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COMPREHENSIVE planning for the development of American communities has a long and respectable history. Beginning with the "city beautiful" movement of the late nineteenth century, comprehensive planning gained support as a process that could assist American communities in providing a pleasant, livable, and well-ordered urban environment. But the first planning efforts did not fully meet this challenge. Early state enabling legislation reflected a narrow perspective that generally limited local governments to planning for public facilities and land use.[1] Conservative judicial opinions neither required municipalities to adopt comprehensive plans as the basis for exercising land use control powers nor immediately recognized that the policies underlying local comprehensive plans should play a significant role in land use control administration.[2]

Increasing urbanization and growing public concern with growth management, environmental protection, and the provision of low-income housing have added new dimensions to the planning process and have imparted an urgency to local comprehensive planning that was not felt earlier. These concerns are reflected in federal legislation mandating comprehensive planning in federal grant-in-aid[3] and environmental programs,[4] in state legislation mandating such plan-

* Howard A. Stamper Professor of Law and Director of Urban Studies, School of Law, Washington University (St. Louis). B.A. 1947, LL.B. 1949, Univ. of Wisconsin; J.S.D. 1956, Yale.—Ed.

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1. This legislation generally followed the language proposed in the Standard Planning Enabling Act. *See* text at notes 7-18 *infra*. For an early example, see Act of May 4, 1927, No. 336, art. XI, § 1149, [1927] Pa. Laws 519 (repealed 1966).

2. *See* note 21 *infra* and accompanying text.

3. *See, e.g.*, Federal-Aid Highway Act of 1970, 23 U.S.C. § 134(a) (1970).

4. *See, e.g.*, Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464

ning by local governments,[5] and in an increasing willingness of the courts to attach greater significance to the comprehensive plan.[6]

This article will deal with the enlarged role of the comprehensive plan in the local land use control process. Part I examines traditional judicial views of the role of the comprehensive plan as a guide to zoning administration. Part II suggests that innovations in land use control and comprehensive planning techniques evidence a need for mandatory planning. Subsequent sections examine changes in the judicial attitude toward the role of the comprehensive plan in land use control administration, and survey some enacted and proposed state legislation that modifies the early planning acts by requiring comprehensive planning. This legislation is analyzed to determine what elements are essential to the mandatory planning process, how they should be enunciated in statutory form, and how the requirement that land use control administration be consistent with the comprehensive plan should be legislatively expressed and legally enforced.

I. The Traditional View of the Comprehensive Plan as a Guide to Local Zoning Controls

In most states, the present statutory basis for local comprehensive planning and land use controls can be traced to model legislation first proposed by the United States Department of Commerce in the late 1920s. Two major model acts were issued: the Standard City Planning Enabling Act,[7] containing statutory authority for planning and subdivision control, and the Standard State Zoning Enabling Act,[8] containing statutory authority for zoning.[9] It is not clear whether these acts were intended to require that zoning be consistent

(Supp. 1974); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. 1974).

5. *See* note 222 *infra*. *See also* text at notes 205-62 *infra*.

6. *See* text at notes 87-204 *infra*.

7. Standard City Planning Enabling Act (U.S. Dept. of Commerce 1928).

8. Standard State Zoning Enabling Act (U.S. Dept. of Commerce rev. ed. 1926).

9. The Standard Zoning Enabling Act was the more successful of the two model acts and is still in effect, with various modifications, in 47 states. *See* 1 N. Williams, American Planning Law § 18.01 (1974). There were few regularly established city departments dealing with planning for private land use at the time the standard acts were drafted; consequently, city administrators moved directly to the drafting and enforcement of zoning ordinances without the benefit of comprehensive general plans. Apparently the resulting pressure for state statutory authority to validate the local zoning process led to the decision to draft the Standard State Zoning Enabling Act first, although logically the Standard City Planning Enabling Act should have been given prior attention. *See* T. Kent, The Urban General Plan 31-43 (1964). *See also* M. Scott, American City Planning Since 1890, at 242-48 (1969).

with a comprehensive plan prepared and adopted independently of the zoning ordinance. The Standard State Zoning Enabling Act did contain enigmatic language stating simply that zoning "shall be in accordance with a comprehensive plan."[10] It can be argued that these words impose such a requirement and that a literal application of this language might have banned zoning in the absence of a comprehensive plan. But this interpretation presents two difficulties. First, since the Zoning Enabling Act was drafted before the planning act, there was at the time of its issuance no statutory planning process to which zoning could be related.[11] Second, when the Planning Enabling Act was finally proposed, it made local planning optional.[12]

Notes appended to the standard zoning act also indicate that the draftsmen did not contemplate an independently adopted comprehensive plan. The footnotes state that the "in accordance" requirement "will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study."[13] This comment suggests that zoning was to be undertaken on the basis of a comprehensive review of local conditions, not that the preparation of an independent comprehensive plan was intended as a condition to the exercise of the zoning power.

The provisions of the Standard City Planning Enabling Act that define the content and role of the comprehensive plan tend to reinforce this interpretation. Early city planning concentrated on local capital improvement programs,[14] and this influence is reflected in the section of the Act that defines the comprehensive plan's contents.[15] This section can conveniently be divided into two parts, the first of which required that the plan include recommendations for the "development" of the "territory" covered by the plan and which listed plan elements. Though the list was expressly not meant to be exhaustive, the elements that it did enumerate related exclusively to recommendations for public capital facilities, streets, and open spaces. The

10. STANDARD STATE ZONING ENABLING ACT § 3 (U.S. Dept. of Commerce rev. ed. 1926).

11. *See* note 9 *supra.*

12. STANDARD CITY PLANNING ENABLING ACT § 2 (U.S. Dept. of Commerce 1928).

13. STANDARD STATE ZONING ENABLING ACT § 3, n.22 (U.S. Dept. of Commerce rev. ed. 1926).

14. *See* Johnson, *Preface*, 31 J. AM. INST. PLANNERS 198 (1965).

15. STANDARD CITY PLANNING ENABLING ACT § 6 (U.S. Dept. of Commerce 1928). This definition was provided even though the draftsmen stated in a footnote to the act that no definition of the plan was thought necessary. *Id.* at § 6, n.32. The draftsmen were apparently divided on this point. *See* T. KENT, *supra* note 9, at 45-46. However, the section of the act expressing the purposes of the plan is not limited to planning for public facilities. STANDARD CITY PLANNING ENABLING ACT § 9 (U.S. Dept. of Commerce 1928).

second part required the inclusion of a "zoning plan," which, though not defined, was clearly intended to cover land uses. The explanatory notes can be construed as containing contradictory statements concerning the form of the zoning plan.[16] These notes do not clarify the exact relationship between the zoning and comprehensive plans, but leave a distinct impression that the zoning plan is a separate document from that part of the comprehensive plan covering public facilities. This interpretation suggests that, if the zoning act's "in accordance" language required an independently prepared plan, it was to be fulfilled by the zoning plan of the Standard City Planning Enabling Act, not by the part of the comprehensive plan that was defined to cover public facilities.

Other features of the standard planning act also suggest that the "in accordance" language of the zoning act was not understood to require reference to some "master plan." Consistent with its apparent distinction between a zoning plan and the part of the comprehensive plan covering public facilities, the planning act implies that a "master plan" be taken into account only to the extent that it governs the construction of these facilities.[17] In addition, even in this regard the plan is only advisory. While public facility construction may be carried out only after planning commission review, commission disapproval can be overriden by a two-thirds vote of the entire membership of the governing body.[18] If the "comprehensive plan" was to be only advisory, and to relate only to public facilities, it is unlikely that the drafters intended that the courts look to it as binding authority on the validity of zoning.

One exception to the advisory status of the comprehensive plan does appear in the subdivision control provisions of the Standard City Planning Enabling Act. Planning commission approval of subdivision plats prior to filing or recording is contingent on the adoption of a "major street plan."[19] The street plan that is contemplated is clearly an element of the comprehensive plan covering public facilities, and is not part of the zoning plan that was also contemplated

16. *See* STANDARD CITY PLANNING ENABLING ACT § 6 n.31, n.36, n.38. The contradiction arises because explanatory note 38 implies strongly that the zoning plan is to be included as part of the general plan; notes 31 and 36 contain emphatic language that the general plan must remain general and not include the intricacies of a zoning plan.

17. *See* STANDARD CITY PLANNING ENABLING ACT § 9 (U.S. Dept. of Commerce 1928).

18. STANDARD CITY PLANNING ENABLING ACT § 9 (U.S. Dept. of Commerce 1928).

19. STANDARD CITY PLANNING ENABLING ACT § 13 (U.S. Dept. of Commerce 1928).

by the planning act.[20] Thus the planning and zoning acts fail to define the zoning plan and leave its relationship to the zoning process unclear.

The early judicial interpretations of the statutes almost uniformly accepted a narrow reading that the "comprehensive plan" with which zoning must be "in accordance" could be found within the text of the zoning ordinance.[21] Perhaps the leading case expressing this "unitary view" is *Kozesnik v. Montgomery Township*,[22] a 1957 decision

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20. *See* text at notes 16-18 *supra*. State legislation has not always followed the Standard City Planning Enabling Act on this point. *See generally*, R. YEARWOOD, LAND SUBDIVISION REGULATION: POLICY AND LEGAL CONSIDERATIONS FOR URBAN PLANNING (1971); Nelson, *The Master Plan and Subdivision Control*, 16 ME. L. REV. 107 (1964).

21. The history of judicial interpretation is discussed in Sullivan and Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URBAN L. ANN. 33 (1975). There is a growing body of literature discussing the role of the comprehensive plan in land use controls. An early and widely cited article is Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). *See* Bernard, *The Comprehensive Plan as a Basis for Legal Reform*, 44 J. URBAN L. 611 (1967); Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955); Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183 (1972); Plager, *The Planning/Land Use Control Relationship*, 3 LAND USE CONTROLS Q. 26 (1969); Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URBAN L. ANN. 69 (1975); Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. STATE L. REV. 766 (1974); Comment, *Zoning Shall Be Consistent With the General Plan—A Help or a Hindrance to Planning?*, 10 SAN DIEGO L. REV. 901 (1973); Note, *Comprehensive Plan Requirement in Zoning*, 12 SYR. L. REV. 342 (1961). For additional commentary by a land use planner, see Raymond, *How Effective the Master Plan?*, 2 J. ENVIRONMENT SYSTEMS 225 (1972). A general review of policy-making through the planning process is presented in Berry, *The Question of Policy Alternatives*, in THE GOOD EARTH OF AMERICA 155 (C. Harriss ed. 1974).

Professor Tarlock's article presents a carefully reasoned case against both mandatory planning and the requirement that land use controls be consistent with an adopted plan. His argument has its origins in Pareto-based theories of property rights and property regulation, which prefer privately-negotiated means for resolving land use conflicts. These theories in turn are based on cost-free assumptions about the bargaining and negotiation process—assumptions that many urban economists view as tautological, if not unreal. Interview with Charles L. Leven, then Director of the Washington University Institute of Urban and Regional Studies, June 15, 1975. On the other hand, equally tautological assumptions, *e.g.*, that public decision-makers possess all needed data and can be expected to make optimal public policy decisions, could be constructed to "support" virtually unrestricted public planning and land use regulation. Professor Tarlock has also published a fascinating account of an attempt to implement a comprehensive planning policy for shopping center development. Tarlock, *Not in Accordance with a Comprehensive Plan: A Case Study of Regional Shopping Center Conflicts in Lexington, Kentucky*, 1970 URBAN L. ANN. 133.

For additional criticisms of the marketplace approach to land development controls, see Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1026-33 (1975); Oxley, *Economic Theory and Urban Planning*, 7 ENVIRON. & PLANNING 497 (1975).

22. 24 N.J. 154, 131 A.2d 1 (1957). *See* Furtney v. Zoning Commn., 159 Conn. 585, 271 A.2d 319 (1970); Nottingham Village, Inc. v. Baltimore County, 266 Md.

of the New Jersey supreme court. The New Jersey zoning enabling legislation had incorporated the "in accordance" language of the standard act,[23] but no independent comprehensive plan had been prepared or adopted by the township. Plaintiff argued that a zoning amendment was therefore ultra vires since the statutory requirements had not been met. The court upheld the amendment, reasoning that the history of planning and zoning legislation in the state indicated that no comprehensive plan external to the zoning ordinance was required.[24]

New Jersey had followed the pattern of the standard enabling legislation and had adopted its zoning act prior to its planning act. This history led the court to conclude that the zoning act did not require a comprehensive plan "in some physical form" outside the zoning ordinance.[25] Having rejected the plaintiff's interpretation of the "in accordance" requirement, the court supplied its own. Relying on early zoning cases, the court found that the intent of the act was to prevent a "capricious exercise" of the zoning power, and thus read a test of fairness and reasonableness into the statute. Without supplying an "exact definition" of "in accordance," the court noted that " 'plan' connotes an integrated product of a rational process and 'comprehensive' requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the

339, 292 A.2d 680 (1972); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Ward v. Montgomery Twp., 28 N.J. 529, 147 A.2d 248 (1959); Allred v. City of Raleigh, 7 N.C. App. 602, 173 S.E.2d 533 (1970), *revd. on other grounds*, 277 N.C. 530, 178 S.E.2d 432 (1971); Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964); Hadley v. Harold Realty Co., 97 R.I. 403, 198 A.2d 149 (1964). *See* N. WILLIAMS, *supra* note 9, at 435-38.

In Shelton v. City of Bellevue, 73 Wash. 2d 28, 35, 435 P.2d 949, 953 (1968), the court stated that a comprehensive zoning regulation may evidence and constitute a comprehensive zoning plan. However, "since [the comprehensive plan] usually proposes rather than disposes, it does not ordinarily, without further regulatory implementation, in and by itself, impose any immediate restrictions . . . [but] forms a blueprint for the various regulatory measures it suggests." Later Washington cases have picked up on *Shelton's* "blueprint" theory. *See* State *ex rel.* Standard Mining & Dev. Corp. v. City of Auburn, 82 Wash. 2d 321, 510 P.2d 647 (1973); Buell v. City of Bremerton, 80 Wash. 2d 518, 495 P.2d 1358 (1972); Gerla v. City of Tacoma, 12 Wash. App. 883, 533 P.2d 416 (1975); Sharninghouse v. City of Bellingham, 4 Wash. App. 198, 480 P.2d 233 (1971). *See also* County Commrs. v. Edmonds, 240 Md. 680, 215 A.2d 209 (1965) (holding that master plan recommending uses different from those permitted in existing zoning ordinance did not give rise to presumption of change in conditions or mistake sufficient to overcome the presumption of correctness accorded the original zoning ordinance); text at note 177 *infra*. Cases taking the traditional unitary view may nonetheless rely on the policies of an adopted comprehensive plan to support their decision. *See, e.g.*, First Hartford Realty Corp. v. Plan & Zoning Commn., 165 Conn. 533, 338 A.2d 490 (1973).

23. N.J. STAT. ANN. § 40:55-32 (1967).

24. 24 N.J. at 164-66, 131 A.2d at 6-8.

25. 24 N.J. at 165-66, 131 A.2d at 7.

physical facts and the [statutory] purposes . . . ."[26] This reading of the statute does establish that departure from a "rational process" is a basis for a claim of improperly selective treatment in the zoning amendment process, and thereby provides some protection against arbitrarily adopted zoning amendments. Nevertheless, it effectively rejects the view that independent comprehensive planning is required by the Standard State Zoning Enabling Act.

Concern for a more explicit planning base for the zoning process did not, however, entirely disappear after *Kozesnik* and similar decisions.[27] It was evidenced in *Eves v. Zoning Board of Adjustment*,[28] in which the Pennsylvania supreme court considered the validity of a township's floating limited industrial zone. As with most floating zone ordinances, the zoning text amendment that authorized the floating zone was adopted before specific designation of such districts on the township's zoning map, and provided both explicit controls over the industrial uses allowable in the zone and detailed site restrictions. Landowners were authorized to apply to the township's governing body for map amendments placing their property in the floating zone.[29] Prior to the enactment of the ordinance, the township had engaged in some planning studies, but it had not adopted a comprehensive plan. In an opinion with a somewhat confused rationale, the court invalidated the ordinance as a violation of the "in accordance" requirement.

It is not clear from the opinion whether the court would have validated the township's floating zone procedure had there been a separate comprehensive plan. This confusion is produced in part by the court's apparent unease over the floating zone technique itself. Early in the opinion, the court quoted the observation of an earlier decision that " '[z]oning is the legislative division of a community

26. 24 N.J. at 166, 131 A.2d at 7.

27. The *Kozesnik* opinion recently has been followed in Oklahoma, Tulsa Rock Co. v. Board of County Commrs., 531 P.2d 351 (Okla. App. 1974), and reaffirmed in New Jersey, Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973); Garden State Farms, Inc., v. Bay II, 136 N.J. Super. 1, 343 A.2d 832 (1975).

However, recently passed New Jersey legislation appears to alter the interpretation of *Kozesnik* by referring to a land use plan element of a master plan and stating that, "all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element." N.J. Public Laws 1975, c. 291, § 49 (1976). This statement is tempered by a following provision that allows the governing body to disregard the consistency requirement if acting by majority vote and with the reasons stated in the record.

28. 401 Pa. 211, 164 A.2d 7 (1960). *Cf.* Sheridan v. Planning Bd., 159 Conn. 1, 19, 266 A.2d 396, 405 (1969).

29. 401 Pa. at 213-14, 164 A.2d at 9.

into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan.' "[30] This quotation suggests that the primary reason for the invalidation of the ordinance may have been its departure from the zoning district system, a holding that might hamper use of the floating zone, but does not specifically relate to the comprehensive plan requirement. Elsewhere in the opinion, however, the court criticized the township's planning process[31] for having devised only the "rudiments" that must enter into a comprehensive plan, and for thus failing to satisfy the statutory requirement. The court seemed to indicate that complete fulfillment could be achieved only if the township explicitly defined the planning policies that apply to individual developments in a comprehensive plan external to the zoning ordinance.

If the *Eves* court did intend to prohibit floating zones as being unauthorized by the "in accordance" requirement, the decision's authority has been placed in question by subsequent Pennsylvania statutes[32] and case law.[33] This reading of *Eves* is still valuable as an example of how courts might invalidate zoning techniques that appear to allow too much administrative discretion, but few courts have followed *Eves* in this direction. Moreover, a growing body of legislation specifically authorizes planned unit development and similar administrative controls,[34] and the American Law Institute's (ALI)

30. 401 Pa. at 215, 164 A.2d at 9, *quoting* Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 110, 141 A.2d 606, 609 (1958).

31. 401 Pa. at 219, 164 A.2d at 11.

32. PA. STAT. ANN. tit. 53, § 10606 (1972). *See also* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029 (1972). If this requirement is not met, one Pennsylvania court would shift to the municipality the burden of proving the relevance of the zoning ordinance to community development objectives. *See* Nichols v. State College Borough, 63 Pa. D. & C.2d 41 (C.P. 1971). The court also held that the statute mandated the preparation of a comprehensive plan. For the pertinent statutory language, see PA. STAT. ANN. tit. 53, §§ 10209.1(a)(1), 10301.

33. *See* Russell v. Pennsylvania Twp. Planning Commn., ___ Pa. Commnw. ___, 348 A.2d 499 (1975) (noting that subsequent cases have eliminated the *Eves* comprehensive plan mandate); Raum v. Board of Supervisors, ___ Pa. Commnw. ___, 342 A.2d 450 (1975); Marino v. Zoning Hearing Bd., 1 Pa. Commnw. 116, 274 A.2d 221 (1971). *But cf.* Appeal of Key Realty Co., 408 Pa. 98, 182 A.2d 187 (1962). *See also* Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 67-71 (1965).

34. *See* Bangs, *PUD in Practice: The State and Local Legislative Response*, in FRONTIERS OF PLANNED UNIT DEVELOPMENT 23, 25-29 (R. Burchell ed. 1973). Much of this state legislation is based on a model act prepared by the Urban Land Institute. *See* R. BABCOCK, D. MCBRIDE & J. KRASNOWIECKI, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT pt. II, at 65-83, 84-94 (Urban Land Inst., Tech. Bull. No. 52, 1965). For an example of state legislation based on the model act, see N.J. STAT. ANN. § 40:55-54 to -67 (1967).

Model Land Development Code would permit a wide variety of administrative zoning procedures at the local level.[35] Thus the real vitality of *Eves* lies in its refusal to uphold an administrative zoning technique absent an independently adopted comprehensive plan. *Eves* reveals that the *Kozesnik* interpretation of the "in accordance" requirement, which finds the required plan in a rationally considered zoning ordinance, is simply not possible when the district concept is abandoned and heavily discretionary techniques are substituted. As local zoning practice increasingly employs administrative techniques, courts may be moved to reexamine the continuing feasibility of the *Kozesnik* approach itself.

Nevertheless, *Kozesnik* still represents the prevailing interpretation of the "in accordance" requirement. Though this interpretation severely restricted the role of the comprehensive plan as a guide to local zoning, it may have been the correct statutory construction in view of the fact that the Standard City Planning Enabling Act made local comprehensive planning optional. This interpretation makes the power to zone available to all municipalities, whether or not they have elected to advance an independent comprehensive plan.

While *Kozesnik* and *Eves* considered challenges to zoning ordinances on statutory grounds, the "in accordance" requirement may also be relevant when zoning restrictions are attacked on constitutional grounds. Two constitutional challenges to zoning ordinances can be mounted, each of which may raise questions concerning the weight a court should accord to the comprehensive plan. The classic challenge to a zoning restriction is that it violates both the due process clause of the fourteenth amendment and the fifth amendment's prohibition against governmental "taking" of private property without just compensation, or similar clauses in state constitutions.[36] The courts apply several tests to determine whether a "taking" has occurred, one of which focuses exclusively on the effect of the restriction and finds a "taking" only if no reasonable use of the property remains.[37] The court may therefore ignore the broader community

35. *See* ALI MODEL LAND DEVELOPMENT CODE art. 2 (1975).

36. In this situation, the landowner will allege that the zoning ordinance appropriates his right to use his land and thereby constitutes a "taking" without due process of law. *See, e.g.*, Krause v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (1968).

