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The Development and constitutionality of the 1971 Delaware Coastal Zone Act

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INTRODUCTION

In June 1971, the Delaware Legislature passed the Delaware Coastal Zone Act[1] that barred heavy manufacturing industry from locating in an area one to six miles deep along the state's 115 mile coastline.[2] The first state law of its kind, heavy industry was defined as any industry that has "the potential to pollute when equipment malfunctions or human error occurs," and specifically banned were oil refineries, petrochemical complexes, and basic steel and paper mills.[3] Public sewage treatment or recycling plants are exempted from coverage of the act[4] and control of industrial development other than that of heavy industry in the Coastal Zone will be through a permit system administered by the State Planning Office.[5] Requests for permits must include (1) evidence of approval by local zoning authorities; (2) a description of proposed construction and operation; and (3) an environmental impact statement.[6] The act created a State Coastal Zone Industrial Control Board to hear appeals from decisions of the State Planner.[7] In addition, the act prohibited the construction in the bay of marine terminals for the transshipment of liquid and solid bulk materials of any substance, (specifically aimed at offshore oil and coal transfer) from vessels to on-shore facilities.[8]

The legislation was basically a reaction to oil industry plans for Delaware Bay that were "a lot more extensive" than state Governor Russell W. Peterson had anticipated.[9] Shortly after Peterson took office in January 1969, Shell Oil Company, which began

buying coastal property in 1961 and today owns a 5,800 acre site near Smyrna at the head of the bay, announced long-deferred plans to build a $200 million refinery on its land, with an associated petrochemical plant to follow. The Delaware Bay Transportation Company, a consortium of thirteen of the nation's leading oil companies, Shell among them, proposed in 1970 the construction of a freestanding 3,200 foot long dock six and one-half miles out in the bay to berth supertankers bringing crude oil to the region. Two forty-eight inch pipelines would run the crude oil to shore. There, on 1,800 acres of coastal land that the consortium bought in 1958 near the mouth of the bay, it would build a storage tank farm from which on-shore pipelines would feed the petroleum to existing refineries. A Texas based company specializing in the transportation of solid bulk materials, Zapata Warness, Inc., had another proposal for a transfer facility in the bay: a 300 acre terminal where millions of tons of domestic coal headed for markets would be stored in fifty-five to sixty-five foot piles for transshipment from self-unloading barges to giant deep-draft carriers. The Zapata project included subsequent plans to expand the terminal to 500 acres of land to add the handling of iron ore for export. Concern about the impact of these large-scale proposals on the undeveloped lower bay area caused Peterson to issue an executive order calling for a one year moratorium on all construction along the river and bay and appointed a task force to develop a master plan for the future use of the state's coastal areas. The provisions of the 1971 Coastal Zone Act essentially embody the recommendations made by the Governor's

task force. "The coastal areas of Delaware are the most critical areas for the future of the state in terms of the quality of life," the act proclaims. "It is therefore the declared public policy to control the location, extent, and type of industrial development in Delaware's coastal areas. In so doing, the state can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism."[10]

The law's immediate effect was to block several hundred million dollars worth of planned projects. The long range effects threatened the oil and transportation industry's vital interests to such a great degree that they enlisted the support of the U. S. Commerce and Treasury Departments to fight the ban on offshore terminals. Delaware Bay is one of three spots along the entire United States Atlantic Coast with water deep enough to accommodate supertankers of 250,000 to 350,000 dead-weight tons. Now going into service, these vessels have drafts of sixty-five to eighty-five feet. Deep water plus open land and ready access to the major population centers of the Middle Atlantic States have combined to make the lower Delaware Bay region irresistable to entrepeneurs relying on the use of supertankers. Governor Peterson was summoned to Washington after the act was proposed by then Secretary of Commerce, Maurice Stans. There he learned it was "un-American" to oppose industrial expansion and that he was "interfering with the prosperity and security of America."[11] "Unless the United States is able to receive these oceangoing bulk carriers, our ability to compete will be seriously damaged," wrote a Treasury Department

assistant secretary in a letter to the Delaware House of Representatives urging defeat of the zoning bill.[12] Governor Peterson urged that the cycle of industrialization must be broken and that smaller vessels will be used if there are no facilities. The United States meanwhile should search for more environmentally compatible forms of energy. During the six weeks the coastal zone bill was debated before becoming law last June 28, it was vigorously fought by an impressive lineup: the Delaware Chamber of Commerce; the state Bidding and Construction Trades Council; Shell; Getty (also a member of the oil consortium); the eleven other consortium oil companies; Zapata Warness; and the United States Department of Commerce and Treasury. Arguments against the bill invoked the importance of economic growth, the need to fill the projected energy requirements of the east coast, the promise of jobs and tax revenues, and the "national interest." Supporting the bill were conservationists, environmentalists, and concerned Delawareans. "It's our coastline," proclaimed a mailing piece issued by a citizens group. "Coastal zoning will save it for us and our children."[13]

When Governor Peterson returned to Wilmington from Washington, the Governor sought out his backers to organize them for the real fight ahead in the legislature. Non-partisan backing was the key, including the help of the former Governor who was from the opposite party. Peterson met with his opponents to try to make them see the light, including chambers of commerce, zoning boards, and important landowners. The bill just barely passed the lower house (one vote) and then the Governor achieved the same margin in the upper house

only by holding two wavering members.

