Gen. Stat. Ann. § 26-17a(b) (Supp. 1972).**

**Id. § 26-17a(c).**

**Id. § 390.615 (1971).** The ocean shore is defined as "the land lying between extreme low tide of the Pacific Ocean and the line of vegetation..." Id. § 390.605(2). The policy underlying the enactment is to give the public the free and uninterrupted use of the ocean shore. Id. § 390.610(1). To effectuate this policy further, the statute also prohibits the state from alienating land in this area. Id. § 390.620.

See also Tex. Rev. Civ. Stat. Ann. art. 5415d (1962), granting to the public the right of access to beaches owned by the state along the Gulf of Mexico. This grant extends to privately owned areas adjacent to public beaches, if the public has acquired a right of access by prescription. Id. § 1.

Some state courts have found absolute rights of public use in coastal areas. In State ex rel. Thornton v. Hay, 254 Or. 584, 595-99, 462 P.2d 671, 676-78 (1969) the Oregon Supreme Court held that the state could enjoin private construction in an area of dry sand between the line of vegetation and the line of mean high tide, on the ground that the public had acquired a preeminent right through this area by the ancient English doctrine of custom. Relying on the policy of expanding public use of shoreline areas as well as on Thornton, the California Supreme Court found that the public had the right of access to beach areas on the basis of an implied dedication of property rights by the private owners. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43, 84 Cal. Rptr. 162, 171, 465 P.2d 50, 59 (1970).
construction, are prohibited in the regions seaward of this line. These schemes, which have the effect of making recreational uses dominant in the coastal area, differ from Delaware's Coastal Zoning Act, which, while prohibiting heavy industrial uses, allows all others, with regulation in some cases.

II. THE DELAWARE COASTAL ZONE ACT

To resolve the conflicting land uses in the coastal zone of Delaware, the Delaware General Assembly has decided that the purpose of land-use regulation is to protect the natural environment of that state's shoreline and to safeguard its use primarily for recreation and tourism. The CZA states the public policy of the state to be to control the "location, extent and type of industrial development" in its coastal area. To achieve this end, the statute completely excludes heavy industry uses from the coastal zone. Certain manufacturing uses, other than those classified as heavy industry, are allowed in this area only by permit.

54 See notes 57-69 and accompanying text infra.
55 CZA § 7001.
56 Id.
57 Id. § 7003 states:

Heavy industry uses of any kind not in operation on the date of enactment of this chapter are prohibited in the Coastal Zone and no permits may be issued therefor. In addition, offshore gas, liquid, or solid bulk product transfer facilities which are not in operation on the date of enactment of this chapter are prohibited in the Coastal Zone, and no permit may be issued therefor. Provided, that this section shall not apply to public sewage treatment or recycling plants.

This prohibition of heavy industry appears to be the result of a recommendation of a study group which examined the problems of Delaware's coastal zone:

The task force also recommends that there be no further intrusion of incompatible heavy industry into the coastal zone since pollution and other adverse environmental and social effects, normally attendant upon such developments, present serious threats to the coastal environment, the natural resources of the bays, and the quality of life in Delaware.

GOVERNOR'S TASK FORCE ON MARINE AND COASTAL AFFAIRS, COASTAL ZONE MANAGEMENT FOR DELAWARE: PRELIMINARY REPORT 3-4 (1971) [hereinafter cited as PRELIMINARY REPORT].

58 CZA § 7002(a) defines the coastal zone to be:

[All that area of the State of Delaware, whether land, water or subaqueous land between the territorial limits of Delaware in the Delaware River, Delaware Bay and Atlantic Ocean, and a line formed by certain Delaware highways and roads . . . .

Subsection 7002(1) then designates those highways and roads which form the boundaries of the coastal zone. The zone extends inward for approximately two miles, to be contrasted with the shallow zones established by statutes regulating coastal activities in other states. See note 12 and accompanying text supra.

