MEMORANDUM

TO: Howard P. Willens, Esq.
FROM: Howard N. Mantel
SUBJECT: Briefing Paper No. 8: Natural Resources (Draft September 2, 1976)
DATE: September 13, 1976

Page 1, I second paragraph, first footnote

For clarification suggest you indicate who presently owns land on the remaining islands. That comes up later but might be useful here.

-----, third paragraph, third sentence

You might explain the significance of the "three-mile belt of marginal sea . . ."

Page 3, first paragraph, second sentence

Of the total acreage of Tinian Island what amount (percentile) is to be leased to the United States? This datum would be useful as background.

Page 6, A first paragraph

A number of states have acted recently to revamp their governmental infrastructure for environmental management control. A summary of reorganizations designed to create more effective environmental agencies in five states (Illinois, Minnesota, Washington, Wisconsin, New York) is contained in State Environmental Management: Case Studies of Nine States, by Elizabeth H. Haskell and Victoria S. Price.* While these activities do not involve substantial constitutional change, a footnote might be useful either in this

* New York: Praeger Publishers, 1973.

paragraph of your text or later on.

It may be feasible to prepare a short table showing the distribution of various functions encompassed under the arrangements described on pp. 6 and 7 with similar approaches in the cited states or other ones. But since this largely does not deal with constitutional issues, it probably is not worth the effort.

Page 8, B

Just a gratuitous editorial suggestion: you might consider leading off the discussion of general policy issues with the third paragraph on p. 8 and dropping the first paragraph. In the second paragraph, the role of the executive branch does more than promulgate administrative roles and enforcement activities. It also stimulates economic development, tourism, active recreational programs, and the like. Also the first sentence of that paragraph might be reworded. Does it suggest that typically constitutions have not dealt with protection of natural resources or that it is a less suitable vehicle for doing so? In the last sentence of the last part of the third paragraph (continuing onto p. 9) the point that is being suggested or that broadening of opportunities for private law suits involves authorization either in a constitution or by the legislature, which has the effect of broadening the jurisdiction of the courts.

Page 9, first paragraph

The point of the paragraph is well taken. However, if the decision is reached to include some fundamentals in the constitution, consideration might be given to applying the terminology "areas of

critical concern." A recent report by the Council of State Governments states,

> The concept of planning for a regulating 'areas of critical concern' has emerged as a major element of the land use program in most states which have undertaken this kind of activity. In some states, this concept forms the core of the entire program, while others use it as the 'leading edge' of a broader effort because it emphasizes problems and needs which are clearly visible and well established in the minds of both the general public and state and local officials.

The report further quotes a definition of critical areas used by the Senate Committee on Interior and Insular Affairs,

> Areas or uses which are of significant interest to or would have an impact upon inhabitants of an area far beyond the local jurisdiction which possesses the zoning or other land use regulatory powers.*

Page 9, second paragraph, first sentence

One might cite two possible alternatives to a negative statement limiting legislature power in the constitution. The first would be to assert statewide zoning authority and the second would be a mandated statewide comprehensive plan for land resource management. Another report by the Council of State Governments, The State's Role in Land Resource Management, 1972, summarizes statewide comprehensive land-use management approaches, with particular reference to the 1961 Hawaii State Land Use Law. The report notes, "In this type of approach the state typically exercises its constitutionally granted police and regulatory powers through

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* See Council of State Governments, "Issues and Recommendations--State Critical Area Programs," Land Use Policy and Program Analysis, no. 5, 1975, p. 1. The quotation by the Senate Committee is contained in Senate Report No. 93-197, "Land Use Policy and Planning Assistance Act," p. 65.

a long-range, comprehensive land resource plan of its own design. The administration of land resource regulations may be undertaken solely by the state or, as in most instances, by some joint arrangement between the state and local governments." (P. 9) It is interesting, however, that cited examples of innovative action is state land-use management for the period 1961-71 apparently do not deal with constitutional activities but with statutory ones. A copy of Table 1 from the cited report is attached.