Democrats in the Delaware Legislature maintain that the Republican passed measure will be ruled unconstitutional. The act has not yet been challenged in court, but Shell Oil says it is "appraising the situation." Delaware's bay frontage, where Shell and the oil consortium hoped to build, is today a stretch of tidal wetlands, salt marshes, woodlands, and shallow estuaries, dotted with wildlife preserves. The state's oceanfront contains a succession of state parks and beaches cut by an inlet lending to small protected coastal bays. The wetlands provide food for fish and birds. The beaches, parks and bays provide recreation for Delawareans and tourists. Both shorelines are endangered by the threat of oil spills from existing heavy water traffic. The act proposes to protect these shoreline areas by zoning regulations designed to prevent pollution and to promote aesthetic values. This paper will examine the constitutionality of the Delaware Act in light of these two purposes and will examine other related issues bearing on the legality of the act.

Zoning has often been suggested as a means to protect the coastal zone.[14] Many states have passed "enabling legislation" authorizing cities and towns to regulate the use of land through zoning.[15] The Delaware coastal zoning legislation grants power to the State Planning Office to regulate land use in the coastal zone on a state wide level.[16]

As the Stratton Commission pointed out, the full program of coastal management should include an extensive program of land acquisition and development, coupled with developmental projects.[17] Regulation, however, whereby the land owner retains the increments of ownership subject only to restrictions placed on the land's use, offers definite advantages as an environmental protection tool. Whereas the prohibitive cost of purchase would preclude a wide-scale attack in so large an area, a program of regulation can be initiated simply and administered efficiently through the existing framework of government. Even beyond the purchase expenditure, acquisition necessarily implies continued state management and therefore continued expense; regulation assumes that, subject to the restrictions, full management control will remain with the individual landowner.

Two major questions must be answered to determine whether the Delaware Act complys with constitutional requirements: under what conditions may the power to zone be transferred? At what point will the line between regulating and taking be crossed?

TRANSFER OF POWER

Although state-wide or area-wide zoning is still a relatively new concept, there is support for approving the transfer of this power from recent trends in other states. Only Hawaii has a full program of planning and zoning administered at the state level.[18] There, the State Land Commission classifies all land into four categories.[19]

Wisconsin takes a stab at regional zoning[20] by requiring that local governments enact a flood-plain zoning ordinance.[21] Failure to include sufficient requirements in the ordinance, or failure to act at all, will automatically mean that the state will do the job and bill the county for the cost.[22] The act's scope is quite limited, aiming primarily at shoreline erosion and flooding along the Great Lakes. Although it is a step in the right direction, the act suffers greatly from a lack of coordination[23] since each county unit acts independently, and city governments may act independently of the county governments.[24] Therefore, under the Wisconsin approach, the idea of controlling growth and use for the common good still stands inferior to intergovernmental competition.

A final example of the trend toward state control is the heralded Massachusetts "Wetlands Act of 1965."[25] This legislative statement grants to the Commissioner of Conservation a potential wealth of power since it gives him the authority to "adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering or polluting coastal wetlands."[26] The Commissioner views this broadly phrased

statement as "in a sense the first step toward overall state zoning. This does give the Department of Natural Resources the right to restrict the coastal wetlands in Massachusetts, overriding local zoning."[27]

There are two aspects to the transfer of power question involved in the Delaware legislation. The first is whether the State Legislature has the power under the Delaware Constitution to classify land for the purposes of regulation and the second is whether the transfer of the power to the State Planning Office is a proper delegation of that power.

The basis for all zoning laws is the state's police power. It is clear that authority rests with the states to legislate to promote the health, safety, and welfare of their citizens. The courts have consistently sustained a state's regulatory authority in the field of land use, even at the risk of circumscribing seemingly traditional rights of the landowner or local authorities.

The general principles of constitutional law relating to the state's police power and the limitations on its exercise have been frequently stated by Delaware Courts. There have been many Delaware judicial decisions interpreting Art.I, sec. 7 of the Delaware Constitution[28] which uphold the right of the state to regulate, as a police power function, to protect the public order, morals, safety and welfare and confirm the right of the state and its municipalities to classify land for zoning purposes.[29]

Art. I, sec. 7 of the Delaware Constitution extends the

rights of due process and equal protection. The Court in Appeal of Blackstone interpreting this clause and its relation to the police power said:

> ...not withstanding this section prohibiting the taking of property without just compensation and the due process and equal protection clauses, the state is not restricted in its right to exercise its police power for the protection of health, morals, safety or general welfare of the community.[30]

In Gallegher v. Davis, Chief Justice Layton summarized the nature of the power and its limitations as follows:

> The police power of the state, speaking broadly, comprehends the whole system of internal regulation. Under it the state seeks, not only to preserve public order, but also to establish between members of society standards of good manners and neighborliness which tend to prevent a conflict of rights. The power extends to such restraints and regulations as are reasonable and proper to protect the lives, health, confort, and property of citizens and to promote the order, morals, safety and welfare of society.[31]

A more recent case, State ex. rel. Buckson v. Pennsylvania Railroad Company,[32] involving state regulation of filling below the high water mark, affirmed the proposition that under its police power the State may enact reasonable regulations necessary to protect the lives, health, comfort, and property of its citizens, and to promote the order, morals, safety, and welfare of the public. Thus the police power doctrine is well established in Delaware.