59 CZA § 7004(a) reads in part:

Except for heavy industry uses, . . . manufacturing uses not in existence and in active use of [sic] the date of enactment of this chapter are allowed in the Coastal Zone by permit only, as provided for under this section.
The statute defines "heavy industry use" in terms of the physical characteristics most frequently associated with the worst industrial polluters, setting forth as specific examples those industries which have proven most harmful to the environment. The definition is not limited to these examples, however, for any industrial development occupying more than twenty acres or employing any of several general types of industrial equipment is excluded from the region. Few plants with any dangerous pollution potential could carry on normal operations without at least some of the listed equipment. Although current nonconforming uses are not prohibited, any expansion of such facilities requires the issuance of a permit under the normal procedures applicable to other than heavy industrial uses.

These other manufacturing uses are allowed in the coastal zone only upon the issuance of a permit from the State Planning Office. An applicant who is denied a permit may appeal by right to a new agency, the State Coastal Zone Industrial Control Board, which then must hold public hearings of record on the

Manufacturing is defined by § 7002(d) to mean:

[The mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement.]

§ 7002(e) defines a "heavy industry use" to be:

a use characteristically involving more than twenty acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smoke stacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment, and waste treatment lagoons: which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp paper mills, and chemical plants such as petro-chemical complexes. Generic examples of uses not included in the definition of 'heavy industry' are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments.

The Governor's Task Force had recommended that the proscribed heavy industries include:

such installations as steel mills, paper mills and oil refineries, and any other industry that traditionally introduces unacceptable quantities and types of pollutants into the air, land or water and, by its very size and nature, causes massive adverse environmental changes over a wide area.


61 CZA § 7002(e).
62 Id. § 7002(b) defines a nonconforming use to be:

a use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to the enactment of this chapter.

63 Id. § 7004(a).
64 Id.
65 See note 59 supra.
66 CZA §§ 7004(b), 7005(a).
67 Id. § 7007(a).
The statute directs these agencies to consider the impact which the proposed development would have on the environment, economics, and aesthetics of the coastal zone in deciding whether to issue a permit. If the result of balancing these considerations so warrants, an industry which is deemed to have an adverse effect on the state's coastal ecology and to provide no offsetting benefit can be denied a permit. Thus, if the statute is well administered, economic development is controlled so as to avoid significant ecological damage to the shoreline.

Unfortunately, evenhanded administration cannot always be assumed. The effectiveness of the permit system could be undermined if either industrialists or conservationists came to dominate the administering agencies: manufacturing plants with little potential for environmental harm but with important economic benefits could be unjustifiably excluded; or polluting industries which do not fall within the definition of heavy industry could be allowed to locate on the coast even though they might not provide any compensating economic benefit. In this context, the importance of the absolute prohibition on heavy industrial uses becomes clear, for even if the enforcement agencies should fall under the sway of business interests, only those industries with a seemingly less dangerous pollution potential would be able to locate along the coast.

The ultimate effects of the statute on the state's economy are

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68 Id. § 7007(c).

If the appeal to the State Industrial Control Board is unsuccessful, the applicant may appeal further to the Superior Court, the only issue being whether the Board abused its discretion in applying standards set forth by the statute. Should the applicant prevail in any of his appeals, § 7009 permits the Secretary of Natural Resources and Environmental Control to acquire a fee simple or lesser interest in the applicant's property. The price is determined by negotiations or condemnation proceedings brought within five years after a judicial ruling that a particular application of the law is an uncompensated taking. See notes 29-32 and accompanying text supra.

The Attorney General of Delaware is empowered to issue temporary cease and desist orders against violators of the CZA. CZA § 7010. The penalty for violating the Act is a fine of not more than $50,000 for each separate offense, the continuance of any prohibited activity during any part of a day constituting a separate offense. Id. § 7011. Additionally, the Court of Chancery has jurisdiction to enjoin violations. Id. § 7012.

69 Id. §§ 7004(b)(1), (3). The State Planner and State Coastal Zone Industrial Control Board must also predict the effect which the proposed development would have on neighboring land uses, such as adjacent residential, agricultural, and recreational areas. Id. § 7004(b)(5). To insure that the proposed development observes local guidelines for land-use regulation, these agencies must include county or municipal comprehensive plans for development and conservation in their deliberations. Id. § 7005(b)(6).