37. This variant is the "diminution of value" test. Other "taking" approaches have been categorized by several commentators to include (1) the noxious use or nuisance abatement test, (2) balancing theory, and (3) the physical invasion test. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Basis of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38 (1964); U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ANN. REP. 126-34 (1973).

planning policies that underlay the restriction. Other "taking" tests look to whether a severe restriction serves a reasonable or necessary public purpose, such as the abatement of nuisance-like uses.[38]

The second constitutional challenge, based on federal and state equal protection clauses, may require a more direct scrutiny of local planning policies and procedures. Suit may be brought on this ground by a landowner who feels that his property has been more harshly restricted than that of other, similarly situated, landowners.[39] Perhaps more frequently, a neighborhood association or a neighboring landowner challenges "spot zoning"[40] of a single property or small area that permits a more intensive use than that permitted on surrounding properties.[41] In such cases, the court must focus on the reasons for the zoning classification, and the classification must be justified by policies applicable to the whole community. The court, therefore, is more likely to rely on a comprehensive plan as the basis for these policies, although its willingness to draw on the plan to resolve disputes will depend on whether the plan fairly represents duly considered local policies and on whether the zoning ordinance faithfully implements the policies of the plan. Thus, the "in accordance" requirement may be important in challenges to zoning ordinances based on constitutional as well as statutory grounds.

II. A Mandatory Planning Requirement for Local Government

Time has revealed that the decision of the model planning act draftsmen to make the planning function optional was as serious a

38. The balancing theory and the noxious use test refuse to find a "taking" when the public purpose to be achieved justifies the regulation, even though its effect on the landowner may be severe. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (employing these tests when the municipality passed an ordinance prohibiting the further excavations of a gravel pit located in a residential area); Consolidated Rock Products Corp. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962) (appearing to take the balancing approach in prohibiting the extraction and quarrying of rock products).

39. *See, e.g.*, Robinson v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957) (in which plaintiffs alleged discriminatory classification as similar land across the street was in a different zone); D. Mandelker, The Zoning Dilemma 7-11 (1971). *See also* text at notes 92-129 *infra*.

40. *See generally* text at notes 130-83 *infra*. A "spot zoning" challenge may arise either under the equal protection clause or the enabling statute. The court apparently considered a "spot zoning" claim based on the enabling statute in *Kozesnik*, 24 N.J. at 172-73, 131 A.2d at 10-11.

41. *See, e.g.*, Roseta v. County of Washington, 254 Ore. 161, 458 P.2d 405 (1969) (neighboring landowners challenging a single multi-family use zoning change). *See also* D. Mandelker, *supra* note 39, at 70-84. In suits brought by such third parties, standing often becomes a critical issue. *See* Douglaston Civic Assn. v. Galvin, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974) (taking an expansive view of standing for neighborhood associations).

shortcoming as their more widely recognized failure to call explicitly for a comprehensive plan in zoning administration. Whatever reasons for the absence of a planning requirement there may have been, it is now apparent that changes in land use control techniques, expansion in the scope of comprehensive planning, and an increasing emphasis on mandatory planning in federal aid programs all underscore the need for mandating a comprehensive planning process at the local government level.

A. *Changes in the Land Use Control Process*

An augmented planning role is called for by changes that have occurred in the land use control process. Under the Standard State Zoning Enabling Act, the assumption always had been that land uses within communities would be allocated to mapped zoning districts in advance of development. Development would then occur as a matter of right wherever it was consistent with the permitted, mapped uses.[42] This assumption has become less warranted as communities have increasingly formulated land use policy through the zoning amendment process and discretionary zoning techniques. Local zoning ordinances are now often framed to require a legislative change in the zoning map before significant new development can proceed. Most developable land is assigned a low-intensity land use classification meant to deter development until rezoning is requested to accommodate a specific project. In some cases, the existing mapped zoning classifications may be extended to the area to permit the desired development. Alternatively, the zoning ordinance may only contain the text applicable to a floating zone or planned unit developments district, and these districts are then located on the map on a case-by-case basis.[43] As the *Eves* court recognized, under a system in which the zoning text and map are not meant to indicate future land use patterns, it is difficult to read the "in accordance" language out of the enabling act by arguing that the plan is to be found within the zoning ordinance.[44]

B. *The Changing Scope of Comprehensive Planning*

Changes in the scope of comprehensive land use planning also warrant a mandatory planning requirement at the local level. The

42. *See* U.S. NATL. COMMN. ON URBAN PROBLEMS, REPORT OF THE NATL. COMMN. ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 203-04 (1969) [hereinafter 1969 REPORT].

43. *See* F. SO, D. MOSENA & F. BANGS, PLANNED UNIT DEVELOPMENT ORDINANCES 9-10 (Planning Advisory Service Rep. No. 291, 1973).

44. *See* text at notes 28-35 *supra*.

historic focus of this planning on the relation of land uses to existing and projected capital facilities[45] is broadening in response to new pressures.[46] In environmental and growth control programs,[47] there is a need for local planning policies that will direct and contain new development in order to minimize environmental damage and maximize the use of existing and planned public service facilities. These policies may restrict growth in certain areas of the community, such as wetlands and flood plains, while encouraging new growth at locations where environmental damage is not so likely to occur. Higher densities may also be proposed at locations where new development is allowed, in order to minimize encroachment on agricultural and environmental resource areas. Mandatory comprehensive planning is sorely needed to rationalize public decisions to restrict or intensify development, so that a proper balance can be struck between the needs of the public and the desires of landowners affected by these decisions.

Environmental and fiscal considerations have also prompted many communities to adopt managed growth programs. These programs seek to direct growth to preferred sections of the community, usually in step with the provision of needed public services, and may seek as well to phase growth over a period of years or to limit the amount of community growth. Fairness in treatment is particularly important whenever managed growth programs include a timing element. As did the New York court of appeals in *Golden v. Planning Board of the Town of Ramapo,*[48] courts may reasonably require as a condition to these programs that a plan exist for the orderly provision of capital facilities, so that development will not be capriciously deferred on the ground that public facilities are not available. Comprehensive planning is also necessary because of the careful orchestration of community regulatory and public service programs that growth management requires. Both zoning and subdivision control ordinances may be employed in a managed growth program, and these in turn will be linked to community capital facility programming. An adequate planning base is needed if these various programs and regulatory ordinances are to be administered cohesively in furtherance of common policy objectives.

Planning programs must also direct increased attention to low-

45. *See* text at notes 1 and 15-16 *supra.*

46. *See* text at notes 2-6 *supra.*

47. *See* notes 3 and 4 *supra.*

48. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972).

income housing needs. Land use planning long lacked any coordination with planning for low-income housing, an omission due in part to the absence of public subsidies for such housing. Before the passage of the Housing and Urban Development Act of 1968,[49] public assistance was available only for publicly owned housing, and during most of the postwar years public housing was funded by the federal government at minimum support levels.[50] The provision of federal subsidies for privately built low-income housing in the 1968 Act created a new awareness of the need for planning to make decisions about the location and availability of subsidized housing. While the subsequent elimination of the 1968 subsidies for private developers[51] reduced the pressure on planning programs to be sensitive to low-income housing needs, the availability of some federal subsidies for privately built housing through the leased public housing program of the Housing and Community Development Act of 1974[52] has once more brought attention to the role of planning in the low-income housing area.[53]

Traditional planning programs usually have been conducted at the local level, and local governments generally have been hostile to the introduction of low-income housing into their communities. Many regional planning agencies have therefore attempted to meet low-income housing needs by adopting fair share housing plans[54] that estimate low-income housing requirements and provide criteria for the distribution of this housing.[55] Although these plans deserve to be

49. Pub. L. No. 90-448, 82 Stat. 476.

50. *See generally* L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 116-19 (1968).

51. Housing Subsidies to private developers under the 1968 Act provided for mortgage subsidy payments both to developers of multi-family housing and to owner-occupants of single family housing. While the multi-family housing subsidies have been terminated, HUD does intend to use remaining unobligated funds for single family dwellings in a new and somewhat revised housing subsidy program. *See* 41 Fed. Reg. 1168 (1976). Congress may yet act to extend this program.

52. 42 U.S.C. § 1437f (Supp. 1974).

53. For example, communities receiving federal assistance under the 1974 Act must prepare housing assistance plans that indicate local low-income housing needs and the general location of sites for such housing. 42 U.S.C. § 5304(a)(4) (Supp. 1974). The federal statute authorizing federal assistance for state, regional, and local planning also requires that any plans funded under its provisions must contain a housing element indicating how the plan will meet regional housing needs. 40 U.S.C. § 461(c)(1) (Supp. 1974).

54. *See* H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS pt. V (1974). Fair share housing plans have been adopted in such widely diverse areas as Miami County (Dayton), Ohio, Miami, Florida, and Minneapolis-St. Paul, Minnesota.

55. Fair share plans vary in the criteria they use to make these regional housing allocations. Most are explicitly or implicitly based on a low-income housing dispersal policy, but the plans vary the basis by which dispersal should occur. Some fair

included as an important element in regional planning programs, they are not always well-integrated into the comprehensive regional plan. Moreover, they face an uncertain future under recent federal community development and housing legislation.[56] Perhaps the basic difficulty is that few states have as yet responded to this need by amending their enabling legislation to require housing elements in both local and regional plans.[57]

As a result of these newer substantive concerns, planners are being forced to make judgments about land development opportunities that have an increasing effect on the land market. Environmental and growth control programs in particular have a substantial impact on where development will occur. Plans that attempt to improve the availability of housing may conflict with environmental and growth control objectives.[58] Growth controls that limit the accessibility of land for development on the basis of local service inadequacies may unduly restrict the amount of land available for development, and the resulting land scarcities may in turn inflate land prices so that housing opportunities are restricted.[59] Comprehensive

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share plans are based on a proportionate responsibility approach that assigns a fair share of low-income housing as determined by both the local performance in meeting low-income housing needs and the adequacy of local school and other public services to support the additional housing. Other plans are based more explicitly on community and neighborhood planning considerations and attempt to relate a low-income housing policy to more general policies for neighborhood improvement and community growth. *See* H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 54, pt. V.

56. Low-income needs are not ignored by the 1974 housing act, however, since cities and urban counties applying for community development funds under that act are required to prepare housing assistance plans that show the "general location" of housing for low-income persons. The housing assistance plan is intended to provide a "greater choice in housing opportunities," and is explicitly based on a policy of dispersing low-income housing developments. 42 U.S.C. § 5304(a)(4) (Supp. 1974).

While the impact of the housing assistance plan on regional fair share housing plans is not yet clear, and though the housing assistance plans are prepared by cities and counties participating in the federal community development program, the federally required housing assistance plan can be expected to maintain local and regional interest in housing planning strategies.

57. Notable exceptions include California, *see* California Local Planning Act, CAL. GOVT. CODE § 65302(c) (West 1974), and Florida, *see* Florida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3177(6)(f) (Supp. 1975) (requiring that the housing element in local plans make "provision of adequate sites for future housing including housing for low and moderate income families and mobile homes . . .").

58. "Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring. . . ." Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149-50, *appeal dismissed*, 409 U.S. 1003 (1972).

59. *See* E. BERGMAN, EXTERNAL VALIDITY OF POLICY RELATED RESEARCH ON DEVELOPMENT CONTROLS AND HOUSING COSTS 20-29 (1974).

planning must allocate available land among these mutually exclusive, competing uses.

To the extent that the planning process can successfully make these choices, it may also forestall due process "taking" objections to land use restrictions that are adopted in furtherance of the plan. Due process objections arise because implementation of a particular land use strategy may inflict capital "losses" on landowners whose development opportunities have been restricted. The price landowners paid for their land may have reflected either the development allowed on the property when they bought it or the development they expected the community to permit, given its prior zoning record. If new restrictions are imposed suddenly, with little notice, and not in accordance with a comprehensive planning policy, the market will not have an adequate opportunity to adapt.[60] Landowners' expectations will be frustrated and due process challenges to the zoning will result. For example, a community may rezone land from high to lower residential density, usually to further a growth restriction policy requiring a downward revision of expected development levels. Although a landowner technically has no vested property right in an existing zoning classification as applied to his undeveloped land, the courts have shown increasing hostility to piecemeal downzonings not carried out as part of a comprehensive rezoning process.[61]

The problem created for the land market by erratic zoning change can to some extent be avoided. When community policies for new growth and development are both comprehensive and prospective, the market can internalize any restrictions that have been imposed. Land purchases at premium prices in restricted areas can then be viewed as a form of speculation against the system, and the inflated price paid for these lands discounted in any appraisal of the validity of the restriction.[62] While mandatory comprehensive planning will not

60. For an analysis of the role of the comprehensive plan in dealing with uncertainties in the land use control process, see Haar, *The Master Plan: An Inquiry in Dialogue Form*, in C. HAAR, LAND-USE PLANNING 745 (2d ed. 1971). Haar's position is criticized in Tarlock, *supra* note 21, at 86-87.

61. *Compare* Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889 (1974) (invalidating zoning ordinance which allowed piecemeal downzoning inconsistent with comprehensive plan), *with* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (upholding comprehensive downzoning consistent with master plan). *See also* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1974) (awarding damages in inverse condemnation for a downzoning enacted by the city to prevent development on plaintiff's land pending its acquisition as public open space).

62. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 520-22, 542 P.2d 237, 245-47, 125 Cal. Rptr. 365, 373-75 (1975). On the other hand, the landowner who buys in reliance on established planning policies might claim constitutional protection

avoid all due process problems in land use regulation,[63] it may reduce the likelihood that purchasers of land will eventually find themselves in situations in which they believe that land development restrictions on uses and densities have unconstitutionally deprived them of the ability to recapture their investment.

C. *Mandatory Federally Required Planning and the New Regionalism*

Mandatory planning is also needed to impart a regional perspective to local land use policies. Housing markets are regional in scope, and low-income fair share housing plans have usually been executed on a regional scale. Growth control programs must also have a regional focus, for no community can reasonably plan to control growth without taking into account the development policies of its neighbors. Air and water pollution likewise are regional phenomena and require solutions that embrace more than a single community.

The necessarily regional focus of these land development policies will create problems if planning is not made mandatory throughout the region. If only some communities have based their land use controls on policies developed through comprehensive planning, the beneficial effects of such planning will be diluted. Moreover, some areas of the regional land market will be subject to comprehensively based land use controls and some will not. This situation could well create inequities among landowners and could cause substantial instability in the regional land market.

While some states have, by legislation, established effective regional planning agencies,[64] the need for regional planning has primarily been recognized at the federal level. Congress has responded by mandating regional planning as a prerequisite to participation in a variety of federally funded land development and capital facility

when these policies are changed. These problems have surfaced to some extent in the downzoning cases. *See generally* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975).

63. This argument is not intended as an ad hominem approach to constitutional issues in land use regulation. No inference is intended that the constitutional position of the landowner is dependent on his speculative intent, although the cases are not without such suggestions. *See* American Natl. Bank & Trust Co., v. City of Highland Park, 29 Ill. App. 3d 878, 881-82, 331 N.E.2d 597, 600 (1975); Krause v. City of Royal Oak, 11 Mich. App. 183, 189, 160 N.W.2d 769, 772 (1968).

64. One of the most effective of these regional agencies is the Metropolitan Council that has been established in the Twin Cities area of Minnesota. *See* S. BALDINGER, PLANNING AND GOVERNING THE METROPOLIS (1971). For an analysis of the operation of another successful agency, see Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612 (1975).

programs.[65] The ad hoc development of regional planning agencies in response to this federal stimulus had made evident a need for the state to provide a coherent legislative base for regional planning.

Extensive regional planning is required by such diverse federal legislation as the Federal-Aid Highway Act,[66] the Federal Water Pollution Control Act and the Coastal Zone Management Act of 1972.[67] Regional transportation planning under the Highway Act, which has now been extended to include planning for public transit,[68] is a condition for federal acceptance of state projects in the federal-aid system. It has been required since 1965 and must be carried out in all metropolitan areas with populations of 50,000 or more.[69]

National air and water quality legislation has increasingly called for strengthened regional planning to implement national pollution abatement goals. A regional waste quality planning process is mandated by the Federal Water Pollution Control Act for urban areas having serious water quality problems.[70] This planning process is intended to provide a basis for the award of federal grants for waste treatment plants, but includes the preparation of a regional land use policy as it relates to water quality goals. The program also requires that limited land use control powers be delegated to a regional agency authorized to prevent the installation of any new "facilities" that would violate the plan.[71]

No explicit planning process in the conventional sense is dictated by the National Clean Air Act of 1970.[72] This legislation only mandates that state implementation plans specify strategies for the attainment and maintenance of national air quality standards through the application of a variety of enforcement techniques, loosely characterized by the federal Environmental Protection Agency (EPA) as a "control strategy."[73] Nevertheless, the Clean Air Act has been inter-

65. *See* notes 66-69 *infra.*

66. 23 U.S.C. § 134 (1970).

67. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1288 (Supp. 1974); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (Supp. 1974).

68. 23 U.S.C. § 134 (1970); *see also* 23 U.S.C. § 142 (Supp. 1974).

69. 23 U.S.C. § 134(a) (1970).

70. 33 U.S.C. § 1288 (Supp. 1974).

71. 33 U.S.C. § 1288(b)(2)(C)(ii) (Supp. 1974).

72. 42 U.S.C. § 1857c-5 (Supp. 1974). *See* Mandelker & Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 ECOLOGY L.Q. 235 (1973).

73. 40 C.F.R. § 51.1(n) (1975). State implementation plans may contain such land use and transportation controls "as may be necessary" to attain and maintain national air quality standards, but there is no planning basis for these controls other than the state implementation plan which is required by the federal law. *See* 42 U.S.C. § 1857c-5(a)(2)(B) (Supp. 1974).

preted by the EPA to require extensive regional planning, including land use planning,[74] to ensure the maintenance of air quality once the national standards have been achieved.[75]

Another federal statute that calls for a regional planning program is the Coastal Zone Management Act of 1972.[76] Coastal states and territories receiving federal financial assistance under this legislation must prepare and adopt a coastal zone management program, which is to include all of the elements of comprehensive planning.[77] While the impact of this legislation in any state may be modest if the coastal zone is narrowly drawn, the zone may be broadly defined and assume regional dimensions.

This growing array of federal planning requirements has led to demands that the various programs be better coordinated.[78] The need for coordination is especially acute because the land use planning required in the environmental programs emphasizes such goals as air and water quality at the expense of more comprehensive planning objectives. The planning assistance program of the Department of Housing and Urban Development (HUD)[79] may promote rationalization of federal requirements by providing financial aid to participating state, regional, and local planning agencies. Assistance is conditional upon the preparation of housing and land use plans that encompass regional housing needs and growth management objectives;[80] it thus provides a broader conceptual base for the planning process than do the other, functionally oriented, federal planning assistance programs. In addition, the federal agencies supervising the various programs are increasingly utilizing inter-agency agreements to coordinate related federal planning requirements.[81] Never-

74. *See* 3 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR AIR QUALITY MAINTENANCE PLANNING AND ANALYSIS (1974).

75. 40 C.F.R. § 51.18 (1975).

76. 16 U.S.C. §§ 1451-1464 (Supp. 1974). *See* Mandelker & Sherry, *The National Coastal Zone Management Act of 1972*, 7 URBAN L. ANN. 119 (1974).

77. 16 U.S.C. § 1454 (Supp. 1974).

78. This issue surfaced in recent congressional hearings held to consider the Land Use and Resource Conservation Act of 1975. *See Hearings on H.R. 3510 and Related Bills Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. ser. 94-7, at 458-67 (1975) (statement of Eliot R. Cutler, General Counsel and Director of Government Affairs, International Council of Shopping Centers).

79. 40 U.S.C. § 461(b) (Supp. 1974).

80. 40 U.S.C. § 461(c) (Supp. 1974).

81. One such agreement was executed between HUD and EPA in order to coordinate water quality planning with the planning done by regional agencies using HUD financial assistance. *See* 40 Fed. Reg. 22,302 (1975). The agreement provides, generally, that funds available under the HUD planning assistance program shall be used to provide the basic land use planning element for both planning

theless, there is as yet no federal statutory authority for the integration of the planning efforts required by highway, environmental, coastal zone management, and other federal programs.

The growing congressional emphasis on mandatory planning at the state and regional levels presents the states with serious problems of compliance. Special attention must be paid to the coordination of federally mandated planning in regions within states, for many regional areas are subject to more than one federal planning requirement. A particular area, for example, may be subject to both coastal zone planning and to air quality maintenance planning under the Clean Air Act. Although state and regional planning will occur simply because federal law mandates it, a coordinated network of mandatory state and regional plans would help harmonize potentially overlapping federal planning requirements whose planning should be coordinated with operative state- and federally-mandated regional programs to produce a coherent state plan. A mandatory network of state and regional plans would help to provide this kind of statewide coordination.

While federal planning legislation is directed primarily to state and regional programs, problems may also arise from the need to coordinate local planning with federally mandated state and regional plans. For example, the Coastal Zone Management Act of 1972 authorizes extensive local participation in the management and planning process.[82] State legislation making local planning mandatory, rather than optional, would secure the local benefits from such planning programs, and would in turn facilitate local coordination with the various regional, state, and national planning efforts.

III. The Nature of Planning Practice and Its Importance to Legislative and Judicial Acceptance of Planning

As courts and legislatures give enhanced recognition to the role of the comprehensive plan in land use control, they must also be sensitive to changes that have occurred in planning practice. Comprehensive plans historically have included land use maps that projected a precise "end-state" to which the community was supposed to conform

programs. *Id.* at 22,303. *See also* 24 C.F.R. § 600.72(b) (1975) (authorizing governmental agencies receiving HUD comprehensive planning assistance to develop the land use element of their plans "in a form which will allow them to meet the requirements of other Federal programs requiring comparable land use elements . . .").