The idea that zoning laws are a valid exercise of the state's police power also has a firm basis in Delaware law. In Auditorium, Inc. v. Board of Adjustment, the Court stated:

> Zoning laws and regulations are now uniformly recognized as proper subjects of legislative action. Their propriety stems from the right of the state, in the exercise of its police power, to protect the public health, safety, and

> welfare. The legislative power is one which may be developed to a municipal or other local governing body.[33]

This point is well settled under Delaware law as Justice Lynch confirmed in Petition of Franklin Builders, Inc. It would now seem beyond a doubt that a State Legislature or municipal body may classify lands for zoning purposes.[34] This settles any issue that might arise as to whether the State of Delaware can classify land for purposes of regulation, such as they did in the 1970 Coastal Zone Act.

This leaves the question of whether the delegation of this power to the State Planning Office was an unlawful delegation of legislative power.

According to Art. II, sec. 1 of the Delaware Constitution: "all legislative power shall be vested in the General Assembly." This means that the doctrine of delegation of powers applies in Delaware. Except for instances in which state constitutions provide for administrative agencies or to the extent that constitutional officers, for example, the governor, possess power by virtue of their offices, all administrative authority is conferred (directly or by implication) by a statute. The proposition that "legislative power cannot be delegated" says the statute purporting to confer the power is invalid because the legislature cannot delegate its powers. In enacting the statute, the legislature must, in broad outline at least, define the field in which the agency will operate and must state the objective sought to be accomplished.

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The law of State delegation differs substantially from the law of federal delegation. Whereas only two delegations by Congress to public authority have ever been held unconstitutional by the Supreme Court,[36] numerous delegations by state legislatures have been invalidated, and the nondelegation doctrine in the state courts continues to have a good deal of force.[37]

To some extent the state holdings invalidating delegations may reflect judicial lack of sympathy with the substantive regulation at issue. But as Professor Louis L. Jaffe has noted:

> Judicial antipathy to social legislation has not been the only factor contributing to the uncertainty and subjectivism in state courts' interpretation of the delegation doctrine. The state courts are troubled by the spectre of discriminatory administration. In the field of general business regulation state decisions are not notably different from the federal decisions... It is when delegated power affects the use of real property or the practice of a profession that the judicial nerve tangles. The doctrine of delegation is then likely to be invoked against delegations which because of uncertainty of standards (in phrase or in fact) encourage undetectable discrimination or subjective notions of policy.[38]

The Supreme Court of Delaware held in State ex. rel. Morford v. Tatnall, that the delegation of legislative power to an administrative body is unlawful unless proper standards and guidelines are established in the act of delegation. The court went on to explain the delegation of power doctrine more fully:

> The maxim that power conferred on the legislature to make laws cannot be delegated to any other authority does not preclude the legislature from delegating any power not legislative which it may itself rightfully exercise. It may confer an authority in relation to the execution of a law which may involve discretion, but such authority must be exercised under and in pursuance of the law. The legislature must declare the policy of the law and fix the legal principles --?

> are to control in given cases. An administrative officer or body may be invested with power to ascertain the facts and conditions to which policy and principles apply.[40]

This case has been the leading authority in Delaware on the delegation of powers and the rule has been well established by a number of later cases. The best modern expression of the delegation of powers doctrine in Delaware was set out in In re Opinion of the Justices which ruled:

> If the General Assembly has declared the policy of a law and has fixed legal principles and standards which are to control an administrative agency in the exercise of its discretion, to determine facts and conditions which will bring into play execution of legislative powers exercised by the act itself, the act is valid, and is not objectionable on the ground that it constitutes a delegation of legislative powers.[41]

In applying the judicial policy to the Coastal Zone Act, the standards and general policy set forth in the statute are adequate to permit reasonable regulations thereunder. The policy of the Act is to control the location, extent and type of industrial development in Delaware's coastal areas, so as to protect the natural environment of the Delaware Bay and coasts and safeguard their use primarily for recreation and tourism. The standards fixed by the legislature to control the State Planning Office in the exercise of its discretion are extremely clear. Heavy industry is defined as industry that has the potential to pollute when equipment malfunctions or human error occurs. This definition is accompanied by specific characteristics and specific examples of what constitutes heavy industry. In passing on permit requests for light industry the State Planner is required to consider the environmental impact of the proposed use, its economic and aesthetic effects, the number

and type of supporting facilities required, the effect on neighboring land uses, and any county and municipal comprehensive plans for the development and/or conservation of their areas. There is no doubt that these will be considered adequate standards especially in light of Delaware cases on the delegation problem that hold:

> ...where the discretion to be exercised relates to the police regulation for the protection of public morals, health, safety or general welfare, it is impracticable to fix standards without destroying the flexibility necessary to enable administrative agencies to carry out the legislative will, and the legislation delegating such discretion without such restrictions may be valid.[42]

A related issue that would possibly to raised in connection with the transfer of power, is whether the State can limit the zoning power given to local subdivisions by the original enabling legislation or by the home rule provisions. Many states have delegated significant authority in estuarine management and land use to local government, and in some cases these local controls are protected from state legislative interference by so called "home rule" provisions under which municipal affairs or matters not of state wide significance are constitutionally protected powers of local government.[43] Both the case law and the statutes in Delaware are contrary to this policy.