70 The only issue in an appeal to the Superior Court from an adverse ruling by the State Industrial Control Board is whether, on the record below, the Board abused its discretion in applying the law's standards. Id. § 7008. A biased Board might be able to make a record sufficient to justify its decision, thus preventing effective judicial review. The record, however, must be supported by the evidence taken as a whole. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 600-18 (1965).
speculative, but it may be that since heavy industries will be prohibited from locating along the Delaware coast, they will not locate anywhere in Delaware. The state lacks an extensive inland waterway system, and therefore heavy industrial users requiring a large water supply for manufacturing and disposal purposes will be unable to build new plants upstream and still remain within the state. Moreover, although heavy industries will arguably remain free to locate just outside the protected zone and acquire rights of way for pipelines across that area to the Delaware River or Delaware Bay, the cost of a pipeline would probably be high.\(^{\text{71}}\) This economic detriment, however, should be offset somewhat by the economic advantages of an improved coastal environment. More attractive beaches might stimulate the tourist industry,\(^{\text{72}}\) and as a result of fewer heavy industrial uses, the shellfishing grounds of Delaware Bay might become more productive.\(^{\text{73}}\) Furthermore, a cleaner estuarine system might attract lighter, nonpolluting industries as well as other commercial activities to the state.\(^{\text{74}}\)

### III. CONSTITUTIONALITY OF THE CZA

Although the constitutionality of the CZA has not yet been tested, grounds for attacking its validity are readily apparent.\(^{\text{75}}\) First, the absolute prohibition provision may constitute a depriva-

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\(^{\text{71}}\) The State Planner has recently approved a plan which allows the Wilmington Marine Terminal, located outside the coastal zone, to pipe low-sulfur oil from its marine dock to storage tanks within the City of Wilmington. The Planner apparently interpreted the CZA not to apply, since the pipeline would not be connected to any structure in the coastal zone. See Pipelines Ruled Exempt from Local Zoning, Wilmington Evening Journal, July 1, 1971, at 10, cols. 1-2. Nevertheless, the costs of land acquisition, construction, and operation might be prohibitive for an industrial user who has no present facility outside the coastal zone.

\(^{\text{72}}\) The Governor's Task Force emphasized that the coastal zone be protected for the purpose of enhancing recreation and tourism. Preliminary Report, supra note 57, at 4-1 to 4-3.

\(^{\text{73}}\) The Stratton Commission, supra note 1, at 54, classified approximately three-eighths of the total estuarine area in Delaware (152,000 acres out of a total of 396,000 acres) as an important commercial fisheries habitat.

\(^{\text{74}}\) Wilmington, Delaware, is currently the corporate headquarters for several large chemical companies. A recent report by a study group associated with Ralph Nader indicates that one of the chief purposes of the Delaware Coastal Zone Act is to maintain the attractiveness of the state as a location for corporate headquarters. The Nader Study Group Report on DuPont in Delaware, The Company State 13-54, 13-56 (1971).

\(^{\text{75}}\) See Legislative Note, The Delaware Coastal Zone Act, 21 Buffalo L. Rev. 481, 489-94 (1972), in which the student author points out that the CZA can be assailed on at least three constitutional grounds: as interfering with interstate and international commerce, in derogation of the commerce clause; as an uncompensated taking in violation of the due process clause of the fourteenth amendment; as prohibiting absolutely only those polluting industries which are heavy industries, this being an unreasonable classification in violation of the equal protection clause.
tion of property without due process in violation of the fourteenth amendment.\textsuperscript{76} This argument is not likely to meet with success. Reasonable zoning measures under similar challenges have been upheld as valid exercises of the police power;\textsuperscript{77} under the Supreme Court's expansive definition of that term,\textsuperscript{78} environmental protection would probably qualify as a reasonable justification for invoking the power.\textsuperscript{79}

Furthermore, since the statute contains a provision that a fee simple or lesser interest can be acquired by eminent domain proceedings,\textsuperscript{80} it is unlikely that a court will declare the CZA unconstitutional on its face.\textsuperscript{81} Although ultimately saving the Act, frequent application of this section would be impractical because of the expenditures it would require. Of course, these costs could be offset to some degree by selling or leasing the acquired lands to nonpolluting users.