82. 16 U.S.C. §§ 1452, 1454(g), 1455(c)(1)-(2), 1455(f).

at the close of the planning period. The mapped, end-state plan has been subject to growing criticism as an overly rigid and not very useful technique for the statement of community planning goals.[83] It has been replaced in many communities by a more flexible policy plan that deemphasizes mapping in favor of textual statements delineating the community's general planning policies. As it has dropped its function of projecting optimal land development strategies, planning has also established a more intimate relationship with the political process. In some areas it has limited itself to informing policymakers, such as local governing bodies, of the planning consequences of alternative strategies in order to facilitate intelligent choice.[84]

The degree of specificity provided by the plan to guide land use control administration has thus often declined at the same time that a substantial expansion in the range of policies covered by the plan has complicated decision-making. To some extent, the precision with which the plan can describe future planning alternatives, whether textually stated or mapped, will depend on the nature and size of the jurisdiction that prepares the plan. In very small local jurisdictions the alternatives may be limited, and any plan inevitably will need to make fairly precise choices regardless of the form it takes. As the size of the jurisdiction increases, the available alternatives may often multiply at the same time that the ability to predict the consequences of any choice diminishes. Size brings an increase both in the number of options and the chance that future unforeseen developments will alter original projections. For this reason, plans produced at regional and state levels are less able to delineate definitive development alternatives. Nevertheless, a regional and state planning perspective is required to facilitate coordination of local policies and to avoid undue parochialism (*i.e.*, from exclusionary policies) at the local level.

Specificity can be achieved in policy planning by more flexible use of the mapping process, especially when policy plans cover large

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83. *See* Meyerson, *Building the Middle-Range Bridge for Comprehensive Planning*, 22 J. AM. INST. PLANNERS 58 (1956).

84. An example of this coordinative type of policy planning is the General Plan Revision Program of the City and County of Honolulu. CITY AND COUNTY OF HONOLULU, PLANNING FOR OAHU: AN EVALUATION OF ALTERNATIVE RESIDENTIAL POLICIES (1974). The plan discusses four alternative growth strategies for the island of Oahu, on which the City-County is located. While it favors one of these as the preferred strategy, it is devoted primarily to an analysis of the governmental programs that would be needed to make each alternative effective. The plan also explores the impact that each strategy will have on such variables as housing, the protection of agricultural and environmental resources, and transportation systems.

areas. Maps can accurately depict the general policies for an entire jurisdiction in graphic form. More specific mapped plans can then be prepared to indicate planning policies for smaller areas, such as intensive commercial areas or designated residential sub-areas in an urbanizing county.[85] Detailed plans can be adopted sequentially whenever they are needed to provide particularized planning for these areas. Courts would then be able to rely on the detailed area plans as a more definitive statement of the policies contained in the generalized policy plan, and could consider them in assessing land use controls adopted to implement the planning process.

These changes in the nature of the planning process should affect legislative decisions about the kind of plan and planning process to require, as well as about the role of the plan in the judicial review of specific land use control actions. While legislation can quite properly limit itself to formulating planning options and thereby leave specific choice of plan form and purpose to the planning agency, courts will have to be sensitive to the changing function of plans as they depart from their traditional mapped form. Policy plans are not entirely without weight in the land use control process, but the weight that is given to these plans will depend on their specificity.[86]

IV. Judicial Acceptance of Comprehensive Planning Policies in Land Use Litigation

In a number of cases, courts have departed from the restrictive approach to the "in accordance" requirement that characterized the

85. A mapping system of this type has been adopted in Montgomery County, Maryland. *See* Montgomery County Planning Board, Planning, Zoning, and Subdivision in Montgomery County, Maryland 4-11 (1973) [hereinafter Montgomery County Mapping Plan]. This mapping system is explained as follows:

> The General Plan indicates in broad terms those areas suitable for residential purposes, business or industry, agriculture, open space, transportation, recreation and community facilities. More detailed and specific land use recommendations are contained in local Area Master Plans, which deal with smaller portions of the County. Even more detailed guidelines may be put forth in Sector Plans, which cover particular localities such as Central Business Districts or areas in the immediate vicinity of a rapid transit station. An adopted Area Master Plan or Sector Plan is incorporated as an amendment to the General Plan.

Id. at 5.

86. *See, e.g.*, Fasano v. Board of County Commrs., 264 Ore. 574, 586 n.3, 507 P.2d 23, 29 n.3 (1973). *See also* Baker v. City of Milwaukie, ___ Ore. ___, ___, 533 P.2d 772, 777 n.10 (1975) (plan adopting "general parameters of long term growth" to be given legal effect). For discussion of a policy plan adopted in King County (Seattle), Washington, see D. Mandelker, *supra* note 39, at 107-73. Most courts that have considered the role of the policy plan in land use regulations have dealt with plans that make at least generalized indications of future land use patterns. In some instances, the plan has been sufficiently specific for the court to consider it a critical factor in support of rezoning. *See, e.g.*, Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972); Montgomery v. Board of County Commrs., 263 Md. 1, 280 A.2d 901 (1971).

early decisions and have given weight to the comprehensive plan in land use litigation. These decisions have arisen primarily in zoning litigation in which the courts have been asked to evaluate the consistency of zoning map amendments with the comprehensive plan. While these cases have so far received the closest judicial scrutiny, the comprehensive plan functions in other meaningful ways in the zoning context. For example, land use allocations made through discretionary zoning techniques such as floating zones should also be consistent with the policies of the comprehensive plan. Growth management programs should be ordered by the comprehensive plan so that development opportunities are allocated fairly throughout the growth management period.

A number of land use control techniques not dependent on the zoning process may also raise plan consistency questions. Subdivision control ordinances require the direct review and approval of new subdivisions under standards and criteria provided by the ordinance.[87] Permit requirements in environmental protection legislation may also be related to a plan. The development permits required by the Washington State Shoreline Management Act,[88] for example, are explicitly related to master programs that are prepared for local shoreline areas and that contain the principal elements of a plan. While decisions considering the consistency of permits and other direct approvals with their controlling planning policies are not yet numerous,[89] it can be expected that these questions will soon be frequently litigated.[90]

While courts have so far given weight to comprehensive planning policies primarily in evaluating map amendments to local zoning ordinances, municipalities have also relied on the comprehensive plan in defending against landowner attacks on zoning regulations in cases in which the municipality has refused to rezone. A comprehensive plan reflects a collective judgment about the allocation of development opportunities throughout the community made prior to a zoning map change that alters the restrictions applicable to a particular par-

87. *See* 1969 REPORT, *supra* note 42, at 203.

88. WASH. REV. CODE § 90.58.010 to 930 (Supp. 1974). For a discussion of the Management Act, see Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974).

89. For a case considering statutory environmental impact requirements when land development with a potential for substantial environmental impact is contemplated, see *In re* Spring Valley Dev., 300 A.2d 736 (Me. 1973).

90. *See* ALI, MODEL LAND DEVELOPMENT CODE, 2-211 (1975) (authorizing at the option of local governments the adoption of land use permits in "specially planned areas" directly to implement local plans).

cel of land.[91] The underlying issue in both sorts of cases is the presumptive weight to be given to this prior collective judgment. The courts have resolved this issue in different ways. This article argues that for effective implementation of a mandatory planning requirement, the courts must give presumptive weight to the policies of the comprehensive plan as they are applied in land use control administration, unless special circumstances indicate that the plan is no longer entitled to such authority. The decisions suggest what these special circumstances might be. First, cases involving the policies of a comprehensive plan will be examined in the context of landowner attacks on restrictive zoning ordinances. Attention will then be turned to the role of the plan in the zoning amendment procedures established by the zoning ordinance.

A. *Planning as a Defense to Attacks on Land Use Control Systems*

Suit has often been brought on the ground that land use controls implementing a comprehensive plan are unconstitutionally restrictive. In defense, the municipality has argued that the policies of the comprehensive plan justify the challenged land use restrictions. These cases have thus presented the courts with an opportunity to deal broadly with the comprehensive plan as a substantive prior justification for the community's land use control effort.

One group of decisions in this category has considered the role of the comprehensive plan as a justification for large lot zoning restrictions. This zoning has, in recent years, been under increasing attack as an exclusionary device intended to restrict new development in urbanizing areas.[92] Nevertheless, large lot zoning can be a useful means to implement planning policies aimed at controlling community growth. When a local growth plan is based on a regional growth control policy, the exclusionary argument is less persuasive, and courts may be inclined to uphold both the local planning policies and the large lot zoning that implements them.

An important decision that considers a large lot zoning strategy in the context of a regional growth control plan is *Norbeck Village Joint Venture v. Montgomery County Council*.[93] In the mid-1960s, the

91. *See* Tarlock, *supra* note 21, at 83-84.

92. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); Township of Willistown v. Chesterdale Farms, Inc., ___ Pa. ___, 341 A.2d 466 (1975) (relying on *Mt. Laurel*); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

93. 254 Md. 59, 254 A.2d 700 (1969); *see also* N. WILLIAMS, *supra* note 9, at § 26.11. *Norbeck* was relied upon in Montgomery County Council v. Leizman, 268

regional planning agency for the Washington, D.C., metropolitan area adopted a plan calling for growth in radial corridors that were to be separated by green wedges of open space.[94] This plan, which received presidential approval, was to be complemented by subregional growth plans implementing the wedges and corridors concept. A number of subregional plans of this type were devised, including an integrated general plan adopted by two suburban Maryland counties, Montgomery and Prince Georges. It was one of a set of area plans enacted within Montgomery County to implement the general plan that came before the court in *Norbeck*.[95]

The town of Olney was identified by the challenged area plan, in accordance with the wedges and corridors concept, as a "satellite community." In order to break the pattern of suburban sprawl, it would be maintained as an autonomous community surrounded by a low-density residential area. Zoning and sewer access restrictions were to be employed to accomplish staged development.[96] As part of a comprehensive rezoning of fifty square miles by the county council, some twenty square miles around Olney were downzoned from one-half-acre to two-acre lots. Plaintiffs, whose land was included in the area reclassified to the lower density, challenged the rezoning as unreasonable and arbitrary and as an improper substitute of the police power for the power of eminent domain. Holding for the county, the court relied heavily on the policies of the plan to sustain the comprehensive rezoning: "Appellants dispute the validity of the concept underlying the plan and the legality of the plan but do not suggest that it was not conceived and adopted in the utmost good faith, and they did not overcome the strong presumption that the plan was valid legislative action . . . ."[97]

Md. 621, 303 A.2d 374 (1973), in which the court upheld a comprehensive rezoning designed to create a buffer zone based on a master plan for the area. The court found that the rezoning was, in the words of the local planning commission, based on a "desire to build and preserve in concert with the natural environment," and therefore was valid. 268 Md. at 632, 303 A.2d at 379. *See also* County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975). *Cf.* Barnard v. Zoning Bd. of Appeals, 313 A.2d 741 (Me. 1974).

94. NATIONAL CAPITAL PLANNING COMMISSION, NATIONAL CAPITAL REGIONAL PLANNING COUNCIL, A POLICIES PLAN FOR THE YEAR 2000: THE NATION'S CAPITAL (1961).

95. *See* MONTGOMERY COUNTY MAPPING PLAN, *supra* note 85, at 4-5. For a map of the planning areas, see *id.* at 6.

96. 254 Md. at 63-64, 254 A.2d at 703-04.

97. 254 Md. at 67, 254 A.2d at 705-06. In rejecting the taking argument, the court noted that all zoning places restrictions on the owner's right to use his property. It concluded that although some restrictions may lessen the value of the property, an owner does not have a vested right in the continuation of the prior zoning status of his property.

The court in *Norbeck* did not question the policies of the plan and so did not undertake an independent examination of its impact on development in the county and the region. In particular, no effort was made to examine the population target on which the plan was based, the plan's assumptions about the role of Olney in the implementation of the wedges and corridors concept, the plan's policies for staging growth, or its assumption that the county was entitled to withhold and phase the availability of public services in order to implement the staged growth policy contemplated by the plan. The court apparently accorded the plan a presumption of validity because it was based on the concepts adopted in the regional plan for the Washington metropolitan area and had been legislatively enacted.

These issues had surfaced in an earlier and somewhat similar Michigan case, *Christine Building Co. v. City of Troy*.[98] *Christine* considered the validity of large lot zoning in the context of a comprehensive community plan adopted by a new and fast-growing Detroit suburb. This plan contemplated a sevenfold increase in the population of the city and a tenfold increase in the city's sewer district area. Population growth was to be limited by the area's sewer capacity as projected in a multicommunity contract that provided for sewage disposal by the City of Detroit. In order to achieve its target population, the city zoned plaintiff's lots at a density of one-half acre. Plaintiff then brought suit attacking the large lot zoning for his property.

The majority in *Christine* found for the plaintiff, noting that other lots near plaintiff's property were zoned at smaller sizes and were allowed septic tanks,[99] and that the sewage disposal contract could be altered to allow for a larger capacity.[100] The court also had doubts about the validity of a zoning and planning program that was oriented toward development in the future rather than toward conditions as they presently existed.[101] A strong dissent, however, was concerned that the favorable holding for the plaintiff might provide a "point of attack" leading to the gradual erosion of the community plan.[102] Unlike the majority, the dissent was willing to defer to the policies reflected in the plan. It noted that allocating additional sewage capacity to plaintiff's property would deprive other areas in Troy

98. 367 Mich. 508, 116 N.W.2d 816 (1962).

99. 367 Mich. at 515, 116 N.W.2d at 819.

100. 367 Mich. at 518, 116 N.W.2d at 821.

101. 367 Mich. at 516, 116 N.W.2d at 819.

102. 367 Mich. at 524, 116 N.W.2d at 824 (Adams, J., dissenting).

of needed service.[103] It might also have pointed out that it would be difficult to effect change in the regional agreement, for this would reduce the capacity available to the other communities served by this agreement.[104]

While *Christine* takes an unfavorable position on the role of the plan in guiding zoning designations, the decision was influenced by the fact that the plan had been adopted by only one municipality in a growing region. To this extent, it can be distinguished from *Norbeck*. In any event, the Michigan supreme court has since had second thoughts on this particular question. Large lot zoning for approximately one-half-acre lots was upheld by the court in *Padover v. Township of Farmington*,[105] in which supporters of such zoning again sought justification in a community plan's population target. In *Padover*, the target was based not on expected sewage capacity, but on the planners' estimate of optimal neighborhood size for elementary schools. While the court was badly split, and while the favorable opinions rely to some extent on the failure of the plaintiff to rebut the presumption that zoning is constitutional,[106] a comment in one of the concurring opinions provides an important judicial rationale for acceptance of the comprehensive plan as a justification for zoning policies:

> If this Court is to remain dogmatic in its insistence upon proofs of validity having an absolute relevance to existing conditions then all planning and zoning based upon projections for future needs could logically be thwarted. Zoning in a new community where land uses have not already been determined is always prospective in nature. There is the need to plan for expectant population densities so that community needs may be based thereupon . . . . The presumption is that if the plan is sound then the structure will also be sound. It takes time however, for things to take shape. Community planners like homebuilders require this initial indulgence. If plans and projections fail to develop then [their] validity may be challenged.[107]

Subsequent decisions by the Michigan supreme court, however, again cast doubt on the scope of its acceptance of planning policies as

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103. 367 Mich. at 524, 116 N.W.2d at 823-24 (Adams, J., dissenting).

104. The Troy plan and ordinance were later invalidated in Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963).

105. 374 Mich. 622, 132 N.W.2d 687 (1965).

106. 374 Mich. at 640, 132 N.W.2d at 696 (Smith, J., concurring) ("presumption in favor of the constitutionality" of the ordinance); 374 Mich. at 633, 132 N.W.2d at 692 (plaintiff has "burden of affirmatively proving" that the ordinance is unconstitutional).

107. 374 Mich. at 642-43, 132 N.W.2d at 697 (Smith, J., concurring).

a basis for zoning restrictions.[108] Moreover, *Padover* touches, but leaves unresolved, the question of whether zoning ordinances may constitutionally defer development for substantial periods if they are based on plans that contain explicit or implicit population limits for urbanizing areas.[109]

Absent a showing that a local plan is based on an exclusionary purpose, a court would be wise to defer to the policies of the plan as a justification for the restrictions contained in the ordinance. Otherwise, the "point of attack" described by the dissent in *Christine* will provide an opportunity for the gradual erosion of planning policy. The difficulty is that the courts may be unwilling to examine the policies of a local plan to determine whether they are acceptable from a state or regional perspective, since this examination might involve the courts in matters beyond proper judicial competence and jurisdiction.[110] This perceived limitation on judicial review may explain

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108. *See, e.g.*, Biske v. City of Troy, 6 Mich. App. 546, 149 N.W.2d 899 (1967), *revd. in part*, 381 Mich. 611, 166 N.W.2d 453 (1969).

In Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971), the Michigan court of appeals adopted the doctrine that the burden of proof to justify a prohibition of a land use shifts to the municipality whenever the use falls into a "preferred use" category. Rights of preferred use are delineated in the state constitution, statutes, or judicial precedents, and include churches, schools and hospitals. 35 Mich. App. at 212-13, 192 N.W.2d at 325-26. Mobile homes were involved in *Bristow*, and the doctrine was extended to include apartments in Simmons v. Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972). However, in Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974), it was made clear that the doctrine is not based solely on preferred use status, but that the preferred use must also be totally excluded from a municipality before the burden of proof may be shifted to the municipality. *Bristow* also discussed possible justifications for the exclusion of a preferred use, including reliance on an existing and flexible master plan. 35 Mich. at 219-20, 192 N.W.2d at 329. A local master plan was relied upon as partial justification for the exclusion of a preferred use in Cohen v. Canton Twp., 38 Mich. App. 680, 197 N.W.2d 101 (1972). *Kropf* adds nothing to the role of the master plan in justifying the exclusion of preferred uses or in establishing the reasonableness of classification prohibiting a preferred use within a part of a municipality. For a discussion of the *Bristow* line of cases and the impact of *Kropf*, see Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341, 1344-60 (1975); Comment, *The Michigan Preferred Use Doctrine as a Strategy for Regional Low-Income Housing Development: A Progress Report*, 8 URBAN L. ANN. 207 (1974).

109. This question was resolved to some extent in Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), *discussed in* text at notes 112-20 *infra*. *See also* Camboni's, Inc. v. County of Du Page, 26 Ill.2d 427, 187 N.E.2d 212 (1963) (rezoning ordinance sustained as reasonable in light of anticipated growth in the area). *But cf.* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (downzoning from an unrestricted to a residential classification held unconstitutional primarily because of the uncertainty of future development).

110. *See, e.g.*, Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 376, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 150-51, *appeal dismissed*, 409 U.S. 1003 (1972): "The evolution of more sophisticated efforts to contend with the increasing complexities of urban and suburban growth has been met by a corresponding

why the opinions are characterized by a willingness either to accept or reject the plan, with little examination of the policy on which it was formulated. The decisions underline the need for some politically acceptable method of administrative plan review that would include the authority to modify as well as merely to accept or reject local planning policies. Alternatively, explicit legislative authority may be needed that will be least allow a court to retain jurisdiction over a case until the plan can be amended to satisfy the court's objections.[111]

Other cases in which the plan has been asserted as a defense have considered local timing and managed growth programs. Perhaps the best-known of these is *Golden v. Planning Board of the Township of Ramapo*,[112] in which an urbanizing township on the outskirts of the New York City metropolitan area amended its zoning ordinance to implement a permit system of all new residential development. Permits would be granted only if the development were adequately served by public facilities, with adequacy to be determined by a point system based on the proximity of the development to available services. The court found that the township had authority to enact the ordinance under the applicable New York zoning legislation, which generally followed the outlines of the Standard State Zoning Ena-

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reluctance on the part of the judiciary to substitute its judgment as to the plan's overall effectiveness for the considered deliberations of its progenitors." *But see* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975). *See also* Florida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3194(3)(a) (Supp. 1975) (authorizing a court, in reviewing local government action or development regulations, to consider the "reasonableness" of the comprehensive plan).

111. Some state legislation has sought to deal with this problem. *See, e.g.*, PA. STAT. ANN. tit. 53, §§ 10609.1, 11004, 11011 (1972). Under section 11011, a court invalidating a zoning ordinance may approve a development or use for which plans have been submitted to the local zoning agency, or may approve the development in part and refer any unapproved elements to the local agency for further proceedings. The court may retain jurisdiction of the appeal during such further proceedings and may issue such supplementary orders as are necessary to protect the landowner's rights. This section was construed in Ellick v. Board of Supervisors, ___ Pa. Commnw. ___, 333 A.2d 239 (1975). For discussion of the Pennsylvania zoning procedures see Krasnowiecki, *supra* note 32. For a similar proposal authorizing a judicial stay order until the municipality has amended its land use regulations in accordance with the order of the court, see A.L.I. MODEL LAND DEV. CODE § 9-112(2) (1975).

112. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). Much of the extensive commentary on *Ramapo* is critical of the decision, emphasizing the actual or potential exclusionary impact of the growth control program. *See* H. FRANKLIN, CONTROLLING URBAN GROWTH—BUT FOR WHOM? (1973); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U. L. REV. 234 (1973); Scott, *Comments on Golden*, 24 ZONING DIGEST 75 (1972). *But see* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

bling Act.[113] The court then proceeded to uphold the timing control in a complex opinion that relied in part on the fact that the challenged ordinance had implemented a well-considered plan for the community. This plan included a capital improvements program on which the public facility point system was based.[114]

Due process "taking" issues were also raised in *Ramapo* by the fact that development was to be deferred in some sections of the community by as much as eighteen years, but the court accepted the restriction as a necessary component of the timing ordinance.[115] The court's handling of this issue must be understood in the context of the plan's objectives. Since the timing plan apparently contemplated the development of the entire township by the end of the eighteen-year period, though at very low densities, it operated more as an interim control on development than as a permanent restriction. It was the township's commitment to allow the private development of all of its land area within the prescribed period that appears to have neutralized the due process "taking" allegations for the court. More explicit interim zoning ordinances aimed at halting land development pending the adoption of a plan or zoning ordinance have been judicially affirmed elsewhere.[116] The holding in *Ramapo* thus should be confined to the planning context in which it arose, and it provides doubtful support for comparable timing controls that are implemented in significantly different circumstances.

