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Several states have recently enacted legislation regulating dredge and fill operations in certain classes of nonnavigable waters. Professor Ausness examines some of the decisions arising under these acts to determine if any distinguishable trend has emerged regarding the nature and extent of constitutional limitations on the regulation of such activities.

A SURVEY OF STATE REGULATION OF DREDGE AND FILL OPERATIONS IN NONNAVIGABLE WATERS

*Robert C. Ausness**

I. INTRODUCTION

THE common law of England based public and private rights in natural waterbodies on the concept of navigability:[1] Beds under nonnavigable waters were subject to private ownership[2] but the sovereign held title to the beds of navigable waterbodies in trust for the common use and benefit of the people.[3] Structures erected on such beds were deemed to be purprestures and could be seized or destroyed by the government.[4]

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1. Maloney & Plager, *Florida's Lakes: Problems in a Water Paradise*, 13 U. FLA. L. REV. 1, 3 (1960).
2. MOORE, HISTORY AND LAW OF THE FORESHORE AND SEASHORE 639 (3d ed. 1888).
3. *See* MALONEY, PLAGER & BALDWIN, WATER LAW AND ADMINISTRATION—THE FLORIDA EXPERIENCE § 122.1(b), at 353 (1968). [Hereinafter cited as MALONEY, PLAGER & BALDWIN.]
4. *See* 1 Anne, Ch. 7, § 5 (1702).

In America, the states succeeded to the Crown's interest in the beds of navigable waterbodies.[5] In addition to the servitude imposed upon navigable waters by powers of Congress under the commerce clause, the United States Supreme Court declared that the beds under such waters were held by the states in trust for the protection of navigation and other public purposes.[6] The majority of state courts have subscribed to the trust doctrine,[7] while a minority have taken the position that a state may convey title to such lands subject to a public right of navigation.[8]

Most states have utilized the public trust doctrine or their authority over commerce and navigation to sustain regulation over dredging and filling in navigable waters[9] but until lately control over such operations in nonnavigable waters has been left to private remedies based upon theories of nuisance and riparian rights.[10] In recent years, however, due to the scarcity of suitable land for residential and commercial construction, developers have increasingly resorted to the creation of artificial sites by filling along lakes, wetlands and coastal areas.[11] Although the state retains sufficient power to control such practices in indisputably navigable waters, governmental authority is less certain in nonnavigable waters or where privately owned submerged lands are concerned.

Since some dredge and fill operations cause ecological harm,[12] a strong state regulatory program is desirable regard-

5. United States v. Holt State Bank, 270 U.S. 49 (1926); Comment, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171, 172 (1964).
6. Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892).
7. *E.g.*, State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); State *ex rel.* Squire v. City of Cleveland, 150 Ohio St. 303, 82 N.E.2d 709 (1948); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935).
8. *E.g.*, Turk v. Wilson's Heirs, 266 Ky. 78, 98 S.W.2d 4 (1936); California Co. v. Price, 225 La. 706, 74 So. 2d 1 (1953); Hogue v. Glover, 302 S.W.2d 757 (Tex. Civ. App. 1957).
9. Bartke, *Dredging, Filling and Flood Plain Regulation in Michigan*, 17 WAYNE L. REV. 859 (1971).
10. To date few decisions have clearly distinguished between the two theories. *See* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1, 50 (1967).
11. The public trust doctrine prevents alienation of submerged lands under navigable waters. Many states, however, by common law right or statutory enactment, have granted limited rights to riparians to fill out to the channel or to a bulkhead line. Sometimes these submerged lands were granted outright to the riparian owners and sometimes they must be purchased.
12. *See* Note, *Maryland's Wetlands: The Legal Quagmire*, 30 MD. L. REV. 240 (1970).

less of whether or not the waters involved are navigable. Recognizing this fact, several states have recently enacted legislation under their police power to control such activities in certain classes of nonnavigable waters.[13] To date most regulation of dredge and fill operations has been limited to coastal wetland areas and the scope of such legislation has generally been restricted to the protection of marine fisheries and similar ecological considerations.

While such objectives may not be relevant to landlocked states, similar legislation might justifiably regulate dredging and filling in nonnavigable lakes and water-courses,[14] and may concern itself with the protection of water quality, conservation of fish and wildlife, flood control or recreation.[15] The encouragement of urban development along planned lines might also be promoted. With this objective in view, this article will survey several representative regulatory acts and examine cases arising under them.[16] These decisions will be carefully reviewed to determine if any distinguishable trend has emerged regarding the nature and extent of constitutional limitations on dredge and fill regulation.

II. PRIVATE LAW CONTROLS OVER NONNAVIGABLE WATERS

The concept of riparian rights provides the primary basis for control over the use of privately owned submerged beds. In speaking of riparian rights,[17] however, it is necessary to distinguish between those exercised over navigable and nonnavigable waters. Riparian rights in navigable waters accrue

13. *See* note 45 *infra*. Some of these statutes are discussed in section III of this article.

14. N.H. REV. STAT. ANN. § 483-A:1 (1968).

15. N.H. REV. STAT. ANN. § 483-A:1-b (Supp. 1971); MD. ANN. CODE art. 66C, § 718 (1970); ME. REV. STAT. ANN. tit. 12, § 4702 (Supp. 1972); CAL. GOVT. CODE § 66601 (West Supp. 1971).

16. Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission, 11 Cal. App. 3d 577, 89 Cal. Rptr. 897 (1970); Maine v. Johnson, 265 A.2d 711 (Me. 1970); Johnson v. Maine Wetlands Control Board, 250 A.2d 825 (Me. 1969); Golden v. Board of Selectmen of Falmouth, 265 N.E.2d 573 (Mass. 1970); Commissioner of Natural Resources v. S. Volpe & Co., Inc., 349 Mass. 104, 206 N.E.2d 666 (1965).

17. Because of its Latin origin, the term "riparian" is perhaps more properly applied to watercourses than to lakes and the term "littoral" is sometimes used in connection with the latter. However, in this article the term "riparian" will be used in either context since the property rights in both types of waterbodies are similar in most respects.

by virtue of ownership of upland bordering on such waters;[18] they traditionally include access[19] and the right to make reasonable consumptive uses of the water.[20] In addition, riparians share privileges of fishing, bathing, and navigation in common with the general public.[21] Similar consumptive use rights are normally possessed by those whose upland property borders on nonnavigable waters[22] although fishing, bathing, and navigation rights may depend on whether the riparian owns a portion of the bed itself.[23] The submerged beds of nonnavigable waterbodies are subject to private ownership in the same manner as other real property, and in most jurisdictions the public has no rights in such waters.[24] In absence of special circumstances, the title of landowners along nonnavigable streams extends to the thread of the stream.[25] For the most part, the amount of submerged land owned is dependent on the frontage possessed by the riparian owners.[26] Apparently no cases have arisen concerning a common law right of one

18. MALONEY, PLAGER & BALDWIN § 21, at 31; 1 CLARK, WATERS & WATER RIGHTS §16 (1967).

19. *See* 1 FARNHAM, THE LAW OF WATERS & WATER RIGHTS §66 (1904); Annots., 21 A.L.R. 206 (1922), 15 A.L.R.2d 213, 318 (1951).

20. Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 402, 48 So. 643, 644 (1909); Bouris v. Largent, 94 Ill. App. 2d 251, 236 N.E.2d 15 (1968); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914); Barakis v. American Cyanamid Co., 161 F. Supp. 25 (N.D. Tex. 1958).

21. Baker v. State *ex rel.* Jones, 87 So. 2d 497 (Fla. 1956); Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Witke v. State Conservation Comm'n, 244 Iowa 261, 56 N.W.2d 582 (1953); Nelson v. De Long, 213 Minn. 425, 7 N.W.2d 342 (1942).

22. Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969); MALONEY, PLAGER & BALDWIN §22.1(a), at 35.

23. Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890); Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646 (1938); Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919); Annot., 5 A.L.R. 1052 (1920).

24. Osceola County v. Triple E. Development Co., 90 So. 2d 600 (Fla. 1956); Patton Park, Inc. v. Pollak, 115 Ind. App. 32, 55 N.E.2d 328 (1944); Winans Lake Hill Corp. v. Moon, 284 Mich. 688, 280 N.W. 81 (1938); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935).

25. *See* Maloney & Plager, *Florida's Streams—Water Rights in a Water Wonderland*, 10 U. FLA. L. REV. 294 (1957). The presumption could be rebutted by the calls of the deed. *See* Annot., 74 A.L.R. 597 (1931). "The 'thread of the stream,' when called for as a boundary line of private estates, is the middle line between shores, irrespective of the depth of the channel, taking them in the natural and ordinary stage of the water, at medium height, neither swollen by freshets nor shrunk by droughts." State v. Muncie Pulp Co., 119 Tenn. 47, 78, 104 S.W. 437, 445 (1907).

26. Knight v. Wilder, 56 Mass. (2 Cush.) 199, 48 Am. Dec. 660 (1848); Clark v. Campau, 19 Mich. 324 (1869); Cordovana v. Vipond, 198 Va. 353, 94 S.E.2d 295 (1956); Lambert's Point Co. v. Norfolk & W. Ry. Co., 113 Va. 270, 74 S.E. 156 (1912). The judicial rules for apportionment are not absolute, but are subject to variation where equity demands. *See* Groner v. Foster, 94 Va. 650, 27 S.E. 493 (1897).

riparian owner to prohibit another from filling submerged land under nonnavigable streams or tidal areas adjacent to his riparian upland.

In the case of nonnavigable lakes riparians usually own to the center,[27] but special rules have evolved with respect to the rights of boating, swimming and fishing on the surface of the lake.[28] The common law position restricts each riparian owner to the use of the water immediately over his portion of the bed and treats any intrusion thereon as a trespass.[29] In states[30] adhering to the common law view, the right to exclusive possession would presumably enable each owner to fill his portion of the bed unless such operation constituted a private nuisance.[31] A similar view apparently prevails in some of those western states which do not recognize riparian rights.[32] It is obvious, therefore, that the common law rule provides little basis for regulation. At the other extreme some New England states have recognized public recreational rights in all "great ponds" regardless of navigability.[33] This approach

27. Scheifert v. Briegel, 90 Minn. 125, 96 N.W. 44 (1903); Richardson v. Sims, 118 Mass, 728, 80 So. 4 (1918); Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437 (1923); Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890).

28. Many states have rejected title to the bed as controlling and have focused on the suitability of a body of water for recreational use. Some states have only gone so far as to permit common use among riparians and their licensees. Florio v. State *ex rel.* Epperson, 119 So. 2d 305 (Fla. Ct. App. 1960); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960); Monroe v. State, 111 Utah 1, 175 P.2d 759 (1946). Other states allow recreational use by anyone who may gain access without trespassing on the uplands. D'Albora v. Garcia, 144 So. 2d 911 (La. Ct. App. 1962); Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957); State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936); State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

29. Note, *Extent of Private Rights on Nonnavigable Lakes*, 5 U. FLA. L. REV. 166, 176 (1952).

30. Sanders v. De Rose, 207 Ind. 90, 191 N.E. 331 (1934); Walden v. Pines Lake Land Co., 126 N. J. Eq. 249, 8 A.2d 581 (Ct. Err. & App. 1939); Mix v. Tice, 164 Misc. 261, 298 N.Y.S. 441 (Sup. Ct. 1937); Akron Canal & Hydraulic Co. v. Fontaine, 72 Ohio App. 93, 50 N.E.2d 897 (1943); Smoulter v. Boyd, 209 Pa. 146, 58 A. 144 (1904); *cf.* Leonard v. Pearce, 348 Ill. 518 181 N.E. 399 (1932); State v. West Tenn. Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).

31. *Private Rights, supra* note 29, at 166.

32. Johnson & Morry, *Filling and Building on Small Lakes—Time for Judicial and Legislative Controls*, 45 WASH. L. REV. 27, 35 (1970).

33. In Massachusetts, the Great Pond Ordinance of 1641 provided that recreational rights in certain bodies of water could not be privately owned. *Water Recreation, supra*, note 5, at 174. *See* Percy Summer Club v. Welch, 66 N.H. 180, 28 A. 22 (1890); New England Trout & Salmon Club v. Mather, 68 Vt. 338, 55 A. 323 (1896).

would seemingly limit or exclude altogether any private right to fill. Wisconsin has adopted a version of the public trust doctrine which prohibits filling in privately owned navigable waters without state permission.[34] Other states take a middle course and subscribe to the civil law or common use approach.[35] The civil law allows the owner of a portion of the bed to use the surface of the entire lake for fishing, boating and swimming as long as he does not unreasonably interfere with the rights of other proprietors.[36]

The effect of civil law rule on the right to fill is presently uncertain since only two decisions have specifically dealt with this problem.[37] In *Burt v. Munger,*[38] the owner of a portion of the bed of a nonnavigable lake was denied the right to fill a 50-by-150 foot portion of the lake bottom or to construct a cement retaining wall on the bed a few feet from the water's edge. The court did not elaborate a rationale for its decision but noted, "The result of such action would be to increase the extent of plaintiff's land on the shore, at the expense of the lake and defendant's rights therein."[39] Since the state was a civil law jurisdiction, the fill would have interfered with the riparians' rights to travel over the entire lake surface, but the court failed to indicate whether the proposed fill interfered with an easement right on the part of other riparian owners or whether it was an unreasonable use under the riparian rights doctrine.