It is established by a majority of decisions today that in the absence of constitutional limitations, local subdivisions are subject to complete state regulation. The state has the right to withdraw the authority or make general regulations which supercede the local ordinances. In Cutrona v. Mayor and Council of Wilmington,

the Delaware Court held that the legislature had the right to take from a department of the city government powers previously given.[44] The rationale behind this policy is that the power to enact new legislation is an undenied legislative function. The efficacy of the legislation depends upon the process of the power to repeal the existing law. Consequently, the legislative power to repeal prior laws exists as a necessary part and increment of the legislative power and function vested in the legislature by the state constitution.

In any case the Delaware statutes are specific on this point. Title 22 of the Delaware Code gives local subdivisions home rule, but section 835 of this title prohibits these localities from amending their charters if the amendment would contravene state law.[45] By inference, the logic of this section would indicate that the state can pass legislation taking away powers previously granted. Also, title 9 of the Delaware statutes grants local subdivisions the power to zone. Sections 2623, 4923 and 6923 respectively, deal with the conflict between local zoning regulations and other laws.[46] These sections, although poorly drafted, in the sense that there seems to be internal conflicts within each section as to what laws predominate, state that whenever the provisions of any other statute impose higher standards than are required by any regulations made pursuant to Title 9, the provisions of the statute imposing higher standards shall govern. The sections go on to state that any statute granting powers to the State Planning Office (as the Coastal Zone Act did) shall predominate over any other regulations enacted pursuant to Title 9. Thus in cases where the

Delaware Coastal Zone Act provides for higher state imposed standards than are contained in local zoning ordinances, the state regulations will prevail and cannot be challanged on the basis of unconstitutionally taking away powers granted to local subdivisions. The only other serious obstacle to the Delaware Coastal Zoning Act lies in determining whether the restrictions placed on the use of land are an arbitrary and unreasonable exercise of the police power, constituting a taking for which compensation must be granted.[47]

THE LINE BETWEEN REGULATING AND TAKING

This problem must be analyzed at both the federal and state levels, although it is fair to assert that at least since 1926 the federal constitution has presented an extremely small obstacle to zoning legislation. The celebrated case of Euclid v. Ambler Realty[48] established beyond question that zoning is a legitimate exercise of the state's police power through its subordinate agencies. The trend has been to allow ever-increasing government control over private property interests as evidenced by Justice Douglas' often quoted line from Berman v. Parker: "It is well 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 well controlled."[49] Additionally, the Court has been extremely reluctant even to hear zoning cases during the past few decades leaving the problem to state courts. Based on the Court's refusal to take a recent California case, Consolidated Rock Products Company v. City of Los Angeles,[50] it would be reasonable to assume that the Court has gone out of the zoning business altogether.

The California Supreme Court admitted in Consolidated Rock that the zoning ordinance in question prohibited quarrying on land that had "great value if used for rock, sand, and gravel excavation but no appreciable economic value for any other purpose;" in fact the court conceded that any other use but the prohibited quarrying was "preposterous."[51] Yet, the California court refused to consider the implementation of the ordinance as a taking of the plaintiff's property, and the United States Supreme Court denied certiorari,[52] thereby allowing the City of Los Angeles, through its zoning regulation, to close plaintiff's business and render its property worthless. Other states, including Delaware, have not been willing to go as far as the California court.[53] The point here is that any challenges to the constitutionality of the Delaware Act are going to be decided on the state level.

As to the federal decisions generally, the law sustains a restriction of the use of land, if the restriction is not arbitrary and is based upon the reasonable exercise of the police powers to secure or enhance the public health, convenience, safety or general welfare. In the leading case of Village of Euclid v. Ambler Realty Company the United States Supreme Court ruled:

> ...It must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[54]

The court held that it is permissible to exclude industrial development from districts where such development will harm other uses in the district. The reasonableness and validity of a regulation does not depend upon its impact on the market value of the

land to which it is applied. Such a factor is constitutionally irrelevant as long as the regulation is not arbitrary. This principle was clearly established in Hadocheck v. Sebastian[55] involving an owner who had purchased the land in question because it contained a deposit of very valuable clay for use in brick making. The landowner had already erected the brick factory on the site and was engaged in brick manufacturing before the challenged ordinance was passed prohibiting brick manufacturing in that area. The property was worth $800,000 for brick manufacturing but only $60,000 for any other use. The Supreme Court held the ordinance valid and denied the landowner compensation for a "taking" despite these economic factors. The court stated:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is least limitable. It may indeed seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitations on it when not exerted arbitrarily.[56]

The exercise of the police powers of the state government to secure the public health and welfare against the threats of pollution and the destruction of scenic beauty would seem to be valid under this test.