Page 10, second paragraph

The statement might be modified somewhat to the effect that a state constitution could create an executive branch agency, but this does not necessarily preclude control by the governor or legislature either with respect to specific functions, appropriations, or other controls. To be sure, constitutionally created agencies usually have a degree of autonomy not enjoyed by legislatively or gubernatorially created agencies, but the statement may be more extreme than is likely to be the case. (If, for example, the constitution were to name the principal departments of the executive branch, this would operate as some constraint on legislative or gubernatorial authority but still could permit considerable flexibility in controls and assignment of specific functions.)

-----, third paragraph, first sentence

One could distinguish between a typical judicial role of courts with respect to land-use transactions and more of an administrative role, which has occurred in some of the American states. I gather you were referring to the former. With respect to citizen actions, should any reference be made at this juncture to exhaustion of administrative remedies, or is that irrelevant to the discussion?

Page 11

Suggest that you add after the third sentence that balancing must also recognize the interdependence among various natural and environmental factors. Severe interference with any one of them can have serious and often detrimental impact on the others.

Page 12, IV A first paragraph, third sentence

Charles M. Lamb makes the point that ". . . states possess authority to regulate land utilization within their boundaries under the Tenth Amendment of the United States Constitution."* Presumably, the commonwealth's inherent power is not dependent on the Tenth Amendment per se, but perhaps it is worth noting (cf. discussion of the Tenth Amendment in other briefing papers).

-----, second paragraph

You don't raise here, although you might, the issue of delegation to local government authorities. That issue generally comes up less with respect to public lands than it does with respect to land-use planning in general. Perhaps, as an alternative, the issue of commonwealth-local government divisions' responsibility ought to be introduced on pp. 9-10 supra. If you do, you might want to quote again from Lamb (pp. 7-8):

> For several reasons this local approach to planning has all too often failed to promote the desired results --coordinated land use. Local governments are typically

* Land Use, Politics, and Law in the 1970s. Washington, D.C.: George Washington University, Program of Policy Studies in Science and Technology, monograph no. 28, 1975, p. 5.

> fragmented structures, a fact which works against effective regulation and for ad hoc decision-making based upon immediate political, economic, social pressures.

One other general point which may be worth noting early on: increasingly land use and marine resource control (including coastal zone management) has involved rather positive assertions by the federal government. The recent literature on the subject tends to emphasize growing federal legislation activities. In effect, the Northern Mariana Islands development represents something of a reverse, since federal land ownership will be shifted to the Commonwealth. This suggests the added, broader responsibility of the Commonwealth government vis-a-vis the state governments.

One final observation: Although we are dealing, in the case of public lands, with controls over the use or disposition of lands that will become property of the Commonwealth government, there has been some experience in public land acquisition as a means of land-use control, including the experience in Europe. Termed land banking, the acquisition or ownership of land by government enables it to control both the nature and timing of development which often can be more effective than zoning or other types of land-use controls.*

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* IPA did a study on advance land acquisition some years ago. In addition, there is reference to the subject in an annotated bibliography by the Council of Planning Librarians, Windfalls for Wipeouts?, an annotated bibliography on betterment, recapture and worsenment . . . avoidance techniques in the United States, Australia, Canada, England, and New Zealand, August 1974, Ch. 16.

Page 16. 2.

I am a bit confused about the third sentence in the beginning paragraph of this section. Assuming the statement is accurate (and begging how one quantifies "generally held view") doesn't this reflect a different historical time sequence? That is, the Marianas view might have been closer to view of American states in the 19th century, particularly the western states in which most of the land was in public domain and there was general movement of population into these areas. Today, even for the larger western states, all land is looked upon as a scarce resource, including public land; hence the need for the "high degree of control and discretion . . ." on the part of state or federal governments. Most of the current literature on land-use management appears to have less to do with the disposition of public lands and more with either the controls of such lands or control of privately held land; hence the emphasis on land-use planning.

In effect, there are dual goals to be pursued in the Marianas: first the general policy on land distribution, which invites some comparison with earlier homesteading provisions, I would assume; and second, wise and effective management of both public and privately held lands for the overall betterment and use of the population, current and future.