The "reasonableness" test has long been employed as a limitation of the exercise of rights to consumptive uses,[40] and

34. Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898); Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W.2d 514, 517 (1952). WIS. STAT. ANN. §§30.11-.13 (Supp. 1969).
35. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955); Duval v. Thomas, 114 So. 2d 791 (Fla. 1959); Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960); State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954) (nonnavigable stream); Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956); Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588 (1953); *But see* Wickouski v. Swift, 203 Va. 467, 124 S.E.2d 892 (1962). *See also* Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935).
36. Johnson & Morry, *supra* note 32, at 38.
37. Burt v. Munger, 314 Mich, 659, 23 N.W.2d 117 (1946); Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968).
38. 314 Mich. 659, 23 N.W.2d 117 (1946).
39. *Id.* at 664, 23 N.W.2d at 120.
40. Harris v. Brook, 225 Ark. 436, 283 S.W.2d 129 (1955); Lake Gibson Land Co. v. Lester, 102 So. 2d 833 (Fla. Ct. App. 1958).

has been adopted more recently as a restriction on recreational uses as well.[41] Under this approach, no riparian use is necessarily unreasonable.[42] A recent Washington decision, *Bach v. Sarich*,[43] utilized the riparian reasonable use rule in a dredge and fill case. In the *Bach* case a riparian owner sought to construct an apartment building on the bed of Bitter Lake, a small nonnavigable lake in Seattle, Washington. The plaintiffs, also riparian owners, sought to enjoin the proposed construction on the theory that the civil law rule gave each riparian owner an easement-type interest over the entire lake surface. The trial court entered judgment on behalf of the plaintiffs and this was upheld by the Washington Supreme Court. Despite the enactment of a zoning regulation designating the defendant's portion of the bed for apartment use, the court held that the apartment was not a riparian use, and therefore was unreasonable per se. The court declared:

> Mere proximity of the apartment to the water does not render it a riparian use. With respect to a structure, such a use must be so intimately associated with the water that apart from the water its utility would be seriously impaired.[44]

Under this so-called related use approach the court must decide whether or not a proposed use is riparian or not before it can consider the question of reasonableness. In the case of dredge and fill operations there is still a great deal of latitude; operations associated with the exercise of the traditional riparian rights of fishing, bathing, navigation and the like would presumably be considered riparian uses by the courts and would therefore be permitted if they were otherwise reasonable. However, as in the *Bach* case, dredging or filling in connection with the construction of apartment buildings or the subdivision of land for residential use might be prohibited.

41. *See* Florio v. State *ex rel.* Epperson, 119 So 2d 305 (Fla. Ct. App. 1960); Botton v. State, 69 Wash. 2d 751, 420 P.2d 352 (1966).

42. Johnson v. Morry, *supra* note 32, at 41. In Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 (1967), the court outlined a three-step procedure to be followed when determining the reasonableness of a proposed use: first, ascertain the nature of the lake; second, assess the character and degree of the use itself; and third, evaluate the consequential effects, including benefits and detriments on the interests of other riparians.

43. 74 Wash. 2d 575, 445 P.2d 648 (1968).

44. *Id.* at 579, 445 P.2d at 651.

The question arises of whether the related use test is an appropriate land use control device. Like other doctrines of real property law, it may balance competing private interests satisfactorily, but like most private remedies, is one-dimensional and seldom allows considerations of public policy to operate in individual cases. Nor can it be said as a matter of optimum land use that a riparian use is necessarily desirable or that a nonriparian use is inherently undesirable. To put it another way, the question of riparianism is not the sole criterion of sound land use policy. Whatever its merits as a doctrine of real property, the related use test, and indeed the civil law rule itself, is an inadequate substitute for public regulation where recreational, ecological or other public matters are concerned. For this reason a legislative regulatory approach should be examined.

III. LEGISLATIVE CONTROLS

A number of states have recently started to regulate dredge and fill operations within wetland areas.[45] Most of this legislation falls into the same pattern: a state agency is given authority to promulgate rules and regulations to control dredging and filling in wetland areas regardless of navigability;[46] landowners are required to secure the permission of state[47] and sometimes also local authorities[48] before they may commence dredge and fill operations in such areas. A public hearing is normally required[49] and provision is made for judicial review.[50] The legislation frequently specifies that the

45. *E.g.*, CAL. GOVT. CODE §§66600-66610 (West Supp. 1971); GA. CODE ANN. §§ 45-136 to --147 (Supp. 1970); ME. REV. STAT. ANN. tit. 12, §§4701-09 (Supp. 1972); MD. ANN. CODE art. 66C, §§718-31 (1970); MASS. ANN. LAWS ch. 130, §105 (1972); N.C. GEN. STAT. §113-229 (Cum. Supp. 1971); N.H. REV. STAT. ANN. §483-A:1 to :5 (1968); N.Y. CONSERV. LAW §§429-a to -g (McKinney 1967); R.I. GEN. LAWS ANN. § 11-46.1-1 (1956).

46. *E.g.*, MD. ANN. CODE art. 66C, §722 (1970); MASS. ANN LAWS ch. 130, §105 (1972); N.H. REV. STAT. ANN. §483-A:4-a (Supp. 1971); N.C. GEN. STAT. §113-230(a) (Cum. Supp. 1971).

47. *E.g.*, MD. ANN. CODE art. 66C, §721 and §726 (1970); MASS. ANN. LAWS ch. 130, §27A (1972); N.C. GEN. STAT. §113-229(a) (Cum. Supp. 1971); R.I. GEN. LAWS ANN. §11-46.1-1 (1956).

48. *E.g.*, CAL. GOVT. CODE §66632(a) (West Supp. 1972); ME. REV. STAT. ANN. tit. 12, §§4701-4709 (Supp. 1972); MASS. ANN. LAWS ch. 130, §27A (1972).

49. *E.g.*, MASS. ANN. LAWS ch. 130, §27A (1972); N.H. REV. STAT. ANN. §483-A:2 (Supp. 1971).