Delaware cases are in accord with the view that regulation of the use of land is valid when not unreasonable or arbitrary in its application. The Court in Papaioanu v. Commissioners of Rehoboth warned that:

> Under the guise of the state's police powers the use and enjoyment of private property cannot be subjected to arbitrary and unreasonable restrictions which clearly are not essential to the general welfare of the community.[57]

Positively stated, when the legislature in exercising its police power seeks to remedy an admitted evil, the test of constitutionality is whether the method adopted bears a reasonable relationship to the public health, safety, morals or general welfare, and in determining this question doubts are resolved in favor of the challenged statute.[58] A recent case, Willdel Realty, Inc. v. New Castle County[59] stated the rule established in a long history of Delaware cases on the validity of land use regulations enacted under the police power:

> Zoning is a legislative action presumed to be valid unless clearly shown to be arbitrary and capricious because not reasonably related to the public health, safety, or welfare. If the reasonableness of the zoning change (i.e. the reasonableness of its relationship to the public health, safety, or welfare) is 'fairly debatable', the judgement of the legislative body must prevail, and it thereupon becomes the duty of the courts to affirm even though there may be disagreement as to the wisdom of the change. In such situation the court will not substitute its judgement for that of the legislative body charged with the primary duty and responsibility of determining the question.[60]

In light of the rule stated in Willdel, could the Delaware coastal zone act be successfully challenged as an "arbitrary and capricious" exercise of the police power? This involves two determinations: 1) the legitmacy of the object of the legislation; 2) the reasonableness of the relation between the means selected to achieve this object and the object itself.

The object of the legislation is to protect the natural environment of the Delaware coast from the threat of pollution and aesthetic defacement. Are these legitimate objects for the exercise of the police power? Certainly, regulating to prevent destruction of the environment and ecological communities is reasonably related to the public health and the public welfare of

the community. There have been no Delaware cases specifically on this point, but by implication, the Delaware cases on the legitimacy of aesthetics as a proper object of the police power would seem to support the conclusion that preventing destruction to the environment is a legitimate exercise of state power.

As early as 1925 a Delaware court held that aesthetic considerations alone, were not such a promotion of the public welfare as to warrant exclusion from a residential district of a private hospital.[61] The same basic principle was expressed some years later in Papaioanu v. Commissioners of Rehoboth[62] but with an important modification:

> A zoning ordinance which is clearly based entirely on aesthetic considerations relates to mere luxuries or indulgences which are in no sense a necessity, and hence void under both this section [Article I, section 7 of the Delaware Constitution] and the federal constitution. Where, however, other considerations such as the prevention of fire and matters relating to the public health, are, also necessarily involved, the situation is quite different. Moreover, if the validity of the legislative act on which a zoning ordinance is based is fairly debatable, the legislative judgement must control.[63]

The Court also placed heavy reliance on the princples of Euclid v. Ambler Realty Co.[64] where the U.S. Supreme Court upheld a zoning ordinance that excluded industry from districts where it would harm other uses, as a proper exercise of the state's police power. This indicates that Papaioanu would be good authority for the proposition that regulating industrial development in order to protect the environment and its resources is a legitimate object for state regulation. Although the coastal zoning act is based in part on aesthetic considerations, other facts relating to the public health and welfare are involved - prevention of the pollution of air and water in the coastal zone. These "other facts" would sustain the

aesthetic purposes of the act, and in fact, are so interrelated with the aesthetic objectives, that one cannot be considered with out the other.

Further authority for the proposition that the objectives of the coastal zoning act are reasonably related to the public health, safety, and welfare can be found in Petition of Franklin Builders [65], a 1964 Delaware case. The Court sustained a local zoning ordinance restricting signs and billboards to certain districts, citing a Supreme Judicial Court of Massachusetts decision as authority:

> It is an attempt to segregate them to a certain extent to places where from the scenic or historic point of view, the dominant use of the land is indifferent or is the transaction of business, and to shut them out from regions where nature has afforded landscape of unusual attractions. [66]

The Court in Franklin Builders recognized that preservation of the natural beauty of the state is a highly important factor in the public welfare and to preserve this natural beauty promotes the public welfare and is a public purpose. If this is true for billboards, it is certainly even more applicable to regulating industrial development in the coastal zone. It is true that the financial detriment to the property owner may be considerably greater in the coastal zone situation than in the billboard example. However, according to the general rule, a statute is not confiscatory merely because it operates to reduce the value of the property by restricting its use; and the application of this rule is even stricter if there is a benefit to the public. Shellburne, Inc. v. Roberts [67] held that individual financial loss was proper for consideration, but not controlling in considering whether a zoning regulation was a proper exercise of the police power. The reasoning in this case suggests

that even though the regulation results in a serious depreciation of the value of property affected by a zoning regulation, the regulation will not be invalidated as long as the regulation is not "arbitrary and capricious". The importance of this rule is that the difference in the reduction in value between the billboard case and the coastal zoning example does not prevent extending the reasoning of Franklin Builders to the coastal zone legislation. Further authority for the proposition that the objects of the Delaware act are reasonably related to the public health, safety, and welfare can be found in the rule oft cited by Delaware cases that when the statute's relationship to the public welfare is fairly debatable, the judgement of the legislative body must prevail.[68] Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor.[69] Franklin Builders, in examining the constitutionality of zoning laws enacted on the basis of the police power, approved federal case authority on the nature of the power, in that:

> The constitutional guarentees do not vary but the application of constitutional principles must expand or contract to meet new and different conditions which are constantly coming into the field of their operation. This result must inevitably follow if the current mode and standards are to continue and further progress made.[70]

To strike down the Delaware coastal zone act as arbitrary and capricious would be directly contrary to this principle of allowing new concepts and new concerns to govern the direction of judicial zoning decisions. When the coastal areas are rapidly being threatened by massive pollution and the destruction of their natural beauty, allowing new concepts and concerns to govern zoning decisions is not only advisable, but rather, it is imperative.