An attack more likely to succeed is the argument that the law establishes unconstitutionally vague standards in delegating power to its regulatory agencies. The basic constitutional test for vagueness in delegation of authority is whether the statute in question states both the purpose which the legislature sought to accomplish and the standards by which that purpose is to be implemented with sufficient exactness to enable those affected by the law to understand its limits.\textsuperscript{82} The legislature need specify details only so

\textsuperscript{76} U.S. CONST. amend. XIV, § 1.

\textsuperscript{77} See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926), in which the Supreme Court stated the test for the validity of a zoning ordinance to be whether the regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Courts are quite reluctant, except in egregious circumstances, to find a zoning ordinance constitutionally void on its face as an unreasonable exercise of the police power.

In Franklin Builders, Inc. v. Sartin, 207 A.2d 12, 30 (Del. Super. Ct. 1964), two cases brought to review a decision denying petitioners the right to maintain signs in violation of local zoning ordinances, the Delaware Superior Court referred to the \textit{Euclid} decision in affirming the order of the zoning appeals board:

\begin{quote}
Since the Supreme Court's decision in Village of Euclid v. Ambler Realty Co. . . . it would now seem beyond doubt that a State Legislature or municipal legislative body has clear power to classify lands for zoning purposes, and that takes such questions as equal protection of the law and/or due process out of these zoning matters. (citations omitted)
\end{quote}

\textsuperscript{78} "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954).

\textsuperscript{79} See, e.g., Northern Natural Gas Co. v. State Corporation Comm'n, 372 U.S. 84, 93 (1963), where the Court stated, "There is no doubt that the states do possess power to allocate and conserve natural resources upon and beneath their lands."

\textsuperscript{80} CZA § 7009.

\textsuperscript{81} See, e.g., Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 111, 206 N.E.2d 666, 671 (1965), in which the Supreme Judicial Court determined that, although the statute in question was not constitutionally void, its application may result in an unreasonable exercise of the police power requiring compensation.

\textsuperscript{82} United States v. Rock Royal Cooperative Inc., 307 U.S. 533, 574, \textit{rehearing denied sub nom.} Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. v. Rock
far as is reasonably practicable, and it can delegate broad powers to the executive branch.83

Although the purpose of the statute appears to be stated with the requisite exactitude, questions still arise as to the ambiguity of two words pertaining to that purpose. Subsection 7004(b)(3) states that the "aesthetic effect," defined as "impact on scenic beauty," is to be a factor in considering requests for permits. In the absence of more specific standards, an aggrieved party might argue that this factor must necessarily have different meanings to different individuals and consequently is not sufficiently precise. The counterargument might state that "scenic beauty" is a reasonably practicable standard in light of the Act's purpose to protect the shoreline for recreation and in light of a general cultural consensus of what is aesthetically pleasing.

A somewhat more serious flaw, however, occurs with the undefined term "pollution." This is a key word both in the definition of "heavy industry use"84 and in the list of factors to be considered in passing on permits.85 Without any further details as to the nature and quality of the industrial discharges that this term is intended to cover, there is no sufficiently exact standard which those affected could understand.

The section of the statute which sets forth its purpose offers the only guidance in supplying an implicit definition of pollution. Since one of the main aims of the statute is to "protect the natural environment of [the state's] bay and coastal areas and safeguard their use primarily for recreation and tourism,"86 the word "pollution" could be read to mean those industrial effluents which are incompatible with these goals. Although the issue is still debatable, this standard could be considered as sufficiently understandable and practicable to save the current statute from constitutional infirmity. The lack of a more precise definition of such significant terms still remains an important technical flaw which should be cured if other jurisdictions adopt similar legislation.

IV. APPLICABILITY TO OTHER JURISDICTIONS

Although the Coastal Zone Act is a reasonable exercise of the police power and an expedient solution to the problem of manag-
ing the competing uses of the coastal zone in a small state like Delaware, the feasibility of a total prohibition of heavy industry from any considerable length of coastline depends on careful planning. The Coastal Zone Act may appear attractive to other states which have not been as articulate as Delaware in resolving conflicting uses.\textsuperscript{87} Before a state legislature enacts a regulatory program patterned after Delaware's approach, however, it should scrutinize the discrete problems of its own coastal area.