50. E.g., N.H. REV. STAT. ANN. §483-A:4 (Supp. 1971); MD. ANN. CODE art. 66C, §728 (1970); MASS. ANN. LAWS ch. 130, §27A (1972).

court shall determine whether the administrative action deprives the landowner of such use of his property as to constitute a taking thereof.[51]

It is worth noting that Maryland and New Hampshire differ somewhat from this model. While most regulatory legislation avoids the issue of navigability in dealing with privately owned submerged lands, the Maryland Wetlands Act[52] departs from this approach by dividing wetlands into public and private areas, and applying more stringent regulation to the former.[53] New Hampshire has enacted comprehensive dredge and fill regulatory legislation that goes beyond wetland protection.[54] The act originally applied only to tidal areas,[55] but was amended in 1969 to include Great Ponds and lakes of ten acres or more, all surface waters of the state, whether navigable or not,[56] and any swamp or bog subject to periodic flooding by fresh water.[57]

A. Massachusetts

In 1963 Massachusetts enacted one of the first statutes to regulate on a statewide basis dredging and filling in coastal wetland areas.[58] The legislation currently declares:

> No person shall remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on coastal waters without written notice of his intention to so remove, fill or dredge to the board of selectmen in a town or to the appropriate licensing authority in a city, to the state department of public works, and to the director of marine fisheries.[59]

The statute further requires the local authorities to hold a hearing on the proposed operation and submit recommendations to the Director.[60] If the area in question contains shell-

51. N.H. REV. STAT. ANN. §483-A:4(II) (Supp. 1971); MD. ANN. CODE art. 66C, §725 (1970).
52. MD. ANN. CODE art. 66C, §§718-731 (1970).
53. *Id.* §719.
54. N.H. REV. STAT. ANN. §§483-A:1 to 5 (1968).
55. Sibson v. State, 110 N.H. 8, 259 A.2d 397 (1969).
56. N.H. REV. STAT. ANN. §§483-A:1-a (Supp. 1971).
57. *Id.*
58. MASS. GEN. LAWS ch. 426 (1963).
59. MASS. ANN. LAWS ch. 130, §27A (1972).
60. *Id.*

fish or is necessary to protect marine fisheries, the Director may impose conditions on the project.[61]

In 1965 the Director was given additional authority to adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging and filling in coastal wetlands.[62] Coastal wetlands, as defined in the act, include:

> [A]ny bank, marsh, swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and such contiguous land as the commissioner reasonably deems necessary to affect by any such order in carrying out the purposes of this section.[63]

Any landowner affected by an order of the Director may bring suit in the superior court to determine whether the order so restricts the use of his property as to deprive him of the practical uses thereof and constitutes an unreasonable exercise of the police power and a taking without compensation.[64] If the court agrees with the landowner's contention, it will invalidate the order as to his property. Thereupon the Director may elect to condemn a fee or lesser interest in the land through the exercise of eminent domain.[65]

To date, no appellate cases have arisen under the 1965 statute; however, the 1963 acts was held valid in *Commissioner of Natural Resources v. S. Volpe & Co.*[66] and was also construed in *Golden v. Board of Selectmen of Falmouth.*[67] In addition, zoning regulations of similar import were twice considered by the court in *MacGibbon v. Board of Appeals of Duxbury.*[68]

A classic review of the substantive due process issue was provided by the court in the *Volpe* case. In 1960, S. Volpe & Co. acquired approximately fifty acres within a 78 acre tract

61. *Id.*
62. MASS. GEN. LAWS ch. 768 (1965).
63. MASS. ANN. LAWS ch. 130, §105 (1972).
64. *Id.*
65. *Id.* MASS. GEN. LAWS ch. 691 (1970), amended the 1965 Act to provide that funds allocated under MASS. ANN. LAWS ch. 132A, §3 (1972), could be used for this purpose. There does not appear to be source of funds for a taking of property under the 1963 Act.
66. 349 Mass. 104, 206 N.E.2d 666 (1965).
67. 265 N.E.2d 573 (Mass. 1970).
68. 347 Mass. 690, 200 N.E.2d 254 (1964), *appeal after remand;* 356 Mass. 635, 255 N.E.2d 347 (1970).

known as Broad Marsh, and three years later sent a written notice to the appropriate state and local officials of its intention to dredge a channel and a basin into the marsh in connection with a marina to be constructed at a later date. It was subsequently determined that the actual purpose of the dredge operation was to fill in the marshes part of a waterfront housing subdivision. The local authorities, the State Department of Public Works and the Army Corps of Engineers initially approved the proposal, but the Director of Marine Fisheries objected, declaring that the protection of marine fisheries and preservation of the ecological components in the estuarine area required that no fill material be placed in the marsh. There was no objection to the proposed channel or basin.

The company, ignoring the agency's orders, began filling portions of the marsh. The Commissioner of Natural Resources and the Director of Marine Fisheries obtained an injunction to prevent the company from continuing its fill operation and to compel it to remove the fill material already placed in Broad Marsh in violation of the permit conditions. The trial judge made four general findings of fact and law: (1) that the fill restriction was authorized by the legislation; (2) that Broad Marsh was a salt marsh necessary to preserve and protect marine fisheries; (3) that legislation itself was valid; and (4) that the fill restriction imposed upon the company was not a taking of property without due process of law entitling it to compensation.[69]

On appeal, before the state supreme judicial court, findings (1) and (2) of the trial judge were accepted since they were not "plainly wrong." The court also apparently agreed with finding (3) since it stated that the protection of marine fisheries was a public purpose and thus within the purview of the legislature. The major portion of the *Volpe* case, therefore, was concerned with item (4), the matter of substantive due process. The court stated that this issue depended on whether or not there had been such a deprivation of practical uses of a landowner's property as to be the equivalent of a taking without compensation. The court applied principles

69. Commissioner of Natural Resources v. S. Volpe & Co., *supra* note 66, at 106, 206 N.E.2d at 668.

of zoning law and placed particular emphasis to two factually similar zoning cases, *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*[70] and *Dooley v. Town Plan & Zoning Commission.*[71]

In the Morris County case, the New Jersey court declared invalid a zoning restriction designed to preserve a swamp area which acted as a wildlife refuge and detention area for flood waters. The zoning ordinance prohibited certain prescribed uses including dumping without a special permit from local authorities. This effectively prevented the landowner, a gravel pit operator, from making any beneficial use of the land. Provisions which were too restrictive were thus deemed "constitutionally unreasonable and confiscatory."[72] The *Dooley* case involved a zoning regulation which established a flood plain zone along a tidal stream and prohibited fill operations within that area. The court declared:

> Where most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil avoided . . . the occasion is appropriate for the exercise of eminent domain.[73]

The uses permitted by the ordinance were impractical and the owner established that the market value of the property would be reduced to seventy-five percent. Accordingly, the Connecticut court held the zoning ordinance to be unreasonable and invalid.[74]

After discussing the *Morris County* and *Dooley* cases, the court in *Volpe* declined to rule on whether prescribed restrictions against filling amount to taking of private property without compensation, but instead remanded the case back to the lower court for the taking of further evidence on such matters as the amount of land below the mean high water marks subject to filling, the uses which could be made of the land in its

70. 40 N.J. 539, 193 A.2d 232 (1963).
71. 151 Conn. 304, 197 A.2d 770 (1964).
72. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, *supra* note 70, at 556-57, 193 A.2d at 242.
73. Dooley v. Town Plan & Zoning Commission, *supra* note 71, at 311-12, 197 A.2d at 774.
74. A previous case, *Vartelas v. Water Resources Comm'n*, 146 Conn. 650, 153 A.2d 822 (1959), had upheld similar legislation.

natural state independently or in conjunction with the property of another, the assessed value of the land in the past five years, the cost of the property to the owner, and the fair market value of the land subject to the restrictions and free of such limitations.[75] There was speculation that the ultimate response to these issues upon the return of the case to the appellate court would resolve unanswered questions concerning the constitutionality of wetland protection laws.[76] The regulatory agency, however, having encountered a highly unfavorable trial judge upon the remand of the case, decided to drop the matter.[77]

As a test of the general validity of the legislative regulation of dredge and fill operations, the *Volpe* case must be regarded as somewhat inconclusive. Its primary significance lies in the court's reliance on zoning as a model for determining the reasonable restrictions of the use of land and the court's enumeration of those facts it considered relevant to the issue of reasonableness.

Soon afterward the constitutionality of dredge and fill regulation again came before the Massachusetts court in *MacGibbon v. Board of Appeals of Duxbury*,[78] although the case involved a local zoning ordinance rather than state legislation. In 1962 the plaintiffs applied to the Duxbury Board of Appeals for a special permit to fill portions of their land. The property in question was comprised of approximately seven acres of shoreland, parts of which were subject to periodic flooding as a result of tidal action. Filling was necessary to enable the land to meet the minimum requirements relating to height above mean sea level and to comply with drainage regulations. Both conditions were prerequisites to the granting of a building permit. The local zoning board, however, denied the special permit application because the plaintiffs had presented no evidence that their land could be filled and used for

75. Commissioner of Natural Resources v. S. Volpe & Co., *supra* note 66, at 111-12, 206 N.E.2d at 671-72.

76. 1 HEYMAN, POWERS: REGULATION—LEGAL QUESTIONS 33-35, 75 (Report Prepared for San Francisco Bay Conservation and Development Commission 1968).

77. Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351 (1970).

78. 356 Mass. 635, 255 N.E.2d 347 (1970).

residential purposes without constituting a hazard to the health of the community.[79] The landowner appealed to the superior court, which upheld the action of the board, but whose decision was reversed on appeal by the supreme judicial court.[80]

In its opinion the court stated that the board's action must be responsive to the landowner's petition and its decision must contain a "definite statement of rational causes and motives, founded upon adequate findings."[81] The court also declared that denial of the fill permit because the land was unsuitable for residential construction or for the construction of septic tanks was improper since the plaintiff's petition did not allege that they intended to engage in residential construction. In other words, the board was to consider only the propriety of the fill operation itself and not the ultimate objective of the landowners. In its brief the board argued that the proposed fill operation would harmfully alter drainage patterns in the area. The court agreed that this allegation, if substantial, might constitute a proper basis for denial of the permit, but noted that the board had taken no evidence on this matter in its proceedings below. Accordingly, the court reversed the board's decision and directed it to reconsider the plaintiff's application in light of whatever information later might be forthcoming on this issue. Subsequently, the plaintiffs again applied for a special permit, this time limiting their application to four separate areas of 10,000 square feet each. The local board again denied the permit application and its action was again upheld by the superior court. The supreme judicial

79. The decision states:
> "[The plaintiffs] have presented no evidence that * * * [their] land could, in fact, be filled and used for residential purposes without constituting a hazard to the health of the community. The marsh * * * [on which the plaintiffs' lots are located] is below the water level at high water * * * . As Duxbury has no system of sanitary sewage disposal, in the opinion of the [b]oard this land is not suitable for installation of a cesspool or septic tank because little or no drainage will be provided for a leaching field. An inadequate leaching field will cause a direct health menace, not only to the occupants of the land in question, but to the entire surrounding residential area."

MacGibbon v. Board of Appeals of Duxbury, 347 Mass. 690, 691, 200 N.E.2d 254, 255 (1964).

80. MacGibbon v. Board of Appeals of Duxbury, 347 Mass. 690, 200 N.E.2d 254 (1964).

81. *Id.* at 692, 200 N.E.2d at 256.

court on appeal a second time held the board's action to be invalid.[82]

The zoning ordinance itself was held to be proper and the court also held that the zoning ordinance contained adequate standards to guide the board in the exercise of its powers. In considering the board's denial of the permit application, the court declared that the board's decision would not be disturbed unless it was based on a legally untenable ground or was unreasonable, whimsical, capricious or arbitrary. Since the board had again failed to indicate factual grounds for its decision, however, the court was compelled to remand the matter back for further proceedings. Because the permit application was returned to the board for further consideration, the court did not decide whether the denial of the plaintiff's permit application constituted a taking of property without just compensation. The court did state that the town could not under the guise of its zoning power preserve privately owned land for public benefit:

> The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act . . . . If such preservation of wetlands was the board's sole objective, it was a legally untenable ground for its decision.[83]

The technical basis for the court's decision in the *MacGibbon* cases appears to be that no authority to protect wetland areas for conservation or aesthetic purposes had been delegated to municipal governments under the general legislative grant of zoning authority, although the court found that the Zoning Enabling Act did permit municipalities to prohibit residential construction on wetlands which would endanger the health and safety of the occupants thereof.

82. MacGibbon v. Board of Appeals of Duxbury, *supra* note 78.
83. *Id.* at 640-41, 255 N.E.2d at 351 (citation omitted).