Challenges to the validity of a zoning law are customarily made on the blanket ground that the law is unconstitutional in that it is confiscatory, arbitrary, unreasonable, and deprives the plaintiff of property without due process of law and equal protection of the law as guarenteed under the federal and state constitution. In Delaware, the "taking" of property without due process of law limitation is intertwined with the definition of the permissible objectives of regulatory power, i.e. is the regulation reasonably related to the public health, safety, and welfare. The basic rule as to whether there is a constitutional necessity to compensate an owner when the state restricts the use of his property by zoning is whether it is done to prevent him from imposing a cost upon others. If this is the case, no compensation must be paid. The dimunition in value of the property as a result of the regulation can be considered in ruling on the constitutionality but it is not a controlling factor.[71] Rather, the controlling factor is whether the statuatory objectives are reasonably related to the public welfare. The objects of the Delaware coastal zone act are to protect the natural environment and scenic beauty of the coastal zone. This will be accomplished by prohibiting heavy industry from locating in the coastal zone and by requiring other industries to meet certain standards before a permit to locate in the coastal zone is granted. In effect, this is regulating the property to prevent industry from imposing a cost on the public - polluting and despoiling the coastal areas. In establishing that the statuatory objectives are permissible under the police power, it is also

established that there has been no taking of property without due process of law.

The constitutional requirement of equal protection is also related to the definition of permissible objectives of the regulatory power. It is sufficient if the classification bears a reasonable relationship either to the general object of the legislation, or to some substantial consideration of public policy or convenience, or the service of the general welfare. In other words, the statute cannot be arbitrary or capricious because not reasonably related to the public health, safety, or welfare. The classification contained in the coastal zone statute does bear a reasonable relation to the object of the legislation. Again, the object is to protect the coastal areas from pollution and to preserve the natural beauty of the area. The classification into light and heavy industry is reasonable since heavy industry has the potential to pollute, while light industry does not. Light industry does not pose the substantial threat to the coastal environment that heavy industry does, and therefore is in more harmony with the objectives of the statute. The classification is reasonable in relation to the objects of the legislation and these objects bear a reasonable relation to the public health, safety, and welfare, and therefore, are not arbitrary and capricious. Thus, there would be no violation of the equal protection clause of either the federal or the Delaware Constitution.

After establishing that the purposes of the coastal zone act are legitimate objects for the exercise of the police power, it must still be shown that the regulations imposed bear a reasonable relation to the attainment of the statuatory objective. In this area the courts give the legislature wide latitude in determining what measures are necessary. Aprile v. State concisely stated the rule:

> A large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for protection of such interests. If the means which are designed by the legislature reasonably tend to accomplish a desired legitimate end, the statute is considered valid. 72

The essence of this requirement is whether the legislature could have determined upon any reasonable basis that the legislation is necessary or desireable for its intended purpose. The court is not required to find that a state of facts exists which justifies the legislation - it is sufficient if a state of facts may reasonably be conceived which would justify it.[73] Certainly there are sufficient facts to justify coastal zoning legislation. The coastal area is truly one of Delaware's most valuable resources. The estuaries, wetlands, salt marshes, woodlands, and beaches that comprise the coastal area are nursery and feeding grounds for fish and wildlife, and serve as valuable recreation areas for Delawareans and tourists. These areas are now threatened by destruction from pollution and physical disruption. The major component of this threat is industrial development which is usually accompanied by heavy pollution and large scale land disruption. It is only through a system of patterned, controlled industrial development that Delaware coastal areas will remain in their present relatively unspoiled condition. These facts justify regulating industrial development through zoning

to prevent pollution and promote aesthetic values. This fulfills the second requirement necessary to prevent a zoning regulation from being arbitrary and unreasonable.

After examining the Delaware case law on the issues involved in the constitutionality of the Delaware act- does the state have the power to classify land for the purpose of regulation? was the delegation of the power a proper delegation? will the classification of the land be reasonable, i.e. will it bear a reasonable relation to the public health, safety, or welfare and will the method chosen bear a reasonable relation to the achievement of statuatory goals? - I can come to no other conclusion that the act will be upheld if, and when challenged in court. The Delaware act has been criticized on the grounds that it is a very crude form of land use regulation; that it doesn't establish a comprehensive method of dealing with other types of development and activities that also threaten the coastal zone, for example, housing subdivisions and commercial enterprises. These criticisms are true - the act contains no provision for control of any other activities that might detrimentally affect the coastal zone. However, the main defect with comprehensive management plans is that they are often so watered down by the time they are passed, that they are virtually ineffective, having no real control over anything. It is often possible for a comprehensive plan to be in existence, but due to political realities, for the plan and its implementation to be continually compromised. The Delaware coastal zone act established a black and white, detailed plan to deal with the most important and pressing need of the Delaware coastal zone - that of dealing with the heavy industrial

development planned for the area. There are no "grey" areas that would enable political concessions to be made that would destroy the effectiveness of the plan. This was a bold and effective step in coastal zone management, and, although not encompassing all development, enables something very real to be done about coastal zone problems.