Banning heavy industry from a long stretch of coastline will not necessarily result in economic stagnation. Existing nonconforming uses will be allowed to continue, and lighter industrial uses may develop. Moreover, in those states which, unlike Delaware, have an extensive inland waterway system, heavy industry will be able to locate upstream. In drawing the boundaries of the regulated zone, however, the legislature must provide for a sufficient buffer zone between the industries and the beaches. Technical factors concerning the specific characteristics of each estuarine system would determine the extent of buffer zone necessary to protect each coastal area. Legislatures would have to exercise caution in resisting efforts by industry to secure an insufficiently narrow zone since the very purpose of a restricted area would be defeated if the natural cleansing and diluting effect of the river were not given a chance to operate on the discharge wastes.\textsuperscript{88}

Of course, in many instances the establishment of a coastal buffer zone will not be sufficient. To obtain maximum protection of the shoreline as well as provide some measure of care for the upstream ecology, a state with inland waterways should also enact and enforce other general pollution statutes. Discharges from upstream plants, although diluted and to some extent purged by the time they reached the coastline, could still have an adverse effect on the beaches.

Further pollution controls will lessen these effects and also aid

\textsuperscript{87} The New Jersey Legislature is already considering a proposal that is patterned after the Delaware Act. N.J. Assembly No. 722 (1972). The New Jersey bill, however, would set up three geographically distinct coastal zones: one on the Atlantic shore of the state, a second along the lower reaches of the Delaware River estuary, and a third extending upstream of the second to the limit of tidal action at Trenton. The inland boundary for all three is specified as the area between the average high tide and an elevation of ten feet. \textit{Id.} § 3(a).

Within each area solid, liquid, or gas bulk transfer facilities are prohibited. Heavy industry is banned completely in the Ocean and Bay zones, but would be allowed by permit in the Upper River region. \textit{Id.} §§ 4, 5(a). Light manufacturing would also be permissive in every zone. \textit{Id.} § 5(b).

\textsuperscript{88} Every body of water can assimilate certain amounts and kinds of waste products. \textit{THE STRATTON COMMISSION}, supra note 1, at 72. Also, since pollutants may be trapped permanently within the estuarine system and work damage that cannot be repaired, estuarine pollution has a more extensive impact than pollution of streams and rivers. \textit{Id.} at 72, 74.
in protecting the entire watershed area from environmental damage. Since banning heavy industry from any widespread region is not economically feasible, some controls must be available to ameliorate the effects of the wastes that are discharged. The Delaware Coastal Zone Act adds an additional measure of protection to the critical estuarine environment by preventing even these reduced effluents from being discharged directly into the coastal waters where they could have a harmful effect on the delicate ecology of that region. What pollution does occur, whether intentional or accidental, will take place farther upstream, thereby lessening the damage to the shoreline itself.

A general pollution law alone is inadequate to protect a state's coastline because of the difficulties of enforcement. The enforcement agency must constantly be alert to the exact nature and quality of the wastes being discharged from the plants within its jurisdiction, a problem which the absolute prohibitions of the Coastal Zone Act seek to avoid. Under the CZA forbidden encroachments into the zone would be difficult to hide and hard for even the most lax enforcement agency to ignore. Those individuals and groups interested in continued strong enforcement would be quickly alerted by the high visibility of violations and could invoke the statute's safeguards.

A more difficult problem arises with respect to those industries which may be unable to locate upstream. To the extent that heavy industrial uses of sufficient economic value and unavoidable pollution potential cannot feasibly be located away from the coast, statutes resolving land-use conflicts will have to make provision for them. For example, bulk transfer facilities, which are

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80 E.g., Mass. Ann. Laws ch. 21, §§ 26–53 (Supp. 1971) establishes the Division of Water Pollution Control which is to adopt and enforce standards of water quality. Id. §§26–27. Discharges in contravention of its standards are punishable by fines of $1,000 per day of discharge. Id. § 42. The enforcement of this type of general pollution control law would involve extensive monitoring and spot checking of the state's waterways. If improper pollution levels are then discovered, the specific violator must then still be found and caught in the act. Under these circumstances, pollution could be reduced but not completely eliminated, for undiscovered violations are always certain to occur.