More troublesome in *Ramapo* is the potential for exclusion, since the township was zoned at relatively low densities through large lot zoning. As the court noted, these densities were not challenged, although the court on first impression could find no justification for them.[117] The application of timing controls in the context of the large lot zoning pattern simply reinforced the low density restriction, since even development meeting the requirement of the point system could occur only at these densities.[118] The court did consider the exclusionary argument in *Ramapo*, but concluded that, in the absence

113. *See* note 9, *supra* and accompanying text.

114. 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152 ("The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth").

115. 30 N.Y.2d at 380-82, 285 N.E.2d at 303-04, 334 N.Y.S.2d at 154-56.

116. *See, e.g.*, Collura v. Town of Arlington, ___ Mass. ___, 329 N.E.2d 733 (1975); New York City Housing Authority v. Commissioner of the Environmental Conserv. Dept., 83 Misc. 2d 89, 372 N.Y.S.2d 146 (Sup. Ct. 1975); State v. Snohomish County, 79 Wash. 2d 619, 488 P.2d 511 (1971). For further discussion of interim zoning ordinances, see 1 N. WILLIAMS, *supra* note 9, at § 30.03.

117. 30 N.Y.2d at 367 n.2, 285 N.E.2d at 295 n.2, 334 N.Y.S.2d at 143 n.2.

118. *See* H. FRANKLIN, *supra* note 112, at 13-15.

of supervisory state and regional land use controls then lacking in New York State, locally adopted timing programs deserved judicial sanction.[119] In part, the court's decision on this point can be explained by the failure of the plaintiffs to provide adequate factual support for the exclusionary argument.[120] *Ramapo* may also be explained by the fact that no downzoning was alleged to have occurred as a result of the timing control ordinance, so that the legality of a downzoning in conjunction with a timing program was not at issue.

Nor did the *Ramapo* case consider the validity of the timing plan as applied to a specific development that had been disapproved and thus deferred under the point system. A similar issue arose in Michigan in *Biske v. City of Troy*.[121] The city had prepared a comprehensive plan that included the area in question within a projected civic center and commercial complex. This area was almost totally undeveloped except for some municipal buildings, and there was no explicit phased program for the development in accordance with the plan's objectives. Plaintiff owned a vacant lot at the intersection of two secondary highways in the area, and proposed to develop a gasoline filling station there. Although filling stations occupied two of the other corners of the intersection, his request for a zoning change was refused because it was inconsistent with the plan.

The Michigan intermediate appellate court upheld the city's refusal to rezone in an opinion that followed the *Padover* approach of validating the zoning restriction by relying on the community's planning policies.[122] The state supreme court reversed on the ground that the city's plan had not yet been legislatively adopted. But the court added an ambiguous comment that appears to limit the *Padover* holding. By relying "too much" on the plan, said the court, the city had adopted a "speculative" standard that failed to consider suffi-

119. 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150. *But see* Berenson v. Town of New Castle, 38 N.Y.2d 102, 112, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975) (in the absence of regional zoning, a court must assess the reasonableness of local zoning in light of regional needs).

120. Comprehensive planning programs, including large lot restrictions, have fallen into judicial disfavor in other jurisdictions in cases in which the exclusionary argument has been pressed. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 188 n.20, 336 A.2d 713, 732 n.20 (1975) (indicating that timing plans like the *Ramapo* plan "cannot be utilized as an exclusionary device or to stop all further development and must include early provision for low and moderate income housing").

121. 6 Mich. App. 546, 149 N.W.2d 899 (1967), *revd. in part*, 381 Mich. 611, 166 N.W.2d 453 (1969). *See* D. MANDELKER, *supra* note 39, at 53-54.

122. 6 Mich. App. at 551-52, 149 N.W.2d at 902.

ciently the effect of the plan on the landowner's use of his property. The property owner must keep his land vacant, though subject to local taxes, while hoping that the development proposed by the plan would materialize.[123]

Biske was in essence a timing case. The community did not object to commercial development on the property; its only objection was that the development proposed by the plaintiff was not sufficiently intensive and did not implement the policies contained in the comprehensive plan. What makes the *Biske* plan speculative, as compared with the timing plan upheld in *Ramapo*, is that the *Ramapo* plan provided for carefully phased development throughout the municipality, while in *Biske* there is no such guarantee. Most municipalities will be unable to give the assurances that *Ramapo* was able to provide, and in these municipalities the "speculative" objection of the Michigan supreme court in *Biske* will be difficult to overcome. Perhaps the comment quoted above from the *Padover* concurrence is relevant. Initial acceptance by the court of the plan's proposals appears warranted in order to provide reinforcement for the plan's policies.[124] Appropriate judicial relief could be made available after a time if the plan still appeared "speculative," either because the development proposed by the plan did not materialize or because actual development patterns did not follow the plan.[125] From this perspective, initial enforcement of the plan is indistinguishable from support of zoning to implement the plan on an interim basis, and interim zoning of this kind has respectable precedent.[126] Moreover, judicial relief is appropriate if the plan's policies are not followed in the zoning process.[127] If the courts are willing to take a flexible

123. 381 Mich. at 617, 166 N.W.2d at 456-57.

124. *See* text at note 107 *supra*.

125. *See* Town of Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973). *Cf.* Bissell v. County Commrs., 12 Ore. App. 174, 506 P.2d 499 (1973), in which the court upheld the county's denial of commercial zoning at an arterial intersection that the plan had designated for commercial uses. There was evidence that the intersection had not developed for commercial uses as the plan had contemplated. For an analysis of the consistency of apartment rezonings with an adopted policy plan, see D. MANDELKER, *supra* note 39, at 127-62.

126. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN L. 65 (1971). The court in *Ramapo* pointed out that, although the developer could depend on nothing more than the town's good faith in adhering to its scheduled program of capital improvements, "there will be ample opportunity to undo the restrictions upon default." 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

127. *Cf.* Board of Supervisors v. Allman, 215 Va. 434, 211 S.E.2d 48, *cert. denied*, 423 U.S. 940 (1975), in which a suburban county adjacent to Washington, D.C., had adopted but had not consistently followed a development policy favoring the location of new growth in a suburban "new town." The court relied on this in-

approach toward plans that contemplate zoning restrictions to achieve timing objectives, the objections raised to the implementation of the comprehensive plan in *Biske* can be resolved through prudent judicial supervision.

Planning policies may also be implemented through land use control techniques other than large lot zoning and timing controls. An example, closely related to the *Biske* situation, is the creation of exclusive industrial and commercial zones in which residential uses are prohibited. Persons seeking to develop for residential purposes in exclusively nonresidential zones, as well as those seeking to locate nonresidential development outside these zones, are in a position to raise due process "taking" objections. In cases that fail to consider comprehensive planning policies, courts have accepted exclusively nonresidential zoning provided it represents an expected market demand.[128] Courts can limit the use of such zoning when the supply of exclusively zoned nonresidential land is not reasonably related to the expected need for that land.[129]

B. *The Role of the Comprehensive Plan in the Zoning Amendment Process*

A number of cases in which the comprehensive plan may play a role do not involve the constitutionality of community-wide or major zoning strategies. They focus instead on the permissibility of zoning changes that allow an individual owner to make a more intensive use of his land.[130] If the rezoning is not consistent with land uses in the surrounding area, it may appear to be a special favor, often termed "spot zoning." For years courts have dealt with spot zoning amend-

consistency in holding unconstitutional the low density residential zoning that was applicable to the property in this case. This property was not within the area that had been planned for the growth of the new town. *See also* Board of Supervisors v. Williams, ___ Va. ___, 216 S.E.2d 33 (1975).

128. *See* Grubel v. MacLaughlin, 286 F. Supp. 24 (D.V.I. 1968). *Cf.* Bosse v. City of Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967). *See* Note, *Industrial Zoning To Exclude Higher Uses*, 32 N.Y.U. L. REV. 1261 (1957). *But cf.* City of Tempe v. Rasor, 24 Ariz. App. 118, 536 P.2d 239 (1975). *See also* Southern Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

129. As in the managed growth timing cases, a question will arise concerning the constitutionally acceptable time period that land may be held off the market for exclusive, nonresidential uses. In *Ramapo* the court held that an 18-year period was not too long. 30 N.Y.2d at 367, 383, 285 N.E.2d at 295, 304-05, 334 N.Y.S. at 143, 156.

130. These cases also include some in which the developers proposed a use on their land not presently permitted by the zoning ordinance. When the use change was refused, these developers brought suit to have the zoning ordinance set aside as unconstitutional, and the courts relied to some extent on the policies of the plan when passing on the constitutionality of the zoning ordinance as applied.

ments and have devised a number of rules to determine whether they should be upheld. Perhaps the most familiar of these is the change-mistake rule adopted by the Maryland courts[131] and followed in a few other states.[132] This rule validates a spot zoning only if a mistake in the initial zoning ordinance or a change in conditions in the neighborhood surrounding the rezoned area can be shown.[133] The change-mistake rule considers the comprehensive plan only advisory in determining whether there has been a change or mistake. Other courts do not follow the change-mistake rule, but nevertheless do not explicitly rely on a comprehensive plan. These courts are willing to validate a spot zoning if it serves the general needs or policies of the community and if the landowner who receives the zone is not the sole beneficiary.[134]

In recent years, some courts have placed greater emphasis on the comprehensive plan in determining whether to validate a zoning change to a more intensive use. Most of these decisions have come from state courts that have not adopted the change-mistake rule and are therefore in a position to review a rezoning on the basis of a change (not only a "mistake") in community policy as well as a change in the area surrounding the rezoned parcel.[135] To varying degrees, these decisions have reversed the presumption of legislative validity that is usually accorded rezoning actions.[136] By presuming the change to be invalid, the court is in a position to demand justification from the municipality for such rezoning. The policies underlying the comprehensive plan are one obvious source of support.[137] By requiring evidence from the municipality in support of the rezoning to more intensive uses, the court is able to evaluate the basis for the change without actually investigating the policies of the comprehensive plan.

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131. Professor Williams traces the origins of this rule back to early cases such as Baltimore City, Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948). *See* N. WILLIAMS, *supra* note 9, at § 6.06 & n.26. *See also* Comment, *Zoning Amendments: The Effect of Maryland's Change or Mistake Rule on the Fairly Debatable Standard—Who's Got The Presumptions?*, 10 URBAN L. ANN. 365 (1975).

132. *See, e.g.*, Lewis v. City of Jackson, 184 S.2d 384 (Miss. 1966). *Cf.* Hodge v. Luckett, 357 S.W.2d 303 (Ky. 1962).

133. The Maryland cases are discussed in D. MANDELKER, *supra* note 39, at 90-96 and 1 N. WILLIAMS, *supra* note 9, at § 6.06.

134. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.06 (1968).

135. *See* text at notes 138-44 *infra*.

136. *See* text at notes 138-44 *infra*.

137. *Ramapo* specifically noted the increasing sophistication of land use controls as a reason for giving deference to the timing control ordinance. 30 N.Y.2d at 376-77, 285 N.E.2d at 301, 334 N.Y.S.2d at 150.

This approach was followed recently by an Illinois court of appeals in a case concerning the validity of a rezoning that would have permitted apartment development in a suburban area of Cook County. The court did not fully shift the presumption of validity, but relied on the absence of a comprehensive plan as a basis for its finding that the "presumption of validity which otherwise would attach to a county zoning ordinance" had been weakened.[138] It was established not only that the county did not have a comprehensive plan, but also that the county commissioners who approved the rezoning had not even consulted any of the county's own agencies charged with the planning function. Aware of the problems that the new development would create,[139] the court found that the board of commissioners' action was an "arbitrary and capricious use of its power," and therefore invalid.[140]

Other decisions have modified the traditional presumption of validity by treating the zoning amendment procedure as a quasi-judicial rather than a legislative process. Foremost among these is *Fasano v. Board of County Commissioners*.[141] This Oregon supreme

138. Forestview Homeowners Assn., Inc. v. County of Cook, 18 Ill. App. 3d 230, 244-46, 309 N.E.2d 763, 774-75 (Ill. App. Ct. 1974).

139. The rezoning would have introduced from 4000 to 6000 new residents in what had previously been a single family residential community. Local facilities, including schools, were inadequate to support this new population, and the proposed apartments might have depreciated the value of adjacent single-family residences and created flooding problems.

140. 18 Ill. App. 3d at 246, 309 N.E.2d at 776. The court noted that this was not a case in which the zoning classification achieved a "relative gain to the public and hardship to a property owner." 18 Ill. App. 3d at 246-47, 309 N.E.2d at 775. Further, the rule that a zoning classification will not be changed except for the public good supported the position of the property owners. However, courts have occasionally stressed the somewhat contrary theory that property owners have no vested right in the continuation of existing zones. *See* note 97 *supra*. There are decisions in other states which support the Illinois view. *See, e.g.*, Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970) (creation of an industrial zone in the midst of a residential area which was hampered by the lack of a general plan for the area and unsupported by a change in conditions, was not in the public interest). In Grant v. Washington Township, 1 Ohio App. 2d 84, 203 N.E.2d 859 (1963), the court held that imposing an 80,000 square foot lot size restriction on an entire tract that was located in what was essentially a rural location was unreasonable, although it might be justified for part of the tract. There did not appear to be a general plan or substantial basis for the pattern of the town's development. *But cf.* Brandau v. City of Grosse Pointe Park, 383 Mich. 471, 175 N.W.2d 755 (1970) (unsuccessful challenge to a 30-year-old ordinance restricting property that was surrounded by predominately commercial zoning to residential or parking use).

141. 264 Ore. 574, 507 P.2d 23 (1973). The court built on, but to some extent qualified, its earlier holding in Roseta v. County of Washington, 254 Ore. 161, 458 P.2d 405 (1969).

For discussion of the *Fasano* case, see Sullivan, *From Kroner to Fasano, An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L.J. 358 (1974) (Mr. Sullivan was counsel for the county in *Fasano*). *See also* Cunningham, *supra* note 108.

court decision first rejected the usual rule that zoning amendments are legislative, and, by adopting the contrary position that the zoning amendment process is quasi-judicial, was able to shift completely the presumption of validity that is usually applied to zoning amendments. *Fasano* also placed heavy weight on the comprehensive plan as a justification for zoning amendments,[142] and in so doing established strong judicial support for the role of the plan in the zoning process.

Fasano considered the adoption by the county of a floating zone to allow a mobile home park in an area not previously zoned for this use. Oregon legislation at the time mandated planning by counties and required that zoning ordinances carry out the comprehensive plan. Accordingly, the court held that a zoning amendment must be consistent with the plan, but qualified its assertion with several conditions that make the role of the plan ambiguous.[143] The court apparently required that there be proof that a "public need" for the change exists and that this need would best be served by making the change at the proposed location.[144] Since the purpose of the plan, in a broad sense, is to indicate public "needs" for land use, the function of this additional showing is not clear.

The court also noted that "[t]he more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance . . . ."[145] This burden apparently requires proof that alternative sites originally designated by the plan are not available, a requirement that enhances the authority of the plan's land use allocations.[146] But the court held as well that a mistake in the original plan or ordinance, or changes in the physical characteristics of an area affected by the zoning change, would be relevant, though not determinative. It thus adopted a qualified version of the Maryland change-mistake rule.[147] This holding qualifies the court's reliance on a comprehensive plan as the basis for a zoning change, since changes in a surrounding area that might

142. 264 Ore. at 583, 507 P.2d at 27-28.

143. 264 Ore. at 583-84, 507 P.2d at 28.

144. 264 Ore. at 584, 507 P.2d at 28. *See* South Central Assn. of Neighbors, Inc. v. Lindsey, ___ Ore. App. ___, 535 P.2d 1381 (1975), in which the need test was applied to hold invalid a rezoning from residential to commercial.

145. 264 Ore. at 586, 507 P.2d at 29.

146. An important case applying the alternative site test is Duddles v. City Council, ___ Ore. App. ___, 535 P.2d 583 (1975). While admitting that a tract shown as commercial on the city's plan was less suitable for commercial use than a nearby tract, the court nevertheless applied the policy of the plan to invalidate the rezoning of the nearby tract. The court noted that unless the plan was amended to allow commercial use on the disputed tract, the commercial designation for the nearby tract should be eliminated.

147. 264 Ore. at 587, 507 P.2d at 29.

support a zoning amendment will not have taken place where the plan proposes more intensive uses in areas whose character is not fully determined. Finally, although the court spoke throughout as if it were dealing with a plan containing fairly precise mapped designations, a footnote to the opinion described a hypothetical plan containing textual policies rather than mapped intentions and implicitly recognized that, as the precision of the plan declines, the burden of showing conformance is more easily met.[148]

On balance, *Fasano* is important for its insistence that the burden of justifying the zoning amendment should increase as the impact of a proposed zoning amendment on the surrounding area increases. This approach is reminiscent of those nuisance cases that enjoin the location of more intensive land uses in areas where they are not compatible with surrounding uses; it weakens the supportive impact of the plan whenever the plan has proposed intensive uses for low intensity or undeveloped areas. It can be argued that reliance on the comprehensive plan as a justification for a zoning change appears most necessary in precisely these situations. When the approved zoning amendment is consistent with at least some of the surrounding development, the approved use ordinarily is not intrusive, and courts might well validate the change on the basis of standard concepts such as the Maryland change-mistake rule. It is only when the plan proposes a relatively intensive use in a less developed area that the change-mistake rule cannot be applied and the reliance on the plan to support the rezoning becomes essential. While the *Fasano* case was an important explanation of the role of the plan in validating zoning changes, the doctrinal basis for judicial recognition of the plan required additional refinement and elaboration.

This elaboration was forthcoming from the Oregon supreme court in *Baker v. City of Milwaukie*,[149] which considered the validity of a zoning ordinance allowing a residential density more intensive than that permitted by a subsequently adopted comprehensive plan. By the time the *Baker* case came before the court, the legislature had mandated the adoption of comprehensive plans by cities as well as by counties.[150] However, no language in the statute explicitly treated

148. 264 Ore. at 586-87 n.3, 507 P.2d at 29 n.3.

149. ___ Ore. ___, 533 P.2d 772 (1975).

150. ORE. REV. STAT. § 197.175(2) (Replacement Part 1973). The city planning legislation in Oregon had initially been permissive and a plan was authorized but not required. ORE. REV. STAT. § 227.090(2). Since its inception, county planning legislation has been mandatory. ORE. REV. STAT. § 215.050. The *Fasano* doctrine has been applied to both city and county zoning amendments. *See* notes 141 and 146 *supra*.

The *Baker* court held that the permissive character of the planning statute at the

the problem of the consistency of zoning with an adopted city plan.

Nevertheless, relying heavily on *Eves*,[151] on a California decision holding comprehensive plan adoption to be a legislative act,[152] and on legal commentary,[153] the Oregon court unequivocally accorded the plan a binding status in local zoning:

> [W]e conclude that a comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the zoning decisions of a city must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed by the plan must fail.[154]

The impact of *Baker* on the *Fasano* case is not entirely clear. While *Baker* speaks only of cities, there is no warrant in Oregon law for not applying its rationale to counties, which are also required to plan. Another important question is whether *Baker* overrules some of the qualifications, such as the "public need" test, that *Fasano* placed on the weight to be given the comprehensive plan in zoning. Since *Baker* considered a zoning ordinance directly in conflict with an adopted comprehensive plan, the court may not have intended that the rationale of the case apply to the zoning amendment process. *Baker* states, however, that the comprehensive plan is binding on zoning *decisions* as well as zoning ordinances,[155] and these decisions would presumably include amendments. These questions aside, the *Baker* court appears to have adopted as strong a view of the role of the comprehensive plan as any court that has considered the problem. It stands as a polar opposite to *Kozesnik*.[156]

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time of the adoption of the Milwaukie plan and zoning ordinance was irrelevant, since the city had in fact adopted a plan whether or not required to do so, and thus had a duty to zone in accordance with it. ___ Ore. ___, ___, 533 P.2d 772, 776-77.

151. ___ Ore. at ___, 533 P.2d at 776. *See* text at notes 28-36 *supra*.

152. ___ Ore. at ___, 533 P.2d at 778. This case, O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965), contains strong dictum supporting the binding role of the plan in land use controls administration.

153. ___ Ore. at ___, ___, ___, 533 P.2d at 775, 778, 779. The court cited Haar, *In Accordance with a Comprehensive Plan, supra* note 21; Haar, *The Master Plan: An Impermanent Constitution, supra* note 21.

154. ___ Ore. at ___, 533 P.2d at 779. The *Baker* decision also relies, but does not appear to be dependent, on a provision in the Oregon City Zoning Enabling Act that requires local zoning ordinances to be based on a "well considered plan." ORE. REV. STAT. § 227.240(1) (Replacement Part 1973). This language is similar to the "in accordance" language contained in the Standard State Zoning Enabling Act. *See* text at notes 10-13 *supra*.

For a discussion of internal consistency between plan maps and plan texts, see Tierney v. Duris, ___ Ore. App. ___, 536 P.2d 435 (1975) (amending a plan map to correct an inconsistency does not represent a change in the comprehensive plan).

155. ___ Ore. at ___, 533 P.2d at 779.

156. *See* text at notes 22-26 *supra*.

Courts in other states have recently considered the weight to be given the comprehensive plan in determining the validity of zoning amendments.[157] These courts continue to treat rezoning as a legislative act. The cases can be grouped according to whether the proposed use was consistent with the plan and whether the court looked to the policies of the plan in passing on the zoning amendment.

Several courts, albeit with little discussion, have given weight to the comprehensive plan in disapproving zoning amendments found to be inconsistent with the plan's policies.[158] The *Baker* case provides especially strong reinforcement for this position, but it has an important companion in *Udell v. Haas*,[159] a 1968 decision by the Court of Appeals of New York. *Udell* considered a downzoning rather than an upzoning, and so may be distinguishable from the Oregon cases, but the principles stated by the New York court would appear to apply in both situations.

In *Udell*, a small village on Long Island had rezoned a parcel of land, located on its periphery and abutting a major highway, from commercial to residential uses. The court found the downzoning invalid, relying in part on the principle that it had not been "in accordance with a comprehensive plan" as required by the New York state zoning enabling statute. The New York court has never inter-

157. For a similar analysis that is not based explicitly on the zoning amendment process, see 1 N. WILLIAMS, *supra* note 9, at § 25.01-26.23. Williams distinguishes primarily between those cases adhering to the *Kozesnik* view and those cases in which there is willingness to give some weight to an independently adopted comprehensive plan.