One could possibly add another point, and that is that with the exception (I gather) of Saipan Island we are dealing essentially with non-urbanized populations, whereas most of the literature on state land or environmental management deals heavily with control of both urban and rural land in light of burgeoning populations. A 1975 publication of the Council

of State Governments illustrates the earlier prevailing view on land policy and its impact:

> Fear of foreign intrusion encouraged a policy of rapid expension of the nation across the continent and spurred legislation that made land ownership readily available to homesteaders and railroad builders. Through these policies, the original public domain (lands owned or held in trust by the federal government) dwindled from 1,442 million acress to 699 million acres.*

Perhaps the point could be made in this paragraph by adding to it that the fact of widespread public land in the Northern Marianas gives the constitution-makers the option, if they care to exercise it in the constitution, of a land banking operation which provides an orderly means of distributing land and controlling its use. Most states today really no longer have that option because so little land is in the public domain and, if anything, it is a question of regaining statewide controls (as distinguished from local controls) through comprehensive land management systems or statewide zoning, or the like, but usually not state acquisition of lands.

Page 18, top paragraph, last 2 sentences

The sentences to tend to balance the third sentence in the first full paragraph on p. 16, and perhaps the two can be pulled together at the end of the top paragraph on p. 18 before tackling the alternatives. Again, to repeat the point, the Commonwealth government may be in the

* Land, State Alternatives for Planning and Management, Council of State Governments, 1975, p. 3.

unique position, if it cares to exercise such an option, of controlling the timing and method and use of a vast amount of the land area of the Northern Mariana Islands.

Page 18, 3, first paragraph

Would it be worth differentiating in this initial paragraph on alternatives between land in general and land bordering on water, which becomes a particularly scarce resource? In part, specialized treatment of seashore land or land under water has been apparent in the coastal zone management type of legislation that has developed in the last decade.

Page 19, first paragraph, last two sentences

The Nature Conservancy, a private group, has made the point on the need to preserve particularly suitable and attractive natural areas. In a report to the U.S. Department of the Interior, the Conservancy makes this point:

> With the rapid growth in recreational and second home development, agricultural reclamation of marginal lands, and the rush to exploit new energy sources, landscape alteration is reaching into even the most remote areas of our country. In the face of this onslaught, fewer and fewer areas retain much of their original natural character; the diversity of biotic species, ecological communities, and other natural elements stands on an ever-narrowing base. The idea that our country is still relatively unpopulated, with great expanses of wild land is without foundation.*

Page 22, first paragraph

While it is not a constitutional provision, there is language in an act of Congress of September 19, 1964 establishing the Public Land

* The Nature Conservancy, The Preservation of Natural Diversity: a survey and recommendations, 1975, p. 9. The report contains details on state legislation on the subject.

Review Commission which may be worth considering:

> . . . policy of Congress [is] that the public lands of the United States shall be: (a) retained and managed or, (b) disposed of, all in a manner to provide the maximum benefits to the general public.*

It might be useful to include in this discussion, if not subsequently, the "forever wild" provision of the New York Constitution. As contained in Article XIV, Sec. 1, "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed." What follows in the balance of that provision of the constitution are a series of exceptions, including the ubiquitous one having to do with ski trails on the slopes of Whiteface Mountain, and the like. In addition, Sec. IV of the same Article may be noted: "The policy of the State shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of agricultural lands for production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, for protection of agricultural lands, wetlands and shorelines, and development and regulation of water resources . . ."

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* A discussion of aspects of federal public land policy and politics is contained in Daniel H. Henning, Environmental Policy and Administration, 1974, pp. 30-33.

Page 23, third paragraph

One should distinguish between special legislation of the kind involved here and legislation designating specific sites for natural, wilderness, or other special-purpose preservation or use. The general meaning of special legislation has to do with individual parcels and their disposition.