FOOTNOTES

1. DEL. CODE ANN., tit. 7, chap. 175, adding secs. 7001 through 7014; enacted June 28, 1971.
2. DEL. CODE ANN., tit. 7, chap. 175, sec. 7002(a).
3. DEL. CODE ANN., tit. 7, chap. 175, secs. 7003, 7002(e).
4. DEL. CODE ANN., tit. 7, chap. 175, sec. 7002(e).
5. DEL. CODE ANN., tit. 7, chap. 175, sec. 7004(a).
6. DEL. CODE ANN., tit. 7, chap. 175, sec. 7004(b).
7. DEL. CODE ANN., tit. 7, chap. 175, sec. 7006.
8. DEL. CODE ANN., tit. 7, chap. 175, secs. 7003, 7002(f). Exempted are industrys that have been granted a permit, existing non-conforming uses, and the Port of Wilmington.
9. COASTAL ZONE MANAGEMENT, VOL. 2, #6, p.1, (June 1971).
10. DEL. CODE ANN., tit. 7, chap. 175, sec. 7001.
11. Supra. note 9.
12. Lindsay, Showdown on Delaware Bay, SATURDAY REVIEW, p. 36, March 18, 1972.
13. Id.
14. See generally VIRGINIA INSTITUTE OF MARINE SCIENCE, Coastal Wetlands of Virginia (1969).
15. See generally C. RATHKOPF, THE LAW OF ZONING AND PLANNING 51-106 (3d ed. 1956); E. YOKELY, ZONING LAW AND PRACTICE sec. 25. 47-51 (3d ed. 1965).
16. DEL. CODE ANN., tit. 7,chap. 175, sec. 7005.
17. The Commission on Marine Science, Engineering, and Resources, chaired by J.A. Stratton, was established by the Act of June 17, 1966, Pub. L. No. 89-454, sec. 5, 80 Stat. 203 (codified in 33 U.S.C. secs. 1101 - 24 (1970).
18. HAWAII REV. STAT. secs. 205-1 to -15 (1968), as amended, (Supp. 1970).
19. HAWAII REV. STAT.sec.205-2 (Supp. 1970).
20. See generally Kockelman, Wisconsin Water Resources Act of 1965, 2 URBAN L. ANNUAL 141 (1969).
21. WIS. STAT. ANN. sec.87.30 (Supp. 1970); see also WIS. STAT. ANN. sec.59.971(6) (Supp. 1970).
22. WIS. STAT. ANN. sec.59.971 (Supp. 1970).
23. See generally Wood, Wisconsin's Requirements for Shoreland and Floodplain Protection, 10 NAT. RES. J. 327 (1970).
24. See WIS. STAT. ANN. sec. 87.30 (Supp. 1970).
25. MASS. ANN. LAWS chap. 130, sec.105 (Supp. 1970).
26. Id.
27. Hearings on S. 2802 at 912.
28. DEL. CODE ANN. CONST. Art. I, sec. 7.
29. State v. Grier, 4 Boyce 322, 88 A.579 (1913);Van Winkle v. State (Super.Ct.), 4 Boyce 578, 91 A.385 (1914); Mayor and Council of Wilmington v. Turk, 14 Del.Ch. 392, 129 A.512 (1925); Gallegher v. Davis (Super.Ct.), 7 W.W. Harr.380, 183 A.620 (1936); In re Ceresini (Super.Ct.), 8 W.W. Harr.134, 38 Del. 134, 189 A.443 (1936); Appeal of Blackstone, 8 W.W. Harr.230, 38 Del.230, 190 A.597 (1937); In re Lloyd (Super.Ct.), 9 W.W. Harr.15, 39 Del15, 196 A.155 (1937); Papaioanu v. Commissioners of Rehoboth, 25 Del.Ch.327, 20 A.2d 447 (1941); State v. Hobson, 46 Del.381, 83 A.2d 846 (1951); Auditorium,Inc. v. Board of Adjustment,

8 Terry 373, 91 A.2d 528 (1952); Boozer v. Johnson, 33 Del.Ch.554, 98 A.2d 76 (1953); Wilmington Parking Authority v. Ranken, 34 DEL.CH. 439, 105 A.2d 614 (1954); State Highway Department v. Delaware Power and Light Co., 39 Del.Ch.467, 167 A.2d 27 (1961); In re Opinion of Justices, 54 Del.366, 177 A.2d 205 (1962); Dukes v. Shell Oil, 40 Del.Ch.174, 177 A.2d 785 (1962); McQuail v. Shell Oil Company, 40 Del.Ch.396, 183 A.2d 572 (1962); Petition of Franklin Builders,Inc. (Super. Ct.), 207 A.2d 12 (1964); Shellburne, Inc. v. Roberts (Del.Supr.), 224 A.2d 250 (1966); State ex. rel. Buckson v. Pennsylvania Railroad Co. (Super.Ct.), 237 A.2d 579 (1967); Allen v. Donovan (Del.Supr.), 239 A.2d 227 (1968); Shellburne,Inc. v. Buck (Del.Supr.), 240 A.2d 757 (1968); Opinion of the Justices, 243 A.2d 716 (1968); Willdel Realty,Inc. v. New Castle County (Super. Ct.), 281 A.2d 612 (1971); Mobil Oil Corp. v. Board of Adjustment (Del.Supr.), 283 A.2d 837 (1971).