158. *See, e.g.*, Fontaine v. Board of County Commrs. 493 P.2d 670 (Colo. Ct. App. 1972); Green v. County Planning & Zoning Commn., ___ Del. Ch. ___, 340 A.2d 852 (1974), *affd.*, 344 A.2d 386 (1975); Board of County Commrs. v. Farr, 242 Md. 315, 218 A.2d 923 (1966); Schilling v. City of Midland, 38 Mich. App. 568, 196 N.W.2d 846 (1972); Heram Holding Corp. v. City of Albany, 63 Misc. 2d 152, 311 N.Y.S.2d 198 (Sup. Ct. 1970). *Cf.* Sampson Bros., Inc. v. Board of County Commrs., 240 Md. 116, 213 A.2d 289 (1965).

For Maryland change-mistake cases in which a zoning change inconsistent with a comprehensive plan was disapproved, see Valenzia v. Zoning Bd., 270 Md. 478, 312 A.2d 277 (1973); Montgomery County Council v. Pleasants, 266 Md. 462, 295 A.2d 216 (1972); Howard Research & Dev. Corp. v. Zoning Bd., 263 Md. 380, 283 A.2d 150 (1971); Park Constr. Corp. v. Board of County Commrs., 245 Md. 597, 227 A.2d 15 (1967).

In Dunk v. Township of Brighton, 52 Mich. App. 143, 216 N.W.2d 455 (1974), although the township adopted a land use plan that recommended retaining the existing 15,000 square foot lot minimum zoning for the area in question, a 40,000 square foot minimum was imposed. Based on the plan and testimony from a health department official, the court held that the plaintiffs had presented a prima facie case that the 40,000 square foot minimum was unreasonable as applied to the plaintiffs' property.

159. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968). *See* 1 N. WILLIAMS, *supra* note 9, at § 26.06. Williams puts *Udell* in the category of cases that first equate the comprehensive plan with general zoning map policy and then apply that policy to determine the validity of individual zoning changes.

preted this statute, which follows the Standard State Zoning Enabling Act, to require the adoption of an independent comprehensive plan. It is, however, willing to find that the land use policies of a community are expressed in a comprehensive plan, if one exists, as well as in the zoning ordinance and map.[160] In this case, the village had continuously zoned the area in which the landowner's parcel was located for commercial uses, at least since the mid-1930s. In 1968 it adopted a "developmental policy" as an amendment to its zoning ordinance that appeared to confirm this zoning.[161] This policy called for a suburban, low-density community. Most of the small portion of the village area that was zoned for commercial use was, like the parcel in *Udell*, located on the periphery of the community and adjacent to nonresidential uses in other neighboring communities.

The downzoning had been accomplished very quickly, after it became apparent that the owner of the parcel intended to build commercially as permitted by the existing zoning classification. There was testimony that the downzoning was accomplished in part to accommodate the "feeling of the Village" that no extensive commercial use should be permitted in that area.[162] These circumstances led the court to hold that the downzoning was not "in accordance" with a comprehensive plan. As the court pointed out, zoning could easily degenerate into "arbitrary infringements on the property rights of the landowner. To assure that this does not happen, our courts must require local zoning authorities to pay more than mock obeisance to the statutory mandate that zoning be 'in accordance with a comprehensive plan.' There must be some showing that the change does not conflict with the community's basic scheme for land use."[163] The problem is no less serious when an upzoning is made at the behest of a single landowner, a circumstance that led the Pennsylvania court in *Eves* to call for comprehensive planning as the basis for a zoning change.[164]

In other cases, zoning amendments inconsistent with the comprehensive plan have been approved. These decisions usually come from states in which the plan is treated as advisory because the "in accordance" requirement has not been interpreted to require a comprehen-

160. 21 N.Y.2d at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 896. *See also* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951) (finding a comprehensive plan in the general land use needs of the community).

161. 21 N.Y.2d at 471-72, 235 N.E.2d at 902, 288 N.Y.S.2d at 895.

162. 21 N.Y.2d at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

163. 21 N.Y.2d at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

164. *See* text at notes 28-35 *supra*.

sive plan external to the zoning ordinance.[165] In these states, a subsequent zoning change is accepted as a modification of the plan. The courts may also emphasize the planning commission's participation in the zoning change as a reason for upholding a rezoning that is inconsistent with the prepared plan.[166]

Some cases have also approved floating zone and planned unit development procedures allowing higher density residential uses, even though such uses are not consistent with the comprehensive plan and with previously existing low density zoning in the area.[167] Since these cases often arise in rural or urbanizing areas, the courts may correctly perceive that the plan and the low density zoning enacted to implement it are part of a "holding" strategy properly subject to revision as the need for more intensive development arises. While they recognize that the plan could provide guidance for zoning changes to higher densities, the courts may be convinced that planned unit development and similar techniques can allow for a departure from the plan in a particular case. Opportunities for site plan review under such procedures also may be a factor that prompts the courts to accept a departure from the plan. Site plan standards contained in these ordinances usually require the higher density development to be compatible with its surroundings, and give both the municipality and the courts an opportunity to insist that the development not be intrusive. To the extent that these standards authorize a review to assure the compatibility of new uses with their surroundings, they meet a principal concern expressed in *Fasano*.[168]

In still other cases, a zoning amendment consistent with the plan has been judicially approved. While *Fasano* is probably the strongest opinion giving weight to the comprehensive plan as support for a zoning amendment to a more intensive use, other courts have also

165. *See, e.g.*, Lathrop v. Planning & Zoning Commn., 164 Conn. 215, 319 A.2d 376 (1973); Furtney v. Simsbury Zoning Commn., 159 Conn. 585, 271 A.2d 319 (1970); Doran Investments v. Muhlenberg Twp., 10 Pa. Commnw. 143, 309 A.2d 450 (1973); Saenger v. Planning Commn., 9 Pa. Commnw. 499, 308 A.2d 175 (1973); Forks Twp. Bd. of Supervisors v. George Calantoni & Sons, Inc., 6 Pa. Commnw. 521, 297 A.2d 164 (1972). *Cf.* Tomasek v. City of Des Plaines, 26 Ill. App. 3d 586, 325 N.E.2d 345 (1975). *See generally* 1 N. WILLIAMS, *supra* note 9, at § 26.06.

166. *See, e.g.*, Cheney v. Village 2 At New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

167. *See, e.g.*, Loh v. Town Plan & Zoning Commn., 161 Conn. 32, 282 A.2d 894 (1971); Chrinko v. Township Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (1963); Cheney v. Village 2 At New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968); Doran Inves. v. Muhlenberg Twp., 10 Pa. Commnw. 143, 309 A.2d 450 (1973). The ordinance must of course provide sufficient standards and criteria under which the use can be allowed.

168. 264 Ore. at 586, 507 P.2d at 29.

been willing to consider the authority of the plan in this situation.[169] As in *Fasano*, these courts have had to consider just how the policies of the plan should be related to the zoning process, a problem substantially mooted in cases like *Baker* where the conflict between the plan and the ordinance is clear.

This problem is not serious in jurisdictions in which the plan is mapped in a fairly detailed way. In these jurisdictions, the courts can apply the plan's mapped land use designations with some precision to zoning amendments and to other actions that implement the plan. Whether the courts should also adopt a rule of reason to allow minor deviations from mapped planning policy is more problematic.[170]

Particularly difficult questions of implementation are presented when the plan is expressed in textual policy form, when the mapping it contains is highly generalized, or when the plan, though fairly precise in its mapping designations, allows some freedom of choice to the agency empowered to implement zoning. The Pennsylvania supreme court was confronted with the latter situation in *Cleaver v. Board of Adjustment*.[171] While the Pennsylvania courts (apart from the intimations in *Eves*) do not require the adoption of an independent comprehensive plan to satisfy the "in accordance" requirement, the case nevertheless is instructive on the role of the plan as a justification for zoning amendments.

169. *See* City of Louisville v. Kavanaugh, 495 S.W.2d 502 (Ky. 1973) (refusal to rezone was arbitrary in light of land use plan); Ward v. Knippenberg, 416 S.W.2d 746 (Ky. 1967) (plan serves as a guide, and actual location of shopping center in zoning ordinance need not follow plan exactly); Henze v. Building Inspector, 359 Mass. 754, 269 N.E.2d 711 (1971); Sonneland v. City of Spokane, 4 Wash. App. 865, 484 P.2d 421 (1971). *Cf.* Montgomery County Council v. Leizman, 268 Md. 621, 303 A.2d 374 (1973) (comprehensive rezoning in accordance with master plan given strong presumption of validity and correctness). *See generally* Montgomery v. Board of County Commrs., 263 Md. 1, 280 A.2d 901 (1971) (zoning amendment consistent with comprehensive plan was approved when supported by change in neighborhood conditions); Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972) (failure to rezone was arbitrary and capricious in light of changed circumstances).

170. *Compare* Ward v. Knippenberg, 416 S.W.2d 746 (Ky. 1967) in which a minor deviation from a comprehensive plan in the mapping of a commercial zone was not held fatal, *with* Duddles v. City Council, ___ Ore. App. ___, ___, 535 P.2d 583, 586-89 (1975), in which the court set aside a commercial rezoning when commercial rezoning was not indicated for that tract but rather for an adjacent parcel. *See also* F.H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, ___ Iowa ___, 190 N.W.2d 465 (1971); Heller v. Prince George's County, 264 Md. 410, 286 A.2d 772 (1972). For a case in which the policy of the plan was applied to find a rezoning invalid even though the rezoning was inconsistent with the land use designated by the plan, see Dustin v. Mayor and Council, 23 Md. App. 389, 328 A.2d 748 (1974).

171. 414 Pa. 367, 375-78, 200 A.2d 408, 413-15 (1964), *followed in* Schubach v. Silver, ___ Pa. ___, ___, 336 A.2d 328, 337-38 (1975); Pollock v. Zoning Bd. of Adjustment, ___ Pa. Commnw. ___, ___, 342 A.2d 815, 820 (1975).

In *Cleaver*, the township had rezoned an eleven-acre tract, located near a suburban Philadelphia railway station and major highway, from single family residential to apartment use.[172] The tract was bounded by single family residences and by a large research center. The plan adopted by the township consisted of general policy proclamations and some policy statements relating to specific areas of land. Generally, apartments were encouraged throughout the township as a transitional use between residential and nonresidential areas. Access to "good highway and rapid transit facilities" was also endorsed for these developments. The plan then called explicitly for the rezoning of certain specified tracts near designated railway stations, including the disputed one, to apartment or professional uses. Neighbors objecting to this rezoning did not challenge these apartment location policies as inappropriate, but complained that the density permitted and the setbacks required by the rezoning were too generous. No policies for density or setbacks were contained in the plan.

The court noted the generality of the plan, but held that "[a] comprehensive plan does not contemplate or require a 'master-plan' which *rigidly* provides for or attempts to answer in minute detail every possible question regarding land utilization or restriction."[173] Since the plan defined a "range of choices" for the zoning of the property at issue, and the rezoning fell within that range,[174] the court found that the ordinance accorded with the plan, and that the zoning was justified by both the plan and attendant circumstances. The *Cleaver* court was thus more willing than the *Fasano* court to credit the policies of the comprehensive plan without qualification, even though its interpretation of the plan as an advisory document leaves room for the court to reject the plan in an appropriate case.[175]

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172. For a map of the environs in this case, see D. MANDELKER, *Managing our Urban Environment* 976 (2d ed. 1971).

173. 414 Pa. at 375, 200 A.2d at 413 (emphasis original).

174. "It is clear that the Tredyffrin Land Use Plan (a) permits a defined range of choices in the zoning of appellant's property . . ., and (b) *does not command* particular requirements of population density or set-back or spacing for apartments thereon, and (c) clearly envisages and permits a proper zoning of the property here in question for apartments." 414 Pa. at 378, 200 A.2d at 415 (emphasis original).

175. The *Cleaver* court addressed the spot zoning objections to the rezoning independently, but found that the rezoning was consistent with other applicable zoning in the surrounding area and that the tract was adjacent to the heavily used railroad tracks. 414 Pa. at 367, 378-80, 200 A.2d at 408, 415-16. Thus, the rezoning in *Cleaver* could have been independently supported as consistent with uses in the surrounding area, apart from the policies adopted in the township plan. While the court's assumption that apartments are properly placed near busy railroad tracks may be open to question, there was at least enough evidence in the case to indicate that the rezoning would not introduce an intrusive use into the area (to use the words of the *Fasano* decision).

The *Cleaver* court was also willing to view the failure of the plan to deal with density and setback requirements as a reason for not deeming these issues controlling in passing on the rezoning. It could be argued, however, that the plan's failure to consider density should be fatal, since the very purpose of a rezoning like the one in *Cleaver* is to increase the density allowed on the rezoned tract. If a plan is incomplete or inadequate, a court could (and should) reject its policies for failing to provide an adequate basis for a rezoning amendment. If in this situation the plan does not adequately define the "range of choices," it should not be entitled to judicial respect. The same result should be reached when the plan is too vague.

Another issue raised by reliance on the plan to support a rezoning amendment concerns the extent to which the court should be willing to accept the developmental policies proposed for the community by the plan.[176] *Cleaver* and similar cases have looked to the plan to determine whether the rezoning amendment is consistent with underlying planning policies. If no regionally significant exclusionary zoning or kindred issues are raised, the courts should accept the policies of the plan as generally controlling for the limited purpose of determining whether a zoning amendment that allows a more intensive use serves community purposes or confers an improper windfall on a single landowner.

Finally, some courts have set aside a zoning amendment even though it was consistent with the plan. Cases decided under the Maryland change-mistake rule have invalidated these amendments when there have been no changes in the surrounding land use that justify the amendment. A leading case is *Chapman v. Montgomery County Council*,[177] in which plaintiffs challenged the rezoning from rural residential to commercial of a 5.8 acre tract in a fast-growing area of the county. The purpose of the rezoning was to allow construction of a convenience shopping center, the approval of which was necessary to avoid an alternative not favored by the plan—expansion of another nearby shopping center. Nevertheless, the court set aside the zoning amendment. It noted that under the change-mistake rule, "[a] 'Master Plan' is not to be confused as a substitute for a comprehensive zoning or rezoning map, nor may it be equated with it in legal significance."[178] The substantial growth in

176. For a discussion of this issue in *Christine* and related Michigan cases, see text at notes 98-111 *supra*.

177. 259 Md. 641, 271 A.2d 156 (1970). *Cf.* Richter v. City of Greenwood Village, 513 P.2d 241 (Colo. Ct. App. 1973), in which the city refused to rezone despite the recommendations in the master plan.

178. 259 Md. at 643, 271 A.2d at 157.

the population of the neighborhood, said the court, might justify additional rezoning to higher residential densities, but was not sufficient to support the shopping center rezoning.

Consideration by the *Chapman* court of the intrusiveness of the commercial use in the surrounding residential area as a factor to be weighed against rezoning reflects the problem raised in *Fasano*. It also illustrates the deficiencies of the change-mistake rule, which substantially discounts the role of the plan in supporting zoning change. If the plan cannot be used to support zoning changes that implement the urban pattern it proposes, the community will always have to zone reactively, after the character of the neighborhood has changed sufficiently to support zoning amendments to more intensive uses.[179]

Just how these changes can occur is not clear from the Maryland cases. It is possible, but by no means certain, that the *Chapman* court would have allowed a rezoning to commercial uses of a smaller tract in the neighborhood. Other alternatives might arise from the inapplicability of the Maryland change-mistake rule to floating zones[180] and to a large-scale comprehensive rezoning of all or part of a community.[181] Legislation in Maryland now codifies the change-mistake rule and lists a series of factors, including the policies of the comprehensive plan, to be considered in determining whether a change in conditions has occurred.[182] This legislation may encourage recognition of the plan in cases like *Chapman*, where urban development has progressed substantially and the application of the plan's policies through rezoning would help implement a reasonable growth pattern. As the dissent in *Chapman* noted, comprehensive plan revisions and comprehensive rezonings are "expensive, difficult, and time-consuming." Population continues to grow between these reformulations, and the comprehensive plan should provide guidance

179. However, a rezoning consistent with a comprehensive plan has been approved when it was supported by a change in neighborhood conditions. *See* Montgomery v. Board of County Commrs., 263 Md. 1, 280 A.2d 901 (1971). *Cf.* Board of County Commrs. v. Edmonds, 240 Md. 680, 215 A.2d 209 (1965).

180. *See, e.g.*, Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968).

181. *See, e.g.*, Montgomery County Council v. Leizman, 268 Md. 621, 622, 303 A.2d 374, 375 (1973); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 65-66, 254 A.2d 700, 704-05 (1969); McBee v. Baltimore County, 221 Md. 312, 316-17, 157 A.2d 258, 260 (1960); Coppolino v. County Bd. of Appeals, 23 Md. App. 358, 369-70, 328 A.2d 55, 61 (1974). *See also* D. MANDELKER, *supra* note 39, at 94-95.

182. MD. ANN. CODE art. 66B, § 4.05(a) (1970).

to the local legislative body for meeting development needs that must be accommodated during this period.[183]

C. *The Role of the Comprehensive Plan in Administrative Zoning Techniques*

Comprehensive planning policies may provide a justification not only for zoning amendments of the traditional sort, but also for changes made through floating zones, which sometimes require a zoning amendment. They may also provide a basis for conditional use permits and special exceptions, which, unlike floating zones, are explicitly authorized by the Standard State Zoning Enabling Act.[184] As already noted, some courts have been willing to approve a floating zone even when it is inconsistent with the policies of a plan.[185] These cases will now be examined more closely. There is no adequate justification for conditional use and floating zone approvals to be more favored than zoning amendments, since effectuation of the policies of the plan are at stake in both cases. Consistency with planning policies should be uniformly required.

An Oregon decision, *Archdiocese of Portland v. County of Washington,*[186] suggests why some courts have excused floating zones and conditional uses from conformity with comprehensive planning policies. The county commissioners had denied a request for a conditional use permit to allow the construction of a church, school, and gymnasium in a residentially zoned area, and the denial was upheld by the Oregon supreme court. The court's opinion dealt with the criteria for approval as well as for denial of such a permit request. It

183. 259 Md. at 656, 271 A.2d at 163-64.

184. STANDARD STATE ZONING ENABLING ACT § 7 (U.S. Dept. of Commerce rev. ed. 1926).

185. *See* text at notes 32-35 *supra.*

186. 254 Ore. 77, 458 P.2d 682 (1969). In State *ex rel.* Standard Mining & Dev. Corp. v. City of Auburn, 82 Wash. 2d 321, 510 P.2d 647 (1973), the city's zoning ordinance provided for gravel mining operations in "any district" if authorized by a special permit issued by the city council. The reasonableness of the conditions imposed by the council in granting the special permit was disputed. The court held that standards to guide the council in imposing conditions on the permit could be found by looking to the purposes of zoning described in the comprehensive plan, and need not be stated in the ordinance itself.

A number of cases have upheld floating zones even though not recommended by the plan. *See* Loh v. Town Plan & Zoning Commn., 161 Conn. 32, 282 A.2d 894 (1971) (master plan is merely advisory and is not the comprehensive plan which is to be found in the scheme of the zoning regulations); Sheridan v. Planning Bd., 159 Conn. 1, 266 A.2d 396 (1969) (the court followed the *Kozesnik* theory, distinguishing the *Eves* case and noting that the plan was advisory only). *Cf.* Lutz v. City of Longview, 83 Wash. 2d 566, 520 P.2d 1374 (1974) (lack of specific guidelines for PUDs in comprehensive plan did not mean that approval of a PUD was invalid as spot zoning).

noted that "[t]he original [zoning] ordinance itself expressly provides for the specified 'conditional uses' which might be made in the zone."[187] The administrative grant of a conditional use permit thus does not have an " 'erosive effect on the comprehensive zoning plan,' " said the court,[188] since "[t]he fact that these permissible uses are pre-defined and have the legislative endorsement of the governing body of the county as a tentative part of the comprehensive plan for the area limits the possibility that the Board's action in granting a permit will be inimical to the interests of the community."[189]

This language needs interpretation. Zoning ordinance provisions authorizing conditional uses and floating zones must contain sufficiently precise standards to guide the zoning agency in considering a proposed development. Perhaps the court meant to say that the inclusion of these criteria in the ordinance obviates any need to rely on the policies of the comprehensive plan as a guide. This position might be sound for conditional uses, which are not often markedly discordant with existing uses in the area in which they are allowed, but may not apply to floating zones, which may be structured to allow intensive new development in previously undeveloped areas. If the floating zone provisions require that the zone be reviewed to determine whether it is compatible with its prospective surrounding area, the courts might be led to rely on the criteria governing approval of the floating zone rather than on the policies of the comprehensive plan, even when approval is not consistent with the plan. Yet a floating zone that is inconsistent with the comprehensive plan may severely distort planning policies.

This problem of substantial inconsistency might be met through zoning enabling legislation, which can require that floating zone and similar approvals, as well as zoning amendments, be consistent with the plan.[190] The same result can be accomplished absent statutory direction by including a comparable provision in the zoning ordinance. Whatever the explicit mandate, extreme care must be exercised in the judicial review of the floating zone process. When the uses and densities introduced by the floating zone are not substantially more intensive than those present in the surrounding area, an

187. 254 Ore. at 83, 458 P.2d at 685.

188. 254 Ore. at 85, 458 P.2d at 686, *quoting* Smith v. County of Washington, 241 Ore. 380, 384, 406 P.2d 545, 547 (1965).

189. 254 Ore. at 85, 458 P.2d at 686 (footnote omitted).

190. *See* IND. ANN. STAT. CODE § 18-7-2-71 (Burns 1974), *construed in* Suess v. Vogelgesang, 151 Ind. 631, 281 N.E.2d 536 (1972). This variance statute applies only to Indianapolis and Marion County. *But see* Board of Zoning Appeals v. Shell Oil Co., ___ Ind. App. ___, 329 N.E.2d 636 (1975) (construing statute requiring improvement location permit to conform to master plan).

ordinance provision mandating the compatability of the floating zone with existing uses may be relied upon to provide the necessary control over the approval process. However, when a floating zone is introduced in a previously undeveloped area, or when it substantially intensifies the uses and densities already present in that area, there is no reason why a departure from the comprehensive plan should be allowed.