Page 24, last sentence (continuing to p. 25)

There has been considerable invention on the part of the state with comprehensive land-use planning activities which tends to run counter, I think, to the point made in the bottom line of p. 24. In a discussion on state planning issues produced by the Council of State Planning Agencies and the Council of State Governments, an article by Fred. R. Bosselman and David Callies discusses what they term the "quiet revolution in land-use control." They make the point:

> The innovations wrought by the "quiet revolution" are not, by and large, the results of battles between local governments and states from which the states eventually emerge victorious. Rather the innovations in most cases have resulted from a growing awareness on the part of both local communities and state-wide interests that states, not local governments, are the only existing political entities capable of devising innovative techniques in governmental structures to solve problems . . . For example, Hawaii, Vermont and Maine have each adopted a statewide land regulatory system, but the techniques of land-use control employed by each of the three are markedly different.*

* Statewide Planning Issues, 1972, annual meeting of the Council of State Planning Agencies, 1972, p. 75. Aspects of this are also discussed in Haskell and Price, op. cit. In addition, the Council of State Governments' publication, Land: State Alternatives for Planning and Management, cited supra, indicates the fairly broad use of statewide use of planning and controls (see Fig. 1, pp. 10-11). Finally, The Proposed State Legislative Program in the Area of Environment, Land Use and Growth Policy produced by the Advisory Commission on Intergovernmental Relations, November 1975, might be worth reviewing.

In a sense my comments, and by implication the text of the memorandum, transcend public and privately held land use controls. Strictly speaking, controls over private land are more in the minds of those concerned with statewide land-use policies and management systems.

Page 25, top paragraph, last sentence

The reference to "one shot" decisions invites some attention to the concept of planning as a "one shot" as distinguished from a continual process. The prevailing wisdom favors the latter concept. Hence if a serious consideration is to be given to a planning system for public land use in the Mariana Islands, the need is to develop a means of relating economic projections and other factors that should guide particular disposition policies rather than the concept of a single comprehensive or master plan that would prove immutable for ages to come. In effect this implies less the development of a plan and more of a set of standards within which decisions governing dispositions are controlled, as well as the institutional infrastructure for such decisions. I think that point begins to emerge in the last paragraph on p. 25 but could be accentuated somewhat. Certainly one aspect of a reasonable planning system is to temper any rash, widespread disposition of public lands into private ownership by individuals or corporations, which then precludes future governmental control through the disposition methodology (as distinguished from, say, zoning and planning methodologies).

As an aside, and perhaps revealing my own ignorance of the subject, could one consider a constitutional policy which favors outright sale or homesteading of smaller sites for individual owners or families

but non-fee disposition of larger tracts for developmental purposes, calculated to give the Commonwealth residual control over lands while they are in an active development stage by private (and presumably corporate) owners. I am not certain, but I think the Scandinavian experience may be of interest in this regard.

Page 27, second paragraph

I gather that class actions are possible under these types of actions with the ability of the Attorney General to intervene to make sure that the public in general is well protected.

Haskell and Price cite (Ch. 9) the Michigan Environmental Protection Act of 1970 which guarantees ". . . the right of every public and private entity to sue any other public or private entity in State courts to protect the environment." (P. 228) Further, the authors note:

> The law also provides that an individual can sue as a member of the public--on a "class action" basis--and employs the public trust doctrine. This assumes that the government possesses the State's natural resources in trust for the proper use and enjoyment of the citizenry. This fiduciary obligation, when abused, can be enforced in the courts by a private citizen who sues in his role as a member of the beneficiary class--the public.

The authors report further the view of the Michigan Attorney General opposing the legislation who argued that current laws provided all needed remedies to protect the environment. I gather that a major purpose of this legislation is to do away with judicial restrictions on standing to sue.

Perhaps one point that ought to be made clearer is that regardless of the way in which these issues get into the courts, and the popular

appeal of citizen action litigation, they do pose the problem of substituting judicial policy-making for legislative or executive policy-making. I think that point ought to be emphasized.

Page 30, first full paragraph

It may be useful to indicate here what is special and valuable about the corporate arrangement, as distinguished from an ordinary governmental agency. I don't think that is explained fully in the fourth sentence of the paragraph. (Indeed, a recent study not yet published on public authorities indicates that they have a political life of their own, albeit different from the political life of general-purpose government agencies.)