30. 8 W.W. Harr.230, 38 Del.230, 190 A.597,601 (1937).
31. (Super.Ct.) 7 W.W. Harr.380, 183 A.620,625 (1936); see also Van Winkle v. State, 4 Boyce 578, 27 Del.578, 91 A.385 (1916); State v. Hobson, 46 Del.381, 83 A.2d 846 (1951).
32. Super.Ct. 237 A.2d 539 (1967).
33. 8 Terry 373, 91 A.2d 528,532 (1952); see also Dukes v. Shell Oil Co., 40 Del.Ch.174, 177 A.2d 785 (1962).
34. (Super.Ct.) 207 A.2d 12,30 (1964).
35. DEL. CODE ANN. CONST. Art.II,sec.1.
36. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Corp. v. United States, 295 U.S.495 (1935).
37. 1 Davis, Administrative Law Treatise, sec.207 (1958).
38. Jaffe, Judicial Control of Administrative Action, pp. 76-77 (1965).
39. 2 Terry 273, 41 Del.273, 21 A.2d 185 (1941).
40. Id.p.191.
41. 54 Del.366, 177 A.2d 205 (1962).
42. State v. Durham (Super.Ct.), 191 A.2d 646,649-650 (1963); see also Betts v. Zeller (Del.Supr.), 263 A.2d 290 (1970).
43. e.g. Article XI, secs. 6 and 8(j) of California's Constitution gives charter cities the power to "make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in their several charters."
44. 14 Del.Ch.434, 129 A.421 (1924); see also Sutherland, Statuatory Construction, sec.305; Dillon, Municipal Corporations, secs. 111 - 132; Larke v. Morrissey, 155 Conn 163, 230 A.2d 562 (1967).
45. DEL. CODE ANN., tit. 22, sec.835.
46. DEL. CODE ANN., tit. 9, secs. 2623,4923,6923.
47. See generally Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Michelman, Property, Utility, Fairness , 80 HARVARD 1165 (1967).
48. 272 U.S. 365 (1926).
49. 348 U.S. 26,33 (1954).
50. 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, cert. denied, 371 U.S. 36 (1962).
51. Id.at 517, 370 P.2d at 344, 20 Cal. Rptr. at 640.
52. 371 U.S. 36 (1962).
53. See, e.g., Comm'r. of Natural Resources v. S. Volpe Co., 349 Mass. 104, 206 N.E.2d 666 (1965). The court noted that in such a conflict "between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the former, and it is

the duty of the courts to stand gaurd over constitutional rights." Id. at 109, 206 N.E.2d at 671.

54. 272 U.S. 375,376 (1926).
55. 293 U.S. 394 (1915).
56. Id. at 410.
57. 25 Del.Ch. 327, 20 A.2d 447,449 (1941); see also In re Lloyd (Super. Ct.),9 W.W. Harr. 15, 39 Del. 15, 196 A.155 (1937).
58. Wilmington Parking Authority v. Ranken, 34 Del.Ch. 439, 105 A.2d 614 (1954); see also In re Opinion of Justices, 54 Del.366, 177 A.2d 205 (1962).
59. (Super.Ct.) 281 A.2d 612 (1971)
60. Id. at p.614: see also Mayor and Council of Wilmington v. Turk, 14 Del.Ch. 392, 129 A.512 (1925); Appeal of Blackstone, 8 W.W. Harr. 230. 38 Del.230, 190 A.597 (1937); McQuail v. Shell Oil Company, 40 Del.Ch.174, 177 A.2d 785 (1962);Shellburne,Inc. v. Buck (Super.Ct.), 240 A.2d 757 (1968).
61. Mayor and Council of Wilmington v. Turk, 14 Del.Ch.392, 129 A.512 (1925).
62. 25 Del.Ch.327, 20 A.2d 447 (1941).
63. Id. at p.449; see also In re Ceresini, 8 W.W. Harr.134, 38 Del.134, 189 A.443 (1936).
64. 272 U.S. 375 (1926).
65. (Super. Ct.) 207 A.2d 12 (1964).
66. General Outdoor Advertising Inc. v. Department of Public Works, 289 Mass.149, 193 N.E. 799,816 (1935).
67. Shellburne, Inc. v. Buck (Super.Ct.), 240 A.2d 757 (1968).
68. In re Ceresini, 8 W.W. Harr. 134, 38 Del. 134, 189 A.443 (1936); Willdel Realty Inc. v. New Castle County (Super.Ct.), 281 A.2d 612 (1971).
69. Appeal of Blackstone, 8 W.W. Harr. 230, 38 Del. 230, 190 A. 597 (1937); McQuail v. Shell Oil Company, 40 Del.Ch. 174, 177 A.2d 785 (1962); Shellburne Inc. V. Buck (Super.Ct.), 240 A.2d 757 (1968); Willdel Realty Inc. v. New Castle County (Super,Ct.), 281 A.2d 612 (1971).
70. Petition of Franklin Builders Inc. (Super.Ct.), 207 A.2d 12 (1964); Village of Euclid v. Ambler Realty Co., 272 U.S. 375 (1926); Berman v. Parker, 348 U.S. 26 (1964); Day-Brite Lighting,Inc. v. State of Missouri, 342 U.S. 421 (1952).
71. Shellburne Inc. V. Buck (Super.Ct.), 240 A.2d 757 (1968).
72. Aprile v. State, 143 A.2d 739,745 (1958).
73. DePace v. Mayor and Council of Wilmington, 5 Terry 319,44 Del.319, 58 A.2d 742 (1945).