D. *Revision of the Comprehensive Plan To Provide Consistency with Zoning Amendments and Administrative Zoning Changes*

Courts that will give credence to the policies of a comprehensive plan in support of a zoning amendment or administrative zoning change may nevertheless first review the comprehensive plan to determine whether it has been properly enacted and revised. Some courts have been willing to accept a revision of the comprehensive plan that was made concurrently with the zoning amendment.[191] If the plan can be amended piecemeal in order to support a zoning change, the role of the plan as a comprehensive statement of community planning policies may be diluted and the planning process may be abused. This practice may in turn seriously undermine the justification for relying on the comprehensive plan as a basis for rezoning. Some jurisdictions have therefore prohibited piecemeal rezonings and plan revisions. A number of these require that rezoning amendments be grouped for consideration during a few specified periods of the year, or that comprehensive rezonings be carried out frequently, on a cyclical schedule.[192] Likewise, amendments to the comprehensive plan could be considered a limited number of times each year.[193] Although grouping several amendments or plan revisions at a particu-

191. *See* Wiegel v. Planning & Zoning Commn., 160 Conn. 239, 241-43, 278 A.2d 766, 767-68 (1971); Malafronte v. Planning & Zoning Bd., 155 Conn. 205, 230 A.2d 606 (1967); Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1963); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 632-35, 241 A.2d 81, 84-85 (1968); Furniss v. Lower Merion Township, 412 Pa. 404, 194 A.2d 926 (1963); Donahue v. Zoning Bd. of Adjustment, 412 Pa. 332, 194 A.2d 610 (1963). *Cf.* Tierney v. Duris, ___ Ore. App. ___, ___, 536 P.2d 435, 438 (1975).

192. *See, e.g.*, Coppolino v. County Bd. of Appeals, 23 Md. App. 358, 369-70, 328 A.2d 55, 61 (1974). The Baltimore County Code provided for periodic consideration of zoning reclassification petitions; a different section required the Planning Board to recommend to the Council a complete, countywide zoning map every four years. The court approved the cyclical consideration of zoning amendments as consistent with good zoning practice.

193. CAL. GOVT. CODE § 65361 (West 1975). For a recommendation endorsing this procedure, see Krasnowiecki, *Model Land Use Development Code*, in MARYLAND PLANNING AND ZONING LAW STUDY COMMISSION: FINAL REPORT 53, 109-10 (1969).

lar time does not entirely remove the danger of ad hoc actions, it may help to reduce the risk.

Some courts also may be willing to disregard the policies of the comprehensive plan when a considerable period of time has elapsed since the plan's adoption and changes in the nature of the community have made the plan's policies obsolete as applied to a particular dispute.[194] This approach has its dangers, for it may undercut timing and growth management programs for which the plan is expected to provide a framework over a period of many years. Nevertheless, communities should not be able to escape entirely their plan revision responsibilities. As an alternative approach, if a plan has not been revised for a considerable period, a court could presume that the plan is no longer representative of community policy and could put the burden on the community to prove the contrary.[195]

If the community contemplates a revision of the plan to support a zoning change, its safest course is to undertake an independent and fully considered amendment of the comprehensive plan. When a limited plan amendment is made expressly to permit a particular zoning change, the community risks intensive judicial scrutiny, but may nevertheless prevail. For example, in *Rosenberg v. Planning Board,*[196] the Connecticut supreme court considered the validity of a city plan amendment intended to support a zoning change. The city charter made a plan mandatory and prohibited any "use in any area which is contrary to the general land use established for such area by the master plan."[197] An owner desired rezoning of his land, desig-

194. *See* Town of Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973). A tract of land was rezoned by the village from single family to multifamily residential. This rezoning was inconsistent with a pre-existing comprehensive plan that had not been amended in ten years. Noting that the proper standard by which to measure the "in conformity" requirement was current comprehensive planning, the court held that the particulars of the plan (which could have been amended) might be disregarded since the amendment was in harmony with the general policy of providing convenient housing near places of employment. Comprehensive planning, not strict adherence to a particular plan, was the objective. 33 N.Y.2d at 188-89, 306 N.E.2d at 160, 351 N.Y.S.2d at 136-37.

Several problems are raised by this decision. One is that a court taking this position will be at liberty to disregard an adopted plan under its own view of whether the plan is outdated. This decision will, in turn, require an analysis by the court of whether conditions have so changed in the community that the policies of the plan are no longer to be credited, an analysis that will project the court into a policy-making role. Once the court decides that the plan can be disregarded, it will likewise be able to decide on the validity of a zoning change based on its own view of local development policy, which will not have been considered and evaluated through the local planning process.

195. This problem could also be handled by a statutory provision periodically requiring the comprehensive revision of the plan. *See* note 192 *supra.*

196. 155 Conn. 636, 236 A.2d 895 (1967).

197. 155 Conn. at 637, 236 A.2d at 897.

nated for single family use in both the plan and zoning ordinance, to permit construction of office and laboratory buildings. He sought and received a change in the plan's designation of his land as a preliminary step to the zoning change. In upholding the plan amendment, the court rejected the argument that the plan may be amended only to reflect changes in conditions that might have occurred since a previous denial of an analogous proposed amendment. Otherwise, said the court, "a prime function of the planning board which is to anticipate and direct the future orderly development of the city" would be thwarted.[198]

Rosenberg allows the planning agency considerable flexibility in amending the plan to reflect changes in planning policy, but does not consider the procedures that must be followed in making amendments to the comprehensive plan. These procedures are critical in any jurisdiction that adopts mandatory planning and requires that zoning be consistent with its plan. This requirement will be undercut if the community may arbitrarily revise comprehensive planning policies without utilizing procedures that guarantee proper consideration of the revision. This concern may, for example, underlie the Oregon decisions that have required plan amendments affecting an individual piece of property to go through a *Fasano*-type quasi-judicial procedure.[199]

Short of requiring quasi-judicial procedures for plan revision, a court may enforce provisions found in many community charters and enabling acts that impose strict review and referral procedures on the comprehensive plan revision process. This position was taken in *Dalton v. City and County of Honolulu,*[200] in which the court considered the validity of a plan and zoning amendment in light of a provision of the Honolulu charter that required all zoning ordinances to conform to and implement the general city plan.[201] The coun-

198. 155 Conn. at 639, 236 A.2d at 897-99. Compare dictum in Tierney v. Duris, ___ Ore. App. ___, ___, 536 P.2d 435, 439 (1975), that "changes would appear permissible when the original plan was in error, or there has been a change in the community, or there has been a change in policy, such as could be produced [*sic*] by city and county election results." *Rosenberg* did not require the planning board to consider the impact of the proposed use on traffic congestion. It held that this problem is properly for the consideration of the zoning board when the zoning change is proposed. *See* 155 Conn. at 640, 236 A.2d at 898.

199. *See, e.g.*, Marggi v. Ruecker, ___ Ore. App. ___, 533 P.2d 1372 (1975).

200. 51 Haw. 400, 462 P.2d 199 (1969), *discussed in* 1 N. WILLIAMS, *supra* note 9, at § 26.12.

201. The charter defined the plan as the council's policy for a future, comprehensive physical development of the city. 51 Haw. at 409, 462 P.2d at 205. It required that any addition to or change in the general plan be referred to the planning director and the planning commission for comment. If the commission disapproved or modified the proposed change, or failed to make its report within 30 days, the

cil had amended the general plan and the zoning ordinance on the same day to allow medium-density residential development, without having referred the amendment to the planning director and planning commission for their advice, as required by the charter. The court invalidated the plan amendment, holding that the specific procedures required by the charter had to be followed exactly. "These sections of the charter," said the court, "allow less room for the exertion of pressure by powerful individuals and institutions."[202] Moreover, the court held specifically that any alteration in the plan must be accompanied by new studies that evidence a need for additional housing, and that show not only that the housing should be located at the site in question, but that the proposed location is the "best site."[203]

The Honolulu plan under review in *Dalton* was quite detailed, and the effect of that decision elsewhere in the jurisdiction has been to require detailed amendments to the general plan as a condition to any zoning amendments based on a change in planning policy, at least when the city's charter can be so construed.[204] Piecemeal

council could nevertheless adopt it, but only by an affirmative vote of at least two thirds of its entire membership. 51 Haw. at 412, 462 P.2d at 207.

202. 51 Haw. at 416, 462 P.2d at 209.

203. 51 Haw. at 417, 462 P.2d at 209. The authority of *Dalton* may have been weakened by a 1972 amendment to the city charter that dropped the word "comprehensive" from the definition of the general plan, as well as the requirement for detailed studies. Revised Charter of the City and County of Honolulu § 5-408 (1973). *But cf.* Hall v. City and County of Honolulu, 56 Haw. 121, 530 P.2d 737 (1975), in which the court found that the hearing requirement imposed by *Dalton* as condition to the adoption or amendment of the general plan was not satisfied by a a hearing on one of the detailed plans that the charter authorizes to spell out more precisely the policies of the general plan. The Honolulu charter authorized a network of county and sub-county plans that is similar to the planning program adopted in Montgomery County, Maryland, *discussed in* note 85 *supra*. For discussion of these plans, see LEAGUE OF WOMEN VOTERS OF HONOLULU, THE CITIZEN AND THE PLANNING PROCESS: UNDERSTANDING THE SYSTEM 2-3 (1974). This planning system will be modified if a general policy plan now under consideration is adopted. *See* note 84 *supra*. A number of cases have upheld the statutory requirement of planning commission input prior to council action on a zoning change. *See, e.g.*, Colorado Leisure Products, Inc. v. Johnson, ___ Colo. ___, 532 P.2d 742 (1975); Houser v. Board of Commrs., 252 Ind. 301, 247 N.E.2d 670 (1969); Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Frankland v. City of Lake Oswego, 8 Ore. App. 224, 493 P.2d 163 (1972), *modified*, 267 Ore. 452, 517 P.2d 1042 (1973). *Cf.* Chrobuck v. Snohomish County, 78 Wash. 2d 858, 869-71, 480 P.2d 489, 495-96 (1971). *But cf.* Wilhelm v. Morgan, 208 Va. 398, 399-400, 157 S.E.2d 920, 921-22 (1967). The Kentucky court also requires adjudicative fact-finding. In Kentucky, if the legislative body makes a zoning change that is contrary to the planning commission's recommendation, the court requires adjudicative fact-finding supported by the record of a trial-type hearing of either the planning commission or the legislative body. *See* Hays v. City of Winchester, 495 S.W.2d 768 (Ky. 1973). *See generally* Tarlock, *supra* note 21, at 94-101.

204. For a discussion of the Honolulu situation, see Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U. L. REV. 766, 770, 772-75

amendments to the plan covering very small areas are thus permitted at any time under the *Dalton* rule if the procedural and substantive requirements have been met. This piecemeal amendment process is subject to abuse, notwithstanding the court's call for long-range and comprehensive revisions in the plan, if the city's planners are willing to recommend amendments for individual parcels of land in order to accommodate would-be developers. *Dalton* to some extent anticipates this problem by placing substantive constraints on plan revisions. Its requirement that the affected parcel must be shown to be the "best site" echoes the similar requirement imposed on zoning amendments by *Fasano*.

Other problems of application are created by the *Dalton* decision. When a community adopts an especially general policy plan in satisfaction of the comprehensive planning requirement, it may not be meaningful to require the plan's amendment as a precondition to a zoning change. To some extent this problem can be alleviated if communitites are also required to adopt more specific area plans that elaborate on their generalized planning policies. *Dalton*-type amendment procedures can then be applied to these area plans.

The *Dalton* approach may also produce problems in zoning administration, since zoning agencies may resist zoning changes simply to avoid the time and expense of updating the plan. This problem can be dealt with if the plan is kept under continuous study and if the locality takes steps to update it frequently, even with amendments that are not geographically comprehensive.

Rosenberg and *Dalton* indicate that the courts have not yet fully developed the requirements that must be met in the plan revision process. While most courts will no doubt require adequate plan amendment procedures, more serious problems are presented by the suggestion that the courts also review comprehensive plan changes on their merits. The few courts that have considered this question have taken different views, not unlike the disagreement in the decisions reviewing originally adopted comprehensive planning policies. Plan revisions may stand on a different footing when they are a prelude to changes in zoning designations. Arguably, affected property owners and community residents are entitled to judicial review of changes in planning policies without their having to incur the expense of obtain-

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(1974). How *Dalton* will be applied to the newly proposed generalized policy plan that might take the place of the existing detailed plan is not clear. *Id.* at 781-83.

The drafters of the charter intended the new plan to be a plan stating policies and objectives, and they intended the burden of the *Dalton* case to be "lifted" by authorizing the amendment of the plan by resolution. CITY AND COUNTY OF HONOLULU, FINAL REPORT TO THE CHARTER COMMN 24 (1972).

ing or resisting a zoning change. This argument is especially persuasive in states that adopt both mandatory planning and the collateral requirement that zoning and other land use controls be consistent with a comprehensive plan independent of the zoning ordinance. In these states, judicial review of the merits of comprehensive plan revisions appears justified, assuming that the courts are able and willing to provide the necessary expertise. As an alternative, administrative review of both plan adoptions and revisions at the regional or state level might be implemented through legislation, perhaps as an adjunct to mandatory planning.

V. Mandating and Enforcing Comprehensive Planning Through Legislation

Judicial decisions that give weight to the comprehensive plan in litigation challenging zoning regulations provide support for legal recognition of the planning process. The implementation of a mandatory planning requirement, however, would raise a number of complex issues that could best be resolved through revision of state planning and zoning enabling legislation. State legislators must settle at least three major issues if they decide to mandate comprehensive planning: the form and content of the planning process to be required at different governmental levels within the state, the extent to which consistency should be required between local land use controls and locally adopted comprehensive plans, and the extent to which local planning programs should be subject to review and modification by other governmental units. This section will explore these issues by reviewing recent legislative enactments and proposals that either give the comprehensive plan some presumptive weight in the administration of land use controls or make the plan a prerequisite to the exercise of these controls.

A. *The Statutory Elements of the Comprehensive Plan*

Traditionally, American planning enabling legislation has not contained substantive planning policies, has rarely prescribed the contents of the plan, and has seldom indicated the goals that the plan should achieve. Although most legislation does require some mapped plans, it has otherwise failed to describe the form that the plan should take. This lack of legislative specificity may in part be appropriate, since planning occurs in many contexts within a state and is presently undergoing rapid changes in perspective, technique, and concept. State legislation, therefore, should not rigidly force one

approach upon planners, but should allow them a choice among the several available alternatives.[205]

A more urgent question is whether planning enabling legislation should provide some substantive guidance for the planning process, either by specifying necessary linkages among the statutory planning elements or by prescribing substantive planning goals. Such a change would require a significant modification of any legislation based on the Standard City Planning Enabling Act, which was content to prescribe a shopping list of acceptable plan elements. The standard act did not indicate what policies the plan was to adopt or how the enumerated elements were to be combined to produce a plan that satisfied the statutory mandate. New planning objectives, such as environmental protection, growth control, and provision of low-income housing, have increased the complexity of planning. The concurrent pursuit of these objectives in any planning jurisdiction will likely produce conflicting planning policies. Legislation should mandate at least the preparation of a local plan in which these policy conflicts are considered and an attempt is made to resolve them. Substantive planning policies, however, may best be left for determination through the planning process, subject to a statutory generalized outline of an acceptable planning program.

In modifying planning enabling legislation to provide better guidelines in the three major areas that seem to demand them—growth management, environmental protection, and planning for low-income housing—close attention should be paid to the hierarchy of planning responsibilities. For example, it might be argued that the internal distribution of residential densities within municipalities is a problem for local consideration, while the determination of density levels and rates of growth for communities within a regional setting is a state or regional responsibility. Similarly, local planning might be entrusted to make general decisions on residential patterns, but the location and density of low-income housing are best determined at state or regional levels. Planning enabling legislation should indicate which issues are to be assigned to each level of government within the state, or at least should provide clear guidance for planning decisions that raise issues of regional or statewide concern but have been left for local determination.

State legislation should require, moreover, that local plans consider the growth management problem, and that they develop the

205. State legislatures concerned about the overly vague plans that may be produced in a policy planning process may wish to circumscribe that process in some way, perhaps by requiring detailed sub-area plans that give greater specificity to the textually stated policies of the plan. *See* note 85 *supra.*

linkages among capital facilities programming, land use projections, and density requirements that are necessary for an adequate growth control program. A statutory directive of this type is contained in the Federal Housing and Community Development Act of 1974.[206] State, regional, and local planning agencies are eligible for federal financial assistance under the act on the condition that they include in their comprehensive plans "[a] land-use element which shall include . . . studies, criteria, standards, and implementing procedures necessary for effectively guiding and controlling major decisions as to where growth shall take place within the recipient's boundaries . . . ."[207] A similar directive is contained in the Florida Local Government Comprehensive Planning Act.[208]

Whether planning enabling legislation should go any further than these general directives is problematic.[209] Any statutory attempt to provide more substantive direction for local growth control policy might be open to the charge that it creates excessive rigidity. Nevertheless, fairly specific provisions were adopted by the Colorado legislature in 1974.[210] This legislation does not mandate a planning process at the local level, but delegates to local governments a permit approval authority over major new public facilities and facility extensions, which have a major impact on the rate and direction of new growth. Detailed substantive statutory requirements are provided to guide local governments in considering whether to approve these projects. While these requirements relate primarily to the need to protect facilities such as airports and highways from urban congestion, the statute also directs that major extensions of water and sewer facilities "be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be

206. 40 U.S.C. §§ 460 to 461 (Supp. 1974).

207. 40 U.S.C. § 461(C)(2) (Supp. 1974).

208. Florida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3177(6)(a) (1975): "The future land use plan shall include a statement of the standards to be followed in the control and distribution of population densities and building and structure intensity as recommended for the various portions of the area."

209. One problem is the uncertainty of the constitutional limits of an acceptable growth control program such as those imposed by the federal right to travel doctrine. *See* Construction Indus. Assn. v. City of Petaluma, 522 F.2d 897, 906 n.13 (9th Cir. 1975); Comment, *The Right To Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

210. In 1974, the Colorado legislature granted to local governmental bodies broad power both to designate certain areas and activities as being of "state interest," and to regulate development of the areas and participation in the activities through the issuance of special permits. COLO. REV. STAT. ANN. §§ 24-65.1-101 to -502 (Supp. 1975). *See* Bermingham, *1974 Land Use Legislation in Colorado*, 51 DENVER L.J. 467 (1974). Specific criteria for administration of areas and activities of state interest are included. COLO. REV. STAT. ANN. §§ 24-65.1-202 and -204 (Supp. 1975).

accommodated within the financial and environmental capacity of the area . . . ."[211]

Consideration of environmental problems should also be required by planning enabling legislation. The Colorado land use legislation provides detailed substantive requirements to protect environmentally sensitive areas from potentially harmful development.[212] Elsewhere, provision has been made for environmental planning through legislation that is explicitly directed to environmental protection. Examples are several state coastal management statutes, which provide for close state supervision over development in coastal areas. Some of these statutes contain a planning component as the basis for the review of new development.[213] Other legislation not limited to coastal areas also provides for environmental protection. For example, the ALI Model Land Development Code would give state planning agencies authority to designate and regulate areas of critical state concern;[214] legislation based on this proposal has been adopted in several states.[215] The ALI critical areas proposal does not, however, require

211. COLO. REV. STAT. ANN. § 24-65.1-204(b) (Supp. 1975). While its language is not absolutely clear, the statute certainly suggests that these projects are to be approved *only* when these standards are satisfied. *See* COLO. REV. STAT. ANN. §§ 24-65.1-204, -402, -501. *See also* COLO. REV. STAT. ANN. § 24-65.1-204(7) (Supp. 1975): "When applicable, or as may otherwise be provided by law, a new community design shall, at a minimum, provide for transportation, waste disposal, schools, and other governmental services in a manner that will not overload facilities of existing communities of the region. Priority shall be given to the development of total communities which provide for commercial and industrial activity, as well as residences, and for internal transportation and circulation patterns."

212. COLO. REV. STAT. ANN. § 24-65.1-202(3) (Supp. 1975):

> Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance, as determined by the state historical society, the department of natural resources, and the appropriate local government, shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife habitat. Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damages to those resources for future use.

213. *See* Coastal Area Management Act of 1974, N.C. GEN. STAT. §§ 113a-100 to -128 (Supp. 1975) (mandating a local planning and development control process for coastal areas based on state-adopted directives for the local planning effort), *discussed in* Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law Is Enacted in North Carolina*, 53 N.C. L. REV. 275 (1974); California Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1976); Shoreline Management Act of 1971, WASH. REV. CODE ANN. §§ 90.58.010-.930 (Supp. 1974). *See also* Comment, *Coastal Controls in California: Wave of the Future?*, 11 HARV. J. LEGIS. 463 (1974).

214. ALI MODEL LAND DEVELOPMENT CODE art. 7, pt. 2 (Proposed Official Draft, 1975).

215. *See* FLA. STAT. ANN. § 380.05 (1974); ME. REV. STAT. ANN. tit. 5, §§ 3310-3314 (Supp. 1975); MINN. STAT. ANN. §§ 116G.07 to .14 (Supp. 1975). For a discussion of this legislation, see Finnell, *Saving Paradise: The Florida Environmen-*

a state planning component. This omission should be remedied so that statewide critical area controls will be based on appropriate state planning policies.

The drafters of new planning enabling legislation should also consider means to preserve prime agricultural areas from intrusive urban growth. Hawaii has pioneered in this field by providing a state program of direct land use regulation aimed in large part at protecting agricultural land.[216] There have also been proposals that a planning element directed to the preservation of agricultural land be included in state legislation mandating local planning.[217] While a policy for the protection of agricultural land would be only one component of a comprehensive environmental protection program, it is significant enough to merit inclusion in planning enabling legislation.