-----, second paragraph

It is also possible that a public land corporation's role can be combined with a more broadly organized commonwealth land-use planning agency, although there is something to be said for not overcomplicating the governmental infrastructure.

Page 31, first paragraph, second sentence

When push comes to shove, perhaps the sentence could be reworked a bit! One thing is to spell out quite precisely what it is that a public land corporation would do, what kind of powers it would have vis-a-vis those given to a general government agency, as well as the question of accountability and delegation of responsibility.

-----, second paragraph

It is pretty clear that you are biased in favor of continuing the public land corporation. I just point this out without editorializing,

but it comes through loud and clear.

Page 32, first paragraph

You might make the point that at least some of the discussion above on public lands management and disposition has some application to the use of private land controls and, in any event, there is a clear interrelationship with respect to a comprehensive land management policy for the Commonwealth.

-----, 1., eminent domain. Footnote.

Under some eminent domain practices it is possible for government to act as the agency to acquire land which in effect has been returned to private use, restoring the land to the tax rolls.

Page 35, last paragraph

Should you add here (perhaps I missed a point) the use of condemnation proceedings for acquisition of less than full-fee interests? There is, I believe, precedent for this and literature on the subject. In effect, this provides some flexibility between the high costs of the full use of eminent domain and constraints on taking under the guise of exercise of police power. I believe that there have been experiments in Pennsylvania and Maryland (my memory may be dim on this) which allowed either voluntary or condemnation procedures to restrict land as open land without the government becoming the fee owner.

Page 36, first paragraph

An important point to be made is that traditionally zoning has been utilized by political subdivisions, more so than by states, although

this is changing slowly, in part influenced by Hawaii. Lamb, op. cit., states, "While Hawaii's counties continue to make zoning decisions with regard to urban land, the State Land Use Commission in the Department of Land and Natural Resources exercises control over land use in agricultural, rural and conservation districts." (P. 15)

It may be useful to follow the first paragraph on p. 36 with the second paragraph on p. 38 which defines what zoning is all about.

Page 37, first paragraph, second sentence

You make reference to possible uses including "underdeveloped coast land." There is a further reference to coastal areas on the top of p. 39 and the full paragraph following. Some additional discussion should be presented, I would think, on coastal zones and coastal zone management. Because the Northern Marianas are islands, control of lands bordering on the seas and the lands under water is a valuable asset and might deserve special constitutional recognition. In this connection see, particularly, chapter 1 of Fred Bosselman, David Callies and John Banta, The Taking Issue.*

Page 38, first paragraph

The concept of tax and economic loss following use restrictions may have been overemphasized in the paragraph. Only the second sentence indicates the more positive side to such restrictions. A well-devised

* A document written for the Council on Environmental Quality and published by the Government Printing Office, 1973.

planning and zoning scheme may augment property values by segregating noncompatible uses and reducing the costs of government services where land has been used in chaotic ways. In fact it has been demonstrated that some zoning or use restriction mechanisms, including historic site designations, can specifically enhance property values. I think these points might be emphasized a bit more.

Page 44, C., fisheries

I gather this is a matter of particular concern for the Northern Marianas. Are there other uses associated with the territorial waters, beyond fisheries, that might be incorporated in particular zoning arrangements or control features? Estuarine zoning (followed in 12 states, including California, Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Rhode Island, Vermont and Wisconsin) might be encompassed. See the Council of State Governments publication quoted earlier, The State's Role in Land Resource Management, p. 13.

Pages 47-49, D., air and water quality

There probably is not too much that can be done in a constitution to guarantee air and water quality. At the same time, I wonder if some discussion should be put in on the limitations of the Florida-type provision which sounds nice but probably has limited impact. Aside from the citizen complaint type of constitutional provision, there are only two kinds of provision that I could see: (1) establishment of an environmental quality agency in the constitution, which poses the problems noted earlier, and (2) a requirement for the establishment of air and water quality standards, again matters which probably do not belong in constitutions.