80 Both the State Planner and the State Coastal Zone Industrial Control Board must hold public hearings on permit requests. CZA §§ 7005(a), 7007(c). Any aggrieved party can appeal to the superior court. Id. § 7008. No statutory limitations are placed on those parties who may seek to enjoin violations in the Court of Chancery. Id. § 7012. Both private individuals and public interest groups thus remain free to invoke the enforcement machinery of the Act. Since it would be impossible to conceal plans for the construction of any prohibited or permissive use, the applicability of the statute's provisions could be quickly determined by all interested parties.

81 Most plans for the use of the coastal zone must seek to accommodate heavy industry. Deep water access will be essential to the future competitiveness of steel and other United States industries which process large volumes of heavy raw materials. Future development must also provide for added transport and power generation facilities. The Stratton Commission, supra note 1, at 52, 53.
prohibited by the Delaware Act, require deepwater access and yet have an enormous potential to cause ecological harm to a coastline. Nevertheless, the age of the supertanker is upon us and although scattered jurisdictions could ban these vessels from their coastal waters, they will have to find a safe harbor somewhere. Development of a deepwater port should be carried out on a regional basis, in order that both risks and benefits are shared.

States with larger land areas than Delaware may find it desirable to enact regulatory legislation which, in addition to dealing with problems of water quality, comprehensively manages all land uses in the jurisdiction to provide for orderly development with a minimum of harmful external effects. Although it might be impractical for the larger states to inventory and promulgate regulations for every square mile, they could nevertheless undertake to plan comprehensively for those areas which are and will be most intensely developed. Small states may find thorough regulation easier to provide. For example, Hawaii has zoned all of its territory. The State Land Use Commission is to district the islands into four types of zones: urban, rural, agricultural and conservation. The counties are empowered to govern the zoning in all but conservation districts, which are regulated on a statewide basis by the Department of Land and Natural Resources. The Department may by regulation manage the use of conservation areas, known as forest and water reserve zones, in order "to allow and encourage the highest economic use thereof." The statute provides additional protection for rural districts by requiring that,

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92 CZA § 7002(f) defines "bulk transfer facility" as:

[A]ny port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to on-shore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a non-conforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

93 Id. § 7003, stating in pertinent part:

[B]ulk product transfer facilities which are not in operation on the date of enactment of this chapter are prohibited in the Coastal Zone, and no permit may be issued therefor.

94 The largest vessel now operating is a tanker of 312,000 dead-weight tons. Under consideration are similar ships of up to 760,000 dead-weight tons. By 1980, maximum drafts are expected to range from 39 feet for freighters to 98 feet for tankers. COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, PANEL REPORTS: SCIENCE AND ENVIRONMENT Table 3, at III-67 (1969).

95 The Governor's Task Force recommended that Delaware explore, on a regional basis with the assistance of the federal government, the technical and economic feasibility of an offshore deepwater port facility built on the continental shelf. PRELIMINARY REPORT, supra note 57, at 3-1.


97 Id. § 205-5(a).

98 Id. § 183-41.
unless authorized by special permit, only low-density residential, agricultural, public, and public utility uses may locate in rural districts. The Land Use Commission is directed to update its classification of lands at the end of each five years following its original adoption. This approach is more sophisticated than the Coastal Zoning Act and perhaps reflects the vast developmental difference in Hawaii's land uses. It is clear at least that Delaware's approach of regulating the coastal area by prohibition and permit must be amplified if a state is to resolve conflicting land use needs effectively.

V. CONCLUSION

The Coastal Zone Act provides an uncomplex and potentially effective device to attack the problem of land-use management in shoreline areas. Its constituent mechanisms, the exclusion of any further heavy industrial uses and the regulation of other industrial and commercial uses by permit, reflect in a novel juxtaposition those methods utilized by other states. The Act has resolved the conflict among land uses firmly in favor of recreation and tourism. Effective administration may allow these uses to occupy Delaware's beaches without seriously damaging the coastal environment. Yet because of Delaware's small size and lack of significant inland areas, the Coastal Zoning Act may not be an appropriate mode of regulation for other coastal states. Each state desiring to regulate the use of its shoreline should begin by surveying its coastal land and then formulate a program of management which will balance those uses in a manner which comports with the public interest.

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99 Id. § 205-5(c).
100 Id. § 205-11 (1963).
101 For a discussion of the resolution of conflicting land uses by prohibition and permit, see notes 49–54, 20–37 and accompanying text supra.