A difficulty with growth control and environmental protection programs is that localities, inadvertently or otherwise, may use these programs to exclude housing for low-income and other groups. The courts are becoming increasingly aware of the need for local zoning regulations to accommodate housing for all income groups.[218] Local planning must therefore concern itself with the housing issue, both to meet housing needs and to ensure judicial approval of land use controls aimed at environmental and growth control. Since local governments may not be sensitive to this issue, planning enabling legislation should include substantive provisions requiring a housing element in local plans; these provisions must require planning for a balanced supply of housing for all income groups.[219]

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tal Land and Water Management Act of 1972, 1973 URBAN L. ANN. 103; Mandelker, *Critical Area Controls: A New Dimension in American Land Development Regulation*, 41 J. AM. INST. PLANNERS 21 (1975).

216. *See* HAWAII REV. STAT. §§ 105-1 to 205-6 (Supp. 1975). *See* Mark, *It All Began in Hawaii*, 46 STATE GOVT. 188 (1973). Though the original Hawaii system was not tied to a state plan, the state legislature has recently adopted an interim land use guidance policy that requires attention to agricultural preservation. HAWAII REV. STAT. §§ 205-16 to -16.2.

217. *See, e.g.*, Washington State House Bill No. 168, 44th Regular Sess. § 16(2) (1975). The bill died in committee.

218. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

219. There is some statutory precedent for this approach. *See* note 57 *supra*. *But cf.* Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

A New York State study commission has called for the preparation of a mandatory housing element in local plans to provide a broad range of housing alternatives. This mandatory housing element would in turn provide a basis for judicial review of local land use regulation. *See* REPORT OF THE TEMPORARY STATE COMMN. ON THE POWERS OF LOCAL GOVERNMENT, STRENGTHENING LOCAL GOVERNMENT IN NEW YORK STATE, PART 2, SERVICES, STRUCTURES, AND FINANCE 55-61 (1973).

In fragmented metropolitan areas, however, it may be difficult to require each local government in the area to accommodate some portion of the regional housing need. Nevertheless, the New Jersey supreme court has recently mandated just such an approach in *Southern Burlington County NAACP v. Township of Mount Laurel.*[220] The court held that, absent some attempt at the regional or state level to ensure a distribution of housing opportunities that takes regional needs into account, it is incumbent upon localities to attempt to meet their fair share of housing for all groups. Even though other courts may follow suit, this decision highlights the need for planning enabling legislation that will both provide a statutory basis for state and regional planning for housing needs and will take into account the varying capacities of local governments to provide for this housing. State legislation might also establish a basis for integrating regional fair share housing plans with the housing assistance plans that are now required by federal community development assistance legislation.[221]

B. *The Emerging Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan*

Several states have enacted legislation mandating planning by local governments, and some of this legislation also requires that local zoning be consistent with the comprehensive plan once it is adopted.[222] These statutes usually have expanded the list of planning

220. 61 N.J. 151, 336 A.2d 713 (1975).

221. *See* text at notes 54-57 *supra.*

The Model Land Development Code provides a statutory procedure for dealing with the low-income housing problem that does not require the adoption of a comprehensive plan at either the state or local levels. Adverse local land use control decisions affecting such housing could be appealed to a state land use adjudicatory board with power to reverse or modify the local decision. ALI MODEL LAND DEVELOPMENT CODE § 7-301(4)(d) (Proposed Official Draft, 1975). One factor bearing on the approval of such development is the need for housing that is reasonably accessible to places of employment. ALI MODEL LAND DEVELOPMENT CODE § 7-402(5) (Proposed Official Draft, 1975). Another section of the code contains special review procedures that prohibit the approval of major employment facilities unless housing is available for employees that is reasonably accessible to the facilities. ALI MODEL LAND DEVELOPMENT CODE § 7-305 (Proposed Official Draft, 1975). While this device might be of assistance in meeting low-income housing needs, it is an incomplete response lacking a planning base for the placement and supervision of low-income housing developments.

222. *See* text at notes 223-62 *infra.* For other legislation mandating a local plan, see ALAS. STAT. §§ 29.33.070, 29.33.085 (1972); § 29.33.090 (Supp. 1975) (requiring zoning to be consistent with plan); DEL. CODE ANN. tit. 9, §§ 6807(a), 6904 (1974); D.C. CODE ANN. §§ 1-1002(a)(4)(D), 5-414 (Supp. 1975); HAWAII REV. STAT. § 225-21 (Supp. 1975) (requiring local plans to conform to state plan);

elements and have made some of them mandatory. Otherwise, the provisions of the original planning enabling act have been left substantially unchanged. Analysis of some of these statutes may suggest directions for future legislative experimentation.

California was one of the first states to enact legislation requiring local governments to adopt a plan.[223] Both mandatory and optional plan elements are provided in the statute,[224] but mandatory substantive planning policies are stipulated only for the housing element.[225] The zoning enabling legislation requires local zoning to be consistent with an adopted local plan and defines "consistent" in the following terms: "The various land uses authorized by the ordinance are [to

IDAHO CODE §§ 67-6508, 67-6511 (Supp. 1975); IND. ANN. STAT. CODE § 18-7-2-31 (Burns 1974); S.D. COMP. LAWS ANN. §§ 11-2-11, 11-6-2 (Supp. 1975); VA. CODE ANN. §§ 15.427, 15.446 (Supp. 1975).

In Arizona and Maine local planning is not mandatory, but once a plan has been adopted, local zoning regulations must be consistent with it. ARIZ. REV. STAT. ANN. § 9-462.01(E) (Supp. 1975); ME. REV. STAT. ANN. tit. 30, § 4962(1)(A) (Supp. 1973). *See also* MINN. STAT. ANN. § 462.357(2) (Supp. 1976) (planning agency to prepare zoning ordinance "at any time" after adoption of land use plan).

In Minnesota, the Metropolitan Council for the Twin Cities area is required to adopt a system plan governing the timing, character, function, location, and projected capacity and conditions on use for existing or planned metropolitan public facilities, and for state and federal public facilities to the extent known to the Council. MINN. STAT. ANN. § 473.855 (Supp. 1976). Local governments within the Council's area are required to prepare comprehensive plans, MINN. STAT. ANN. § 473.858, and these are to be reviewed by the Council for conformity with the metropolitan plan, MINN. STAT. ANN. § 473.175. Official controls, including land use controls, that are adopted by local governments may not conflict with their comprehensive plan, or permit an activity in conflict with the metropolitan plan. MINN. STAT. ANN. § 473.865 (2).

The planning agency is required to prepare county plans in Rhode Island and Washington, but adoption by the governing body is optional. R.I. GEN. LAWS ANN. § 45-24-1 to -3 (1956); WASH. REV. CODE § 36.70.320 (Supp. 1974). *See also* NEV. REV. STAT. § 278.640 to .675 (Supp. 1975) (authorizes the governor to prescribe, amend, and administer land use plans and zoning regulations for any county lands not subject to comprehensive plans and zoning regulations as of 1975. The governor may enjoin any development that does not conform to an applicable plan).

See also MD. ANN. CODE art. 23A, § 9(c) (1970). In Maryland, the law specifies that for a period of five years, an annexing municipality may not rezone the annexed land to permit a land use substantially different from that allowed by the land use plans to which the annexed land was previously subject. MD. ANN. CODE art. 23A, § 9(c) (1970). This provision was upheld in Maryland-National Capital Park & Planning Commn. v. Mayor & Council, 272 Md. 550, 325 A.2d 748 (1974).

For a locally adopted mandatory county planning requirement, see CHARTER OF BROWARD COUNTY, FLORIDA, § 6.05(D)(G) (1974). The Charter requires all zoning governing uses and densities to "comply" with the county land use plan.

For a Canadian solution see OTTOWA REGIONAL COMMUNITY ACT, QUEBEC STAT., c. 85, § 142 (1969), *as amended*, c. 85, § 1 (1974).

223. CAL. GOVT. CODE § 65300 (West 1974). Advisory guidelines have been prepared at the state level to assist local governments in the preparation of local plans. *See* CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, GENERAL PLAN GUIDELINES (1973).

224. CAL. GOVT. CODE §§ 65302, 65303 (West Supp. 1976).

225. CAL. GOVT. CODE § 65302(c) (West Supp. 1976).

be] compatible with the objectives, policies, general land uses and programs specified in [the] plan."[226] This definition of consistency may be defective, for it requires only that land uses "authorized" by the zoning ordinance be related to the plan. Nor does this language explicitly apply to zoning amendments unless a land use permitted by an amendment is "authorized" by the zoning ordinance once the amendment is adopted. This interpretation is consistent with the apparent intent of the statute.

"Compatibility" is the key concept linking the comprehensive plan and the zoning ordinance under the California statute. There have as yet been no reported decisions construing this term,[227] but some interpretation has been provided in advisory guidelines for local plan preparation issued by the California Council on Intergovernmental Relations.[228] The Council notes that the comprehensive plan is generalized and long-range, while the zoning ordinance has "immediate force and effect on each parcel of land."[229] It follows, says the Council, that "[t]he zoning ordinance should be considered consistent with the general plan when the allowable uses and standards contained in the text of the ordinance tend to further the policies of the general plan and do not inhibit or obstruct the attain-

226. CAL. GOVT. CODE § 65860(a)(ii) (West Supp. 1976). The California Code requires subdivisions to be consistent with the general or specific plans of the city or county. CAL. GOVT. CODE § 66473.5 (West Supp. 1976). It further mandates enactment of a specific plan for the area in which the subdivision is to be included. CAL. GOVT. CODE § 66474.5 (West Supp. 1976). Finally, under the Code, which requires that every general plan in California have a housing element, CAL. GOVT. CODE § 65008 (West Supp. 1976), federally financed housing is also subject to the housing is to be treated the same as conventionally financed housing, CAL. GOVT. CODE § 65008 (West Supp. 1976), federally financed housing is also subject to the consistency requirement unless the city or county has a state approved plan for federal housing. For an analysis of the history behind the enactment of the zoning consistency requirement in California, see Catalano & DiMento, *Mandating Consistency Between General Plans and Zoning Ordinances: The California Experience*, 8 NAT. RES. LAW. 455 (1975).

227. There have been some attorney general opinions. *See, e.g.*, 58 OPS. CAL. ATTY. GEN. 21 (1975).

See also Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors, No. 6-63218 (Cal. Super., March 12, 1975), in which petitioners successfully challenged the adoption of a new general plan on numerous grounds, including the failure of the plan to be internally consistent in implementing the planning elements required by the California statute.

228. This council is a state agency composed of representatives from cities, counties, school districts, special districts, regional organizations, and state agencies. Its purpose is to promote cooperation and coordination among local, regional, state, and federal agencies. However, the planning guidelines issued by the Council are only advisory. CALIFORNIA COUNCIL OF INTERGOVERNMENTAL RELATIONS, *supra* note 223, at 2.

229. CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, *supra* note 223, at II-11.

ment of those articulated policies."[230] The guidelines thus appear to state a "rule of reason" for relating the zoning ordinance to the comprehensive plan that is similar to the position that several courts have taken on the same issue without the benefit of a statutory pronouncement.[231]

Growth timing problems are not explicitly covered by the California legislation, although the guidelines suggest that zoning should "gradually" be revised to reflect the plan's projection of future growth patterns.[232] Similar problems are created by a provision in the statute that requires amendment of the zoning ordinance within a reasonable time in conformance with any plan amendments.[233] Allowance for the gradual revision of the zoning ordinance to conform to a plan amendment would perhaps be more workable. Greater flexibility in meeting the zoning consistency provision would also be provided if the plan consisted of both general plan policies and more detailed area plans. The detailed plans would be prepared to implement general policies, such as for long-term growth, as they evolved.[234] Amendment of zoning regulations to conform to the area plan might then be required within a reasonable period of time after it was adopted. The statute could also specify that a community might meet the consistency requirement through the adoption of a floating zone, planned unit development, or similar procedure. These administrative zoning techniques could be used to make any zoning changes needed to conform to the policies of the plan.

Under the California law, compliance with the statutory consistency requirement may be enforced through a court action brought by a resident or property owner in the municipality.[235] This provision has been interpreted broadly by the state's attorney general, who has

230. CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, *supra* note 223, at II-13.

231. *But cf.* Roseta v. County of Washington, 254 Ore. 161, 458 P.2d 405 (1969), in which the court suggested that a planning policy generally designating an area for residential use did not justify a zoning amendment that shifted a lot in the area from a single family to a multi-family classification.

232. "The zoning ordinance, being current and precise, reflects the existing phase of land development, but should gradually follow the general plan into the future as appropriate in relation to timing and sequence of uses. Thus it would be inconsistent with the plan to zone a large area of existing low intensity use . . . [for high intensity] scattered uses [that] might . . . contravene a general plan policy calling for compact urban development." CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, *supra* note 223, at II-12.

233. CAL. GOVT. CODE § 65860(c) (West Supp. 1976).

234. There is explicit statutory authority in California for this type of plan. CAL. GOVT. CODE § 65450 (West 1966) to 65452 (West Supp. 1976).

235. CAL. GOVT. CODE § 65860(b) (West Supp. 1976).

ruled that the cause of action authorized by the statute arises when the zoning ordinance is inconsistent with the plan, when there is no adopted plan, or when a plan does not include all of the required statutory elements.[236] This ruling raises the question of whether a court is competent to grant relief for each of these violations. The attorney general suggests that a court can always retain jurisdiction of the suit to enforce compliance with the consistency requirement and can enjoin the issuance of building permits or any other zoning action until the requirement has been met.[237] This approach has been taken by the Supreme Court of Oregon in enforcing a plan consistency requirement that was judicially imposed on that state's cities.[238]

The California attorney general has also ruled that, while a court cannot require a community to adopt specific substantive planning policies that the court might consider desirable, it can at least order the preparation of a plan containing whatever policies the locality prefers.[239] Since the California legislation contains a substantive mandate that the required housing element in local plans provide a reasonable balance of housing for all segments of the community, a court could also inspect that element to determine whether the plan has been faithful to the statutory directive.

Florida has recently adopted a consistency provision that is both more focused and more extensive in scope than that of California. The Florida Local Government Comprehensive Planning Act of 1975[240] mandates planning by counties, municipalities, and special districts. County plans are to govern within the limits of municipalities and special districts that fail to prepare plans, while the state planning agency may impose its own plan in any county that does not complete one by a fixed statutory deadline.[241] Mandatory and op-

236. 58 OPS. CAL. ATTY. GEN. 21, 25, 26 (1975).

237. 58 OPS. CAL. ATTY. GEN. 21, 26 (1975). Since the opinion states that the court may enjoin the issuance of building permits until the plan is adopted, the inference is that the court may also retain jurisdiction until the steps leading to the adoption of the plan have been completed.

238. *See* Baker v. City of Milwaukie, — Ore. —, 533 P.2d 772 (1975). Without the benefit of a statutory provision, the court held that a mandamus action was available to a resident of the community to enforce zoning consistency with a master plan.

239. 58 OPS. CAL. ATTY. GEN. 21, 26 (1975). The opinion states that adoption of the statutorily required constituent elements of the plan can be mandated. Of course, the locality can adopt whatever policies it chooses except in the area of housing for which the planning statute mandates substantive policies.

240. FLA. STAT. ANN. §§ 163.3161-.3211 (Supp. 1975).

241. Florida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3167(4) (Supp. 1975). The Act provides that a county plan recom-

tional elements are prescribed for all plans; these include a mandatory housing element that must provide for low- and moderate-income housing needs. There is some guidance for the preparation of growth control programs, and the statute lists the coordination of the various planning elements as a major goal of the planning process.[242]

This statutory comprehensive planning framework provides the basis for an extensive consistency provision that is directed both to development by government agencies and to local land use regulations: "After a comprehensive plan . . . has been adopted . . . all development undertaken by, and all actions taken in regard to development orders by, [*sic*] governmental agencies in regard to land covered by such plan . . . shall be consistent with such plan . . . . All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan . . . ."[243] This provision is reinforced by one stating that it is the intent of the act that local land development regulations implement the comprehensive plan,[244] and by another authorizing judicial review of the relationship between the comprehensive plan and implementing governmental actions or land development regulations, in any litigation challenging these actions or regulations.[245] Land development regulations include zoning, subdivision controls, and all other measures "controlling the development of land."[246]

The Florida statute's extension of the consistency requirement to land development regulations other than the zoning ordinance, and its explicit inclusion of amendments to these regulations, are major innovations. Perhaps even more far-reaching, however, is its application of the policies of the plan to "development orders" by governmental agencies. A "development order" is defined as "any order granting, denying, or granting with conditions an application for a development permit."[247] This section apparently means that all gov-

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mended by the state planning agency must be adopted by the state Administration Commission, which consists of the governor and cabinet. FLA. STAT. ANN. § 163.3167(5) (Supp. 1975). *See generally* E. BARTLEY, LOCAL GOVERNMENT COMPREHENSIVE PLANNING ACT OF 1975: AN INFORMATIONAL SUMMARY (1975).

242. FLA. STAT. ANN. § 163.3177(2) (Supp. 1975).

243. FLA. STAT. ANN. § 163.3194(1) (Supp. 1975).

244. FLA. STAT. ANN. § 163.3201 (Supp. 1975).

245. FLA. STAT. ANN. § 163.3194(3)(a) (Supp. 1975).

246. FLA. STAT. ANN. § 163.3194(2)(b) (Supp. 1975).

247. FLA. STAT. ANN. § 163.3164(5) (Supp. 1975). This definition appears to be borrowed from a like definition contained in ALI MODEL LAND DEVELOPMENT CODE § 1-201(13) (Proposed Official Draft No. 6, 1975). It should be noted that the Model Code does not require the adoption of local zoning or similar ordinances in order to regulate development. ALI MODEL LAND DEVELOPMENT CODE § 2-101 (Proposed Official Draft No. 6, 1975).

ernmental authorizations of private land development must be consistent with the policies of the plan whether they are made under zoning or some other land development control procedure. The Florida act's requirement that governmental development conform to an adopted plan is also a significant innovation. This provision, which parallels an English one,[248] departs from the traditional view that development by governmental agencies is not generally subject to zoning controls.[249]

A more limited plan consistency provision is contained in the Kentucky planning enabling act, which permits the enactment of a zoning ordinance after the objectives of a comprehensive plan have been enunicated.[250] Complete preparation of the plan itself is not required. Once the zoning ordinance has been adopted, the following consistency requirement for zoning amendments is provided by the statute:

> Before any map amendment is granted, the planning commission or the legislative body must find that the map amendment is in agreement with the community's comprehensive plan, or, in the absence of such a finding, that one or more of the following apply . . . . (1) That the original zoning classification given to the property was inappropriate or improper.
>
> (2) That there have been major changes of an economic, physical or social nature within the area involved which were not anticipated

248. *See* N. ROBERTS, THE REFORM OF PLANNING LAW 65-75 (1976); Hagman, *Articles 1 and 2 of A Model Land Development Code: The English Are Coming*, 1971 LAND-USE CONTROLS ANN. 3. Similarly, development by local authorities and "statutory undertakers," *i.e.*, certain public service corporations, is subject to regulation under the English law. *See* J. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN BRITAIN 90-92 (4th ed. 1972).

249. *See generally* Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEXAS L. REV. 316 (1961).

Under the Florida law, governmental agencies are defined to include federal, state, local, and specific district agencies. The applicability of the consistency provision to development by federal agencies is questionable in view of federal sovereign immunity. *See* Comment, *Preemption of Local Zoning by Federal Lessee*, 1971 URBAN L. ANN. 200.

250. KY. REV. STAT. ANN. § 100.201 (1971). The Act imposes four minimum requirements for the comprehensive plan: (1) a statement of goals, objectives, policies and standards to guide physical, economic, and social development; (2) a land use plan projecting future uses; (3) a transportation plan; and (4) a community facilities plan, again projecting future needs. KY. REV. STAT. ANN. § 100.187 (1971). It also requires the substantive elements of the plan to be based on a specified study process. KY. REV. STAT. ANN. § 100.191 (1971). To ensure further that the plan will not merely perpetuate existing land use characteristics, the Act requires the planning commission to adopt a statement of objectives and principles to guide an ongoing planning and implementation process, KY. REV. STAT. ANN. § 100.193 (1971), and imposes a public hearing requirement. KY. REV. STAT. ANN. § 100.197 (1971). *See* Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation: An Analysis of the 1966 Revision of K.R.S. Chapter 100*, 56 KY. L.J. 556, 581-82 (1968).

> in the community's comprehensive plan and which have substantially altered the basic character of such area.[251]

This provision imposes a plan consistency requirement similar to the Maryland change-mistake rule, which invalidates a zoning amendment consistent with the plan in areas where no change in conditions has occurred.[252] The Kentucky statute, however, merely requires that the planning commission or legislative body make a finding of plan consistency when there has been no change in conditions.

The Kentucky statute was given a literal reading by the state's highest court in a case in which the challenged zoning amendment was inconsistent with the policies of the plan as initially adopted and a supporting plan amendment had been improperly approved.[253] The court first held that the adoption of a land use element in the plan, required by the Kentucky statute, is a prerequisite to the validity of a zoning amendment that is justified by the plan. It then held that plans could be amended only by following the formal planning study and hearing requirements of the statute.[254] Since these procedures had not been followed in amending the plan, and there had been no change in conditions, the amendment was struck down.

Another consistency requirement is contained in the Nebraska zoning enabling legislation, which applies only to counties, and which provides that "[z]oning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations. Such zoning regulations shall be consistent with the comprehensive development plan and designed for the purpose of promoting the health, safety, . . . and welfare of the . . . inhabitants of Nebraska, including . . . specific [zoning] purposes."[255] This statute is more far-reaching than the

251. KY. REV. STAT. ANN. § 100.213 (1971). This section of the statute appears to codify Hodge v. Luckett, 357 S.W.2d 303 (Ky. 1962). Bellemead Co. v. Priddle, 503 S.W.2d 734 (Ky. 1974) construed this legislation broadly and held that it authorized planned neighborhood development units (floating zones). *See* Fritts v. Ashland, 348 S.W.2d 712 (Ky. 1971); Tarlock, *supra* note 21, at 587-89, 594.