There is one final approach, and that is earmarking specific revenue sources for these purposes, but that poses, in all likelihood, more problems than it would solve, as reflected in the separate paper on taxation and finance. There is, I gather, no specific need to mention flood control, which consumes a good deal of attention in the literature on state environmental management. Query?

Additional Comments

A few other points may be worth noting or reiterating, based in part on a conversation with Ruth P. Mack.*

1. Would there be virtue in a constitutional guarantee of beach access? One approach, which can be considered constitutional or legislative, would be to prohibit dispositions of land that is at present publicly held without a guarantee that the public would have access to the beach itself. There are technical aspects of restrictions on alienation or public inalienability of seashore land, including the question of high and low tide boundaries and the like. I am just making the basic point.

2. Are there any constitutional issues that arise with respect to assuring control of adequate interior land as well as seashore land with respect toward flood management? One point made is that all flood plains land should remain open.

3. In terms of water quality, is there any need to deal specifically with ownership of rivers and river beds in order to assure appropriate water flows and water levels? There is some technical terminology here, but again I am just trying to make the essential point.

* Dr. Mack is Director of Economic Studies at IPA and has done considerable work on flood plain management.

Table 1

EXAMPLES OF INNOVATIVE ACTION IN STATE LAND USE MANAGEMENT
(1961–71)

| *State* | *Program description* | *Reference* | *First enacted* | *Administered by* | *Category** |
|---|---|---|---|---|---|
| Colorado | Colorado Land Use Act. Provides temporary emergency power over land development activities and authorizes model resolutions. | Ch. 106–4, C.R.S. 1963 | 1971 | Colorado Land Use Commission | A |
| | Authorizes State to prepare subdivision regulations in counties where no regulations exist. | Ch. 106–2, C.R.S. 1963 | 1971 | Colorado Land Use Commission | D |
| Delaware | Coastal Zone Act. State management of shore zone industrial development. | Ch. 70, T. 7 | 1971 | State Planning Office | C |
| Hawaii | Land Use Law. State management of land by broad categorical districts. | Ch. 205 | 1961 | State Land Use Commission | A |
| Maine | State management of all lands in unorganized or deorganized townships. | Title 12, s. 681-689 | 1969 | Land Use Regulation Commission | C |
| | Approval of large-site industrial or commercial developments, potential polluters, and residential sites over 20 acres. | Ch. 3, s. 481-88 | 1970 | Environmental Improvement Commission | B |
| | "Critical Area" program to provide for management of all shoreland areas 250 ft. from high water mark. | Ch. 424, s. 4811-4814 | 1971 | Environmental Improvement Commission | C |
| Massachusetts | "Critical Area" program for protection of coastal and inland wetlands. | Ch. 130, s. 27A, 105 and Ch. 131, s. 40, 40A | 1963 | Department of Natural Resources | C |
| | Zoning Appeals Act. To ensure dispersion of low-income housing. | Ch. 774, s. 1-2 | 1969 | Department of Community Affairs | B |
| Michigan | Shorelands Management and Protection Act | Act No. 245, Public Acts of 1970 | 1970 | Department of Natural Resources | C |
| Oregon | Governor shall prepare land use plans and enforce zoning on all areas not subject to local regulation. | S. 10, 1969 | 1969 | Governor | D |
| Vermont | Approval of site development in accordance with state land use plan. | Ch. 151, 6001 | 1970 | Environmental Board | A |
| | Shoreline Zoning Act. Zoning to prohibit all construction within 500 ft. of shoreline at all bodies of water larger than 20 acres. | Act 281 | 1970 | Department of Water Resources | C |
| Wisconsin | Shoreline Zoning Law. "Critical Area" program for management of lands around lakes and waterways. | Ch. 614-8588 | 1965 | Department of Natural Resources | C |

Note: This chart presents examples of recent state action and does not pretend to be inclusive of all such action.

*A. Management of general land uses within the State.

B. Approval of land use development within the State in accordance with functional criteria (e.g., environmental, housing).

C. Management of land uses within geographically specified critical areas (e.g., wetlands, shorelines, scenic highways).

D. State enactment of zoning or subdivision authority in the absence of a local ordinance or regulation without reference to statewide plan or standards.