Less than a year later in *Golden v. Board of Selectmen of Falmouth*,[84] the Massachusetts court apparently receded from its holding in *MacGibbon* and upheld the denial of a special permit under the provisions of the 1963 state wetlands protection act discussed earlier in connection with the *Volpe* case. The plaintiff, the owner of a tract of land extending from the edge of a pond through a tidal marsh to upland property, applied for a special permit to construct a twenty-four foot wide channel in which to dock his two boats. The municipal board of selectmen, acting under the provisions of the state act, denied the permit application even though the state director of marine resources had approved the proposal. The plaintiff appealed the board's decision to the superior court, which ruled that the board had exceeded its authority in refusing to grant the special permit.

The case turned on the issue of whether the Massachusetts wetlands protection act permitted local authorities to deny permits despite approval of the undertaking by the state Director of Marine Resources. The judge of the superior court held that the statute did not permit boards of selectmen to regulate local coastal wetlands once action by the Director had been taken. The supreme judicial court, however, declared that the state statute did not preclude the board from also exercising control over wetland areas within its jurisdiction. It determined that the state zoning enabling legislation conferred the power upon municipalities to regulate the use of wetlands independently of the provisions of the state wetlands protection act. The court concluded that the board had the power to deny the permit as long as its decision was not "based on a legally untenable ground" or was not "unreasonable, whimsical, capricious or arbitrary",[85] the standard applied in the *MacGibbon* case. The court stated, "There is nothing before us showing that the board's decision did not comply with this standard."[86] The *Golden* case represents a remarkable departure from the second *MacGibbon* case. Since the landowner had not filed a brief, apparently no one raised

84. 265 N.E.2d 573 (Mass. 1970).
85. *Id.* at 576. *See also* MacGibbon v. Board of Appeals of Duxbury, *supra* note 78, at 639, 255 N.E.2d at 350.
86. *Id.*

the question of whether the protection of wetlands constituted a "legally tenable ground" under the state zoning enabling act; the *MacGibbon* case had indicated that it was not. The zoning ordinance in the *Golden* case stated that its purpose was "to provide for the reasonable protection ad conservation of certain irreplaceable natural features, resources and amenities for the benefit and welfare of the present and future inhabitants of the Town."[87] This language contains no references to health or safety but resembles those very objectives the court in *MacGibbon* held not to be within the purview of the Zoning Enabling Act.[88] Nor did court in *Golden* inquire into the reasons for the board's denial of the plaintiff's permit. In a footnote to the opinion the board is quoted as denying the permit application because the "special permit would not be providing for the reasonable protection and conservation of the natural resources and features of the Town."[89] If this is the only basis for the board's decision, it hardly comports with the requirement of a "definite statement of rational causes and motives, founded upon adequate findings" imposed upon the local authorities by the court in the first *MacGibbon* case.[90]

The court never really adequately resolved the question of substantive due process. The intent of the ordinance was manifestly to protect a public interest and yet no consideration was given to the matter of whether alternative uses were available to the landowner or whether "there has been such a deprivation of the practical uses of a landowner's property as to be the equivalent of a taking without compensation."[91] In all fairness to the court, however, it must be mentioned that the lower court had based its decision solely on the preemption issue and thus it is possible that the substantive due process matter was never properly raised.

It is difficult to assess the significance of the *Golden* decision at this time. On one hand the case appears to hold that

87. *Id.* at 575 n. 3.
88. MASS. ANN. LAWS ch. 40A (Cum. Supp. 1971).
89. Golden v. Board of Selectmen at Falmouth, *supra* note 84, at 575 n. 3.
90. MacGibbon v. Board of Appeals of Duxbury, *supra* note 80, at 692, 200 N.E.2d at 256.
91. Commissioner of Natural Resources v. S. Volpe & Co., *supra* note 66, at 108, 206 N.E.2d at 669.

municipalities, through the use of their zoning power, can regulate wetland areas independently of state efforts provided that the local restrictions are more stringent than those of the state agency. On the other hand it is uncertain whether *Golden* represents a gradual change in judicial attitude from the concern for property rights exhibited in *Volpe* to a greater tolerance of public regulation in wetland areas since, strictly speaking, the question of an uncompensated taking was not raised. Nevertheless, the *Golden* case would seem to justify a mood of cautious optimism by the proponents of dredge and regulation through the use of the police power.

B. Maine

Maine's wetlands protection act, enacted in 1967, has also established a state agency to regulate dredge and fill operations.[92] The Act provides:

> No person, agency or municipality shall remove, fill, dredge, or otherwise alter any coastal wetland, or drain or deposit sanitary sewage into or on any coastal wetland . . . without first obtaining a valid permit.[93]

Permit applications, including appropriate plans and other data, must be filed with local officials as well as with the Wetlands Control Board.[94] Local officials are required to conduct a hearing on the matter and communicate the results to the state board.[95] The statute defines coastal wetlands as any swamp, marsh, beach, flat or other contiguous lowland above extreme low water which is subject to tidal action or normal storm flowage at any time, excepting periods of maximum storm activity.[96] Permits are issued by municipal authorities subject to the approval of the state agency and either governmental authority may impose conditions on the proposed

92. "The Wetlands Control Board shall be composed of the Commissioners of Sea and Shore Fisheries and of Inland Fisheries and Game, the Chairman of the Environmental Improvement Commission, the Chairman of the State Highway Commission, the Forest Commissioner and the Commissioner of Health and Welfare or their delegates." ME. REV. STAT. ANN. tit 12, §4705 (Supp. 1972).

93. ME. REV. STAT. ANN. tit. 12, §4701 (Supp. 1972).

94. *Id.*

95. *Id.*

96. *Id.*

operation.[97] Appeal may be taken to the superior court if the permit application is denied or conditions are imposed so as to unreasonably restrict the use of the property.[98]

The leading case interpreting the Maine statute is *State v. Johnson.*[99] The plaintiffs owned a tract of land about 220 feet wide and 700 feet long extending across salt water marshes near a tidal river. The landowner's permit application was denied by the state board because the proposed filling would "threaten the public health and would be damaging to the conservation of wildlife and estuarine and marine fisheries."[100] The plaintiffs brought suit alleging that the board's action constituted an unreasoable exercise of the police power and a taking of their property without just compensation. In *Johnson v. Maine Wetlands Control Board* the court had remanded the case for further findings of fact.[101] However, the plaintiffs proceeded with their dredge and fill operation in the absence of the necessary permit and the board sought injunctive relief. The trial court found that the property was a part of a salt marsh area, a valuable natural resource of the state; that the highest and best use for the land if filled would be residential; and that unfilled it had no commercial value. Thereupon an appeal was again taken to the Supreme Judicial Court of Maine which declared that these findings were supported by evidence and were conclusive. The court also upheld the legislation against the allegation that the standards by which the landowner's proposal must be measured were unconstitutionally vague.[102]