252. *See* text at notes 131-134 *supra.*

253. *See* Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492 (Ky. 1974).

254. This holding echoes the *Dalton* rationale, *discussed in* text at notes 200-04 *supra.*

255. NEB. REV. STAT. § 23-114.03 (1974) (fourteen purposes are enumerated). In addition, in all villages and the larger cities, a zoning ordinance may be adopted only after the municipal legislative body has adopted a comprehensive plan. Neb. L.B. 504 § 1 (1974), *as amended*, NEB. REV. STAT. § 19-901 (Supp. 1975). The 1975 amendment to this section removed any suggestion from the statute that the comprehensive plan was intended to be advisory. *See* Letter from Sen. Douglas K. Berenter to Daniel R. Mandelker, Sept. 19, 1975 (on file with author).

Kentucky law, for it applies to zoning ordinance adoptions as well as to amendments. It also requires that both adoptions and amendments be referred to the planning commission for its recommendations; the commission presumably would determine whether the proposed zoning measure was compatible with the policies of the plan.

This statute was applied by the Nebraska supreme court in a case considering a challenge to a rezoning in a county that had not adopted a comprehensive plan.[256] The court held that the statute applied immediately upon enactment to all existing zoning ordinances[257] and that a lapse of almost four years without county adoption of a comprehensive plan was unreasonable.[258] The rezoning was set aside.

The zoning statutes in these four states delegate enforcement of the consistency requirement to the courts. Legislatures should provide as much direction as possible for judicial enforcement without placing excessively restrictive limitations on local governments. Particular attention should be paid to the statutory specification of required and optional planning elements and to the linkages among these elements. This problem of legislative direction is partially addressed by the Kentucky statute, which errs on the conservative side by requiring only the adoption of planning objectives as a condition to the enactment of a zoning ordinance. Broader legislation, such as the California law, links the zoning power to the adoption of all of the required elements of the plan.

The problem of phasing in the consistency requirement also requires more attention. The California legislation resolved this problem by delaying the date on which the statute adopting the requirement took effect, in order to provide time for the adoption of local plans.[259] Kentucky's provision for the enactment of interim zoning ordinances pending adoption of the land use plan's objectives is an alternative approach.[260] A time limit for the adoption of the

See also NEB. REV. STAT. § 84-152 (Supp. 1975), requiring a county containing a city of the first class to have prepared a comprehensive plan by July 1, 1977. By the same date, any county in a Standard Metropolitan Statistical Area may "prepare, adopt, and enforce zoning and subdivisions regulations that are based upon a comprehensive development plan . . ." for any municipality that has not adopted such regulations and has not organized and staffed to enforce them. NEB. REV. STAT. § 84-151 (Supp. 1975).

256. *See* Bagley v. County of Sarpy, 189 Neb. 393, 202 N.W.2d 841 (1972) and a later case, Deans v. West, 189 Neb. 518, 203 N.W.2d 504 (1973).

257. 189 Neb. at 394-95, 202 N.W.2d at 842-43.

258. 189 Neb. at 395, 202 N.W.2d at 843.

259. CAL. GOVT. CODE § 65860(c) (West Supp. 1975).

260. KY. REV. STAT. ANN. § 100.334 (1971). This provision applies when the

plan could restrict the period during which interim zoning ordinances are permitted.

Defining the scope of the consistency requirement presents yet another problem. Preferably, the requirement should be stated broadly enough to be applicable to the entire zoning and land use control process. A more limited requirement, like the Kentucky statute that applies just to map amendments, is undesirable. Consistency with the plan should be required not only for map amendments but also for variances, conditional use permits, and floating zones and other administrative zoning procedures.[261]

Even after the scope of the requirement has been determined, the meaning of "consistency," which only the California and Florida laws attempt to define, remains a problem. A definition should be provided that contains both a spatial and a timing dimension. Zoning action should be made to comply with the spatial policies contained in the plan, whether they are specified on a map or by textual statement. The timing problem is also critical, for in many cases the plan will provide for land use changes at some future time, after development in the community has further progressed and been intensified. The California commission's planning guidelines suggest phasing zoning amendments to shift land use categories to more intensive uses as the times specified in the plan for the development of selected areas approach.[262] This method deserves legislative consideration. Problems also arise when the owners of land on which development has been deferred under the plan's timing policy object to zoning ordinances that restrict development in the interim period. The *Ramapo* case provides important support for deferring development in accordance with local timing plans; the right to do so should explicitly be recognized in the legislative definition of consistency.

VI. Enforcing Compliance with Mandatory Planning Through State and Regional Review

Judicial enforcement of mandatory planning and consistency requirements depends on the initiative of local residents and property owners in demanding compliance with the statute, as well as on the

commission "is conducting" or "in good faith is preparing to conduct" the studies required for a comprehensive plan.

261. *See* note 190 *supra*. In addition, see Cow Hollow Improvement Club v. Board of Permit Appeals, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966) (variance); Carlton v. Board of Zoning Appeals, 252 Ind. 56, 245 N.E.2d 337 (1969) (variance); Crane v. Board of County Commrs., 175 Neb. 568, 122 N.W.2d 520 (1963) (conditional use); Jacobi v. Zoning Bd. of Adjustment, 413 Pa. 286, 196 A.2d 742 (1964) (conditional use); Annot., 40 A.L.R. 3d 372 (1971).

262. California Council on Intergovernmental Relations, *supra* note 223.

willingness of the courts to interpret liberally the planning and zoning consistency provisions. Even courts inclined to take a broad view of the statute may be circumscribed in the relief that they can give. For example, the Nebraska and Kentucky courts were compelled to issue a blanket injunction of local zoning actions in order to enforce the statutory mandate. As an alternative to judicial enforcement of the mandatory planning and consistency requirement, the planning statute could provide for state or regional administrative review of local land use planning and controls. This review might provide greater assurance both that local controls are consistent with local planning, and that local planning is consistent with state and regional policies.

A limited statutory procedure for state level review of local plans has been provided in the ALI Model Land Development Code.[263] While the Code has taken the position that both state and local planning should remain optional, it would bar the adoption of certain sophisticated local land development control regulations, such as planned unit development ordinances, in the absence of a local comprehensive plan.[264] This provision is viewed as an incentive to localities to engage in land use planning. The Code would also allow state planning agencies to review local comprehensive plans (but not local development control ordinances) once a state plan has been adopted. If the state agency disapproved a local plan, "no aspect of the [disapproved plan would] be entitled to any weight in support of the validity of any action of the local government under this Code."[265] This provision would, on its face, bar the courts from considering a disapproved plan as support for local land use control actions, even when the Code did not make those actions dependent on the plan. Perhaps even more importantly, it is implicit in the Code that plan disapproval would mean that those local land development control powers that are dependent on a local plan could not validly be exercised at all.

The Code's judicial review article also gives weight to the state plan. It provides that, "[i]n a proceeding concerning the relationship

263. The discussion of state administrative procedures for the review of local plans that follows is based in part on a chapter in a forthcoming treatise by the author on national and state land development controls.

264. *See* ALI MODEL LAND DEVELOPMENT CODE § 2-212 (Proposed Official Draft, 1975).

265. ALI MODEL LAND DEVELOPMENT CODE § 8-502(3) (Proposed Official Draft, 1975).

See also Florida Local Government Comprehensive Planning Act of 1975, which provides that the state planning agency may make recommendations for the modification of local plans insofar as these plans affect state planning policies or the responsibility of state agencies, but these recommendations need not be accepted by the local government. FLA. STAT. ANN. § 163.3184(2) (Supp. 1975).

of an order, rule or ordinance, to the public health, safety, or welfare, the court shall give due weight . . . to the consistency of the challenged action with the applicable state . . . Land Development Plan."[266] This section would apply to any local land development control action and to those state land development regulations that implement the policies of a state plan.

The Code thus makes the judicial presumptions accorded land development control actions dependent upon whether the actions are consistent with a state plan. By relying on favorable judicial presumptions, the Code hopes indirectly to encourage compliance with state planning policies. This approach, which is consistent with the ALI's decision not to mandate a comprehensive planning process, stops distressingly short of full administrative review at the state level of local plans and ordinances. It is at best a weak compromise.

More stringent state administrative procedures to ensure that local plans and land use controls are consistent with state plans have now been provided in legislation enacted in Oregon and Wyoming.[267] The broader Oregon statute requires that all cities and counties in the state engage in comprehensive planning and "[e]nact zoning, subdivision and other ordinance or regulations to implement their comprehensive plans."[268] The comprehensive plan is defined in conventional terms as a "land use map and policy statement . . . [covering] . . . all functional and natural systems and activities relating to the use of lands . . . ."[269] There is no further attempt to delineate precisely the elements to be contained in comprehensive plans.

Planning is also mandated at the state level in Oregon through a state Land Conservation and Development Commission, authorized to "[e]stablish state-wide planning goals consistent with regional, county and city concerns"[270] and to "[p]repare state-wide planning guidelines."[271] In developing its goals and guidelines, the Commission is to "consider" the existing plans of state agencies and local governments. It is also to give "priority consideration" to areas and

266. ALI MODEL LAND DEVELOPMENT CODE § 9-110(3) (Proposed Official Draft, 1975). This provision is further explained in notes to the Code that indicate that courts are to pay "special attention" to the plan. ALI MODEL LAND DEVELOPMENT CODE, at 493. "No negative implication is intended by calling attention to these facts. The court may . . . give special attention to other facts and may . . . draw no adverse conclusion from the absence of a plan." ALI MODEL LAND DEVELOPMENT CODE, at 493-94.

267. For the history of the development and enactment of the Oregon law, see C. LITTLE, THE NEW OREGON TRAIL (1974).

268. ORE. REV. STAT. § 197.175(2)(b) (1975).

269. ORE. REV. STAT. § 197.015(4) (1975).

270. ORE. REV. STAT. § 197.404(2)(a) (1975).

271. ORE. REV. STAT. § 197.040(2)(d) (1975).

activities designated by the statute as being of more than local significance. One such activity is the placement of public facilities, which requires a permit from the Commission, while significant areas include tracts adjacent to freeway interchanges and such environmentally sensitive zones as wetlands, wilderness areas, flood plains, and agricultural land.[272] By focusing the Commission's attention on key areas and facilities, the statute presumably intends to encourage the preparation of state planning goals and guidelines relating to these important determinants of growth and their environmental impact. The state goals and guidelines are not intended to be technical directives that simply assist localities in their conduct of the planning process. They are to function instead much like goal statements in policy plans, and to provide generalized principles for the guidance of land development within the state.

One year after the Commission has adopted state planning goals and guidelines, it must review all state agency, city, county, and special district comprehensive plans and land use controls to determine their consistency with the state "goals."[273] The statute does not require consistency with state "guidelines." Nor are the goals and guidelines, and the types of policies to be included in them, defined in the statute. The available legislative history indicates only that the "goals" are to have "the full force of authority of the state to achieve the purposes" of the statute, while the "[g]uidelines . . . are suggested directions that would aid local governments in activating the mandated goals."[274] This interpretation has been accepted by the Commission. It has adopted a set of generalized goals, covering topics ranging from the protection of environmental quality and resources to the provision of public facilities and services, on which to base its review of local government planning and plan implementation programs. Significantly, the goals call for an orderly transition from rural to urban land uses through the establishment of expansion boundaries around existing urban areas and list a series of factors to be considered in reviewing conversion of agricultural land to urban use.[275] The Commission has also promulgated more specific "guidelines" for the implementation of the goals.

The Commission is endowed with powers of administrative review, modification, and enforcement of local plans and ordinances.

272. ORE. REV. STAT. § 197.230 (1975).

273. *See* ORE. REV. STAT. § 197.325 (1975).

274. OREGON LAND CONSERVATION AND DEVELOPMENT COMMN., STATEWIDE LAND USE GOALS, GUIDELINES, AND THE COLUMBIA RIVER GORGE AS A CRITICAL AREA 1 (1974).

275. *See id.* Goal 9.

On its own motion, the Commission may prescribe and, if necessary, may "amend and administer" local plans and controls that do not comply with state planning goals.[276] It may enjoin any building or land use that fails to conform with a local comprehensive plan or land use regulation.[277] On petition by a local government or state agency, the Commission also may review any local plan, land use regulation, or action for consistency with statewide planning goals.[278] Orders entered by the Commission in a review proceeding are enforceable by the state courts.

A regional planning agency for the Portland metropolitan area has been created by another Oregon statute.[279] This agency is authorized to adopt "regional land use planning goals and objectives," to prepare a plan for the region in conformity with these goals and objectives, to review local comprehensive plans and land use regulations, and to make recommendations to local planning bodies.[280] Goals and objectives adopted by the regional commission apparently are subject to review by the state commission for compliance with the state planning goals.[281]

Wyoming has adopted similar state and local planning and plan review legislation, which provides that "[a]ll local governments shall develop a land use plan within their jurisdiction. The plans shall be consistent with established state guidelines and be subject to review

276. ORE. REV. STAT. § 197.325(1) (1973). The statute also authorizes counties to review all comprehensive plans within the county and advise the government or agency preparing each plan whether it is consistent with statewide planning goals. ORE. REV. STAT. § 197.255 (1973). Counties are also responsible for coordinating all planning activities affecting land use within their boundaries "to assure an integrated comprehensive plan for the entire area of the county." ORE. REV. STAT. § 197.190(1) (1973). The statute exempts the city of Portland from this provision. This review and coordination function may also be assumed by a voluntarily formed regional planning agency or a council of governments. Counties and cities representing a majority of the population in the area may petition the State Land Conservation and Development Commission for permission to form a regional planning agency. The regional planning agency shall be established if the Commission "finds that the area described in the petition forms a reasonable planning unit" and the majority votes to create the agency. A voluntary association of local governments may perform the review if each county and a majority of cities ratify a resolution adopted by the association authorizing this function. ORE. REV. STAT. § 197.190(3), (4) (1973).

277. ORE. REV. STAT. §§ 215.510(3), 215.535 (1973).

278. ORE. REV. STAT. § 197.300(1) (1973). Under § 197.305 this review shall be based on the administrative record prepared with respect to the plan or action being challenged. "In conflict" is the § 197.300(1) term for "inconsistent." A petition for review may also be filed by "any person or group of persons whose interests are substantially affected." ORE. REV. STAT. § 197.300(1)(d) (1973).

279. ORE. REV. STAT. §§ 197.705 to -.795 (1973).

280. ORE. REV. STAT. § 197.755(1) (1973).

281. ORE. REV. STAT. § 197.300 (1973).

and approval by the [state land use] commission."[282] The commission in turn is to adopt statewide "land use goals, policies and guidelines."[283] Local plans need only be consistent with the state "guidelines." All of the relevant terms are defined by the act, though not in a manner that removes all doubts about their nature and significance.[284] A "guideline" is defined, for example, as "a checklist of methods through which a land use policy is established,"[285] though precisely what a "checklist" should contain is not made clear. The Wyoming statute, unlike the Oregon law, does not endow the state commission with the power to modify local plans and land use controls.

The Oregon and Wyoming statutes are notable for the innovative manner in which they provide a substantive basis for the review of local planning and (in Oregon) land use controls. Implicitly in Oregon and explicitly in Wyoming, the goals and guidelines that are prepared at the state level are not to be a substitute for a state plan; in Wyoming a state land use plan must be developed by the commission after its adoption of the state goals, guidelines, and policies.[286]

The legislation of both states avoids the delay in implementation that would arise if state review of local planning and land use controls were to be deferred until after preparation of a state plan. Plans that contain a fully articulated set of proposals for the development of the state require substantial expenditures of time and money. State goals and guidelines containing more generalized policies may provide adequate review standards in the interim, providing they can achieve sufficient precision and substance. The Oregon and Wyoming statutes may thus furnish innovative means of accommodating policy planning, increasingly recognized as a replacement for the more conventional mapped plan, to a procedure for reviewing the adequacy of local planning and plan implementation.

State and regional administrative review procedures like those adopted in Oregon and Washington have several advantages over purely judicial techniques for enforcing consistency requirements under mandatory planning legislation. Administrative review need not rely on the initiative and resources of private litigants. Moreover, an

282. WYO. STAT. ANN. § 9-856(a) (Supp. 1975).

283. WYO. STAT. ANN. § 9-853(a)(vi) (Supp. 1975).

284. WYO. STAT. ANN. § 9-850 (Supp. 1975).

285. WYO. STAT. ANN. § 9-850(g) (Supp. 1975).

286. Presumably, however, local planning and land use controls are to be reviewed for conformity only with the state planning goals and guidelines after the state land use has been prepared. WYO. STAT. ANN. § 9-853(a)(vii) (Supp. 1975). Failure to require reference to the state plan once it has been adopted is arguably a weakness of this statutory scheme.

administrative body can readily take cognizance of state and regional concerns and can comprehensively review local plans and regulations, while the perspective of a court is necessarily limited in litigation over a specific local action. Reliance on a state or regional agency to adopt policies that implement the state's planning legislation will also avoid the rigidity that would occur if legislatures attempted to include substantive state planning policies in state planning legislation.[287]

Several statutory requirements are necessary to provide for adequate administrative review. Though the requirement that local regulations and plans be consistent is generally found to be implicit in statutes providing for administrative review, explicit consistency provisions are desirable. The statute should also make administrative review of local land use regulations mandatory and should provide the agency with sufficient review and enforcement authority. Oregon's statutory authority for administrative amendment of local plans and regulations provides an example of this approach. State and regional administrative review, implemented through appropriate legislation, should be the primary tool for shaping local planning to the requirements of state planning policies and statutes and for conforming local land use controls to adopted local plans.

VII. Conclusions

While planning theorists and practitioners have long advocated the importance of comprehensive planning to land use control, until recently courts and legislatures have accorded no more than minimal recognition to the comprehensive plan. The problem was created, in part, by the equivocal approach toward the comprehensive planning requirement taken by the drafters of the early model planning and zoning enabling legislation. This equivocation accounted for the ambiguous "in accordance" requirement of the early model legislation that allowed courts to assume that the zoning process alone could provide a rational and binding framework for local land use controls. Most courts took a restricted view of the statutory requirement and allowed a comprehensive and rationally developed zoning ordinance to substitute for an independently adopted comprehensive plan.

In recent years, an increasing number of courts have conceded a greater role for the comprehensive plan in zoning administration. State legislatures have more frequently mandated that local governments engage in a comprehensive planning process, and some have

287. In some critical areas such as low-income housing, however, legislative adoption of substantive planning policies is desirable. *See* text at notes 49-57 *supra*.

also required that local zoning and land use regulations be consistent with an adopted local plan. This article has argued, for several reasons, that this trend in judicial decisions and in planning and zoning legislation is appropriate and should be accelerated.

At the local level, mandatory comprehensive planning provides a policy basis for the land use control process to help ensure that the process has internal consistency. In the absence of a local comprehensive plan, zoning and rezoning actions by local governments may be ad hoc and arbitrary. It is principally this concern that has moved courts to accord a greater role to the comprehensive plan as a check on local zoning administration. The need for such a check is especially acute in outlying areas that are undergoing urbanization.[288] Many communities in these areas now use zoning to create "holding zones" for their undeveloped sections, and land use policy is made as developments are approved through zoning amendments and discretionary zoning procedures. In the absence of a comprehensive plan, this policy-making procedure is particularly subject to arbitrariness.

Judicial and legislative insistence on mandatory planning as a condition to the exercise of local land use controls will require changes in the administration of these controls. For example, the requirement of consistency with the plan may compel the use of quasi-judicial procedures, such as employment of hearing examiners, for making changes in local land use regulations, since an adequate factual record may be necessary to determine consistency upon review. In addition, greater financial assistance to local governments will be required to enable them to prepare and implement the necessary planning policies and regulations. While the federal government will probably continue to provide this assistance, state governments have a financial responsibility as well. Wyoming, for example, has initiated a program of state grants-in-aid for local land use planning. Without adequate financial support for local planning and plan implementation, the legal mandate for comprehensive planning will not have its intended beneficial effect.

Mandatory local comprehensive planning can do more than provide a policy base necessary for achieving internal consistency in the administration of local land use control programs. Local planning and plan implementation efforts should be made responsive to state and regional needs, especially in the areas of low-income housing, environmental protection, and growth control management of the transition from rural to urban land uses. These concerns create con-

288. *See generally* 1969 REPORT, at 203-07.

flicting pressures on the land use planning and control process that transcend local jurisdictions. The local comprehensive plan, executed and implemented under adequate statutory guidance, can help to resolve these conflicts.

To insure the accommodation of regional and state needs, however, more broadly based planning is necessary. This point is best illustrated by the New Jersey supreme court's mandate in *Mount Laurel* that developing municipalities in the state consider regional housing needs.[289] While the court was aware that a proper regional housing program may not necessarily include the provision of an adequate range of housing in each municipality in a metropolitan region, it was unable to require a regional solution. A truly regional solution demands legislation creating a state or regional planning authority. Comprehensive planning by this body could both determine the regional need for low- and moderate-income housing and assure that all municipalities in which a need exists have met their fair share of the total.

Legislation mandating local planning should also provide a method for reviewing local planning and plan implementation to verify that the interests of the state and region are properly considered. State and regional review of local planning is provided by the Oregon and Wyoming legislation. Such a review process can also ease the problem of establishing adequate substantive statutory standards for local comprehensive planning. Except in the area of low-income housing, where substantive legislative guidance is necessary, sharply defined standards for the planning process may bind planning agencies too rigidly. They may also fail to include all of the substantive considerations that are necessary for an adequate planning program. If land planning agencies can develop adequate state and regional planning policies subject to general statutory directives, this rigidity can at least partially be avoided.

Even if state and regional review of local planning is provided, mandating comprehensive planning for local governments cannot guarantee that local land use controls will be internally consistent in their administration and faithful to regional and state policies. But the increasing and sometimes competing pressures for the better management of the urban and rural environment demand a comprehensive set of policies for the administration of land use control systems. These policies can be provided through mandatory and effectively enforced comprehensive planning at the state, regional, and local levels.

289. 67 N.J. at 179, 188-90, 336 A.2d at 727-28, 732-33.