In its discussion of substantive due process, the court examined the Wetlands Act in light of zoning case law. The court stated that the government in the exercise of its police power may regulate the use of property and if the owner suffers injury normally it will be regarded as *damnum absque injuria* or he will be considered to have been compensated by sharing in the general benefits which the regulations were in-

97. *Id.* §4702.
98. *Id.* §4704.
99. 265 A.2d 711 (Me. 1970).
100. Johnson v. Maine Wetlands Control Board, 250 A.2d 825, 826 (Me. 1969).
101. *Id.* at 825.
102. State v. Johnson, *supra* note 99.

tended to secure. Quoting from *Pennsylvania Coal Company v. Mahon,*[103] however, the court declared that the magnitude of diminution in value may at times be sufficient to compel the government to utilize its power of eminent domain instead of regulating under the police power:

> One fact for consideration in determining such limits is the extent of the dimunition. When it reaches a certain magnitude, in most if not in all cases there must be a exercise of eminent domain and compensation to sustain the act.[104]

The court cited with approval the *Dooley, Morris County, Volpe* and *MacGibbon* decisions and remarked:

> [T]he Massachusetts cases are of particular significance inasmuch as the "dredge and fill" Act discussed in *Volpe* is expressed in terms closely parallel to our Wetlands Act and the zoning ordinance in *MacGibbon* deals with facts closely akin to those before us.[105]

Significantly, the court declared that the preservation of wetlands, a valuable natural resource of the state, was a matter of state-wide rather than local concern. Since the benefits from the preservation of the wetlands extended beyond the municipal limits, the immediate benefit to the individual landowner was minimal in comparison with the inconvenience imposed upon him. Therefore, the court concluded, "[T]heir [the landowners'] compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the State's police power is unreasonable."[106] The *Johnson* case clearly relied on the rationale of the Massachusetts decisions discussed earlier in this article. However, it should be noted that the *Golden* case had not yet been decided when the *Johnson* case came before the Maine court. It is significant that the act itself and therefore the principle of police-power-controls over privately-owned wetland areas was upheld.

103. 260 U.S. 393 (1922).
104. *Id.* at 413.
105. State v. Johnson, *supra* note 99, at 716.
106. *Id.*

C. California

In 1965 the California legislature established the San Francisco Bay Conservation and Development Commission (BCDC) and directed it to make a detailed study of the bay, and on the basis of the study, to prepare a comprehensive and enforceable plan for the conservation of the waters of the bay and the development of its shoreline.[107] The jurisdiction of BCDC extends to San Francisco Bay itself, to diked salt ponds and over managed wetlands surrounding the bay, to certain tidal waterways, and to an area extending 100 feet landward from the shoreline.[108]

The legislation also provides that any person or governmental agency wishing to place fill or to extract matter, or to make any substantial change in use of any water, land, or structure within the commission's jurisdiction must secure a permit from it and if necessary from any city or county within which any part of the work is to be performed.[109] If a permit is also required by local authorities, they must hold a hearing on the matter and transmit a report to the commission; the commission itself must then hold further hearings.[110] The legislation also states:

> A permit shall be granted for a project if the commission finds and declares that the project is either (1) necessary to the health, safety or welfare of the public in the entire bay area, or (2) of such a nature that it will be consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect.[111]

The commission may attach conditions to the granting of the permit. Also, the commission will be deemed to have granted a permit if it fails to take action on the application within the prescribed period.[112] No specific procedure is provided for judicial review of the commission's action, but the

107. Note, *Saving San Francisco Bay: A Case Study in Environmental Legislation*, 23 STAN. L. REV. 349 (1971).
108. CAL. GOVT. CODE §66610 (West Supp. 1972).
109. *Id.* §66632.
110. *Id.* §66632(b) and (c).
111. *Id.* §66632(f).
112. *Id.*

statute requires proceedings to be brought within ninety days of such action.[113]

In *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission,*[114] the California court upheld the constitutionality of controls imposed over San Francisco Bay. The plaintiff owned a parcel of land submerged at high tide by the waters of San Francisco Bay, but not under navigable waters. This property was adjoined by other parcels which had either been filled or were in the process of being filled. The owner's application for a permit to deposit fill from construction projects was approved by municipal and county authorities but denied by the Bay Conservation and Development Commission. Thereupon, the landowner filed an action in the superior court for mandamus, or in the alternative, damages for an alleged taking of his property without just compensation. The plaintiff, however, was denied relief on both counts. A state intermediate appellate court sustained the commission's action against a variety of arguments raised by the landowner.[115] On the issue of substantive due process, the court held that the denial of the permit did not amount to an unconstitutional taking of property in so doing adopted a fairly broad view of the state's police power:

> The police power of a state is an indispensable perogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied.[116]

113. *Id.* §66632(j).

114. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

115. In addition to the substantive due process issue, the plaintiffs argued: (1) the Hunter's Point Reclamation District Act prevented BCDC from restricting dredge and fill operations within the Hunter's Point District; (2) the permit was deemed to be granted because the District failed to act on it within 60 days as required by CAL. GOVT. CODE §66632(d); (3) that the use of proxies under CAL. GOVT. CODE §66632 was an unlawful delegation of power; (4) that a quorum was not present when the plaintiff's permit application was denied; and (5) the plaintiff was denied procedural due process when it was not allowed to cross-examine adverse witnesses.

116. Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission, *supra* note 114, at 570-71, 89 Cal Rptr. at 905.

It should be noted that California courts have gone beyond those of any other state in sustaining the validity of zoning regulations against constitutional attack.[117] The leading case is *Lockard v. City of Los Angeles.*[118] Two other cases, *McCarthy v. City of Manhattan Beach*[119] and *Consolidated Rock Products Co. v. City of Los Angeles*[120] represent the outer limits of the police power. The plaintiffs in *McCarthy* owned a substantial strip of oceanfront property. In 1941 the city zoned the land for beach recreational activities, the only property in the area so restricted. This action was upheld by the courts despite the fact that the plaintiff's taxes were $9000 per year on the property and it had never been employed in a profitable use. In the *Consolidated Rock* case, cited as authority in *Candlestick,* property of great value for gravel excavation purposes was restricted to agricultural and residential use. The property was located adjacent to another mining operation and was remote from land used for other purposes. Although the land was admittedly worthless for any use but mining, the trial court applied the fairly debatable test[121] and sustained the zoning ordinance. This decision was upheld on appeal.

The court in the *Candlestick* case indicated that the legislation must be sustained if there was any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity. The court determined that recitals in the legislation's declaration of policy provided such a basis:

> In those sections the Legislature has determined that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional ap-

117. HAGMAN, URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW §117 at 213 (1971).
118. 33 Cal. 2d 453, 202 P.2d 38 (1949).
119. 41 Cal. 2d 879, 264 P.2d 932 (1953).
120. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).
121. The use of the fairly debatable test in the *Consolidated Rock* case has been criticized. *See* HAGMAN, *supra* note 117, §118 at 216 n. 33.

proach is necessary to protect the public interest in the bay.[122]

The court also invoked the fairly debatable test of zoning law to support its conclusion that the regulation was valid.[123] On the issue of whether the application of the regulation to the particular plaintiff might not constitute a taking of property without due process of law, the court, while recognizing that some police power regulations might be unconstitutional, did not review the evidence at all, but simply concluded that the regulation did not amount to an undue restriction on the plaintiff's property. The *Dooley* and *Morris County* cases were distinguished; the former because no use at all could be made of the land, and the latter because private property was in effect being used as a flood water detention area and open space.[124]

Obviously the court in the *Candlestick* case felt that the plaintiff had not been deprived of all practical uses of his land, and yet this aspect was not discussed in the same detail as it had been in the *Volpe* and *MacGibbon* cases. Indeed, these cases were not even mentioned. The *Johnson* case had arisen only a few months before, and the *Golden* case was not yet decided. Earlier in its opinion, the court had noted that the property was originally purchased for $40,000 and that it contained the remnants of ship hulls.[125] The plaintiff maintained that the submerged land had no value except as a place to deposit fill or as filled land. The board disputed the accuracy of this allegation but conceded that no information had been placed on the record regarding alternative uses of the property.

It is still too early to tell if *Candlestick* will mark the beginning of a trend toward greater judicial tolerance of

122. Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission, *supra* note 114, at 571-72, 89 Cal. Rptr. at 905-06.

123. It has become traditional in many states to test the reasonableness of a zoning ordinance by the "fairly debatable" standards. The ordinance is considered to be fairly debatable and, therefore, reasonable "when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955).

124. Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission, *supra* note 114, at 572, 89 Cal. Rptr. at 906.

125. *Id.* at 562, 89 Cal. Rptr. at 889.

dredge and fill regulations. Even though California cases in the zoning area are not illustrative of the weight of authority, it appears that at the moment at least *Candlestick* and *Golden* represent the prevailing view.

IV. CONCLUSION

In view of the meager case law available, no final conclusions can be drawn from the experience of wetlands protection legislation in Massachusetts, Maine and California. However, a few tenative findings can perhaps be suggested.

First of all, the protection of wetlands by means of restrictions over dredge and fill operations has met with judicial approval. To date no wetlands protection statute has been held invalid on its face; instead the courts in *Volpe, Golden, Johnson* and *Candlestick* all specifically held such legislation to be within the scope of the state police power. It appears that this authority may be delegated to local government bodies by means of appropriate enabling legislation. These cases also support the premise that legislation which seeks to control similar activities in other classes of nonnavigable waters will be sustained if it is supported by an adequate legislative declaration of policy.

Secondly, no challenge based on grounds of a denial of procedural due process under dredge and fill control statutes has succeeded.[126] Regulatory legislation, however, should provide for administrative hearings concerning permit applications at which all relevant data can be placed on the record. Such administrative findings of fact, thus established, could assist the courts in sustaining the validity of regulatory action. Judicial review should also be available.

Finally, it is clear that the question of whether a taking of property without compensation has occurred will be determined by reference to the principles of the law of zoning.[127] It seems that similar matters are involved in flood plain zon-

126. The only serious challenge on procedural due process appears to have been raised in *Candlestick*.

127. *Cf.* Deloger, *Land Use Control Principles Applied to Offshore Coastal Waters* 59 KENTUCKY L. J. 606 (1971).

ing and other types of regulations to control the use of open space. Cases arising out of such restrictive devices should have considerable relevance to dredge and fill legislation, particularly with respect to the issue of substantive due process. The cases reviewed in this article suggest at least two important factors, diminution in value and public use.

The United States Supreme Court declared in *Pennsylvania Coal Company v. Mahon*[128] that diminution in the value of the property is a significant element in the substantive due process issue. The *Mahon* case was cited with approval in the *Volpe, MacGibbon, Johnson,* and *Candlestick* cases. In principle at least, the owner must be left with some reasonably practical (and profitable) use of his property.[129] Thus, it would appear that while state regulation of dredge and fill operations is feasible, and indeed desirable, there will be situations in which eminent domain will be called for. It follows, therefore, that the statute should provide for payment of compensation in cases where the regulation amounts to a taking of property. An alternative to this might be the inclusion of a "variance" provision. This would mitigate the severity of the regulations in cases where no other profitable use could be made while still providing for exercise of eminent domain.

Another significant factor is the extent to which the plaintiff's land is forced to serve a public purpose. Both the *MacGibbon* and *Johnson* cases dealt with this matter and concluded that the land in question was being so converted and accordingly an exercise of eminent domain power was called for.[130] The same issue arose in the *Dooley*[131] case where flood plain zoning was involved.[132] Clearly, this could cause a serious problem in the case of dredge and fill restrictions imposed for conservation or recreational purposes.

The boundary between proper exercise of the police power and a taking of private property is frequently ill-defined and

128. 260 U.S. 393 (1922).
129. *See* Averne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).
130. *See also* Bartlet v. Zoning Commission of the Town of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971).
131. 151 Conn. 304, 197 A.2d 770 (1964).
132. For a discussion of the constitutional aspects of flood plain zoning see generally, Dunham, *Flood Control Via the Police Power,* 107 U. PA. L. REV. 1098 (1959); 4 NAT. RES. J. 445 (1965).

uncertain. In addition, judicial standards of permissible regulation vary somewhat from state to state.

Nevertheless, some regulatory authority over dredge and fill operations in small lakes and streams as well as fresh water and tidal wetlands is desirable and, in many cases, essential. As discussed previously in this article, private law remedies based on nuisance and riparian rights principles are frequently inadequate. Statutory controls may take the form of a regulatory scheme directly administered by a state agency, or this function may be delegated to local governmental authorities by amendment to existing zoning enabling legislation. In any event, reference to the comparatively settled principles of zoning law should provide a standard by which questions of substantive due process can be determined with a minimum of inconvenience and expense to the litigants.