

THE LAW OF PLAN IMPLEMENTATION IN THE UNITED STATES

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I. INTRODUCTION

Legal scholars have failed to study the legal problems resulting from efforts to carry out the planning of the modern welfare state.¹ Plans, the product of applied science and other methodologies, seek to rationalize, legitimate, or guide the exercise of expanded state power. One of the central questions of our age is whether plans provide a new rational basis for the increased expansion of state power or whether the plans are mere window dressing for an expansionist state.² Plans in the United States are largely advisory in nature and consequently are carried out by separate laws. If plans are more than mere window dressing, one might expect implementing laws to be consistent with such plans and the laws themselves to be carried out. This article explores the legal methods for insuring consistency between implementing laws and plans—"the implementation prob-

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1. To every generalization, there is an exception. One major exception is the work of B. ACKERMAN, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974). Other articles will be cited below. These articles, however, do not treat the issue as a generic one of plan implementation.

2. This latter view is best expressed in J. ELLUL, *THE TECHNOLOGICAL SOCIETY* (1964).

lem."³

In order to assess laws specifically designed to insure implementation of plans, it is useful to ask the basic question: Why carry out a plan? One must have a plan; in the words of the poet, "what's a heaven for?" But it might be argued that plans are only ideals which are never intended to be carried out. America has a tradition of Utopian planning and there is a great deal of optimism and hope within American public life which might appear to support such a Utopian approach to planning.⁴ On the other hand, the pragmatic strain of American culture, exemplified best in the writings of John Dewey,⁵ would argue that plans are like goals—targets to be aimed at in order to spur action and release activity. From this point of view, plan implementation or at least some activity directed towards planning goals is the most important part of the plan.

Perhaps more prosaic arguments can be found for implementing plans. Since planning costs money, one should not plan unless one intends to make use of the plans; otherwise it is inefficient.⁶ (Of course, the failure to implement one plan is not necessarily inefficient, since it may make sense to propose multiple plans, one of which is implemented. But the systematic and continuous non-implementation of plans is obviously inefficient.) Moreover, plans may spur initial public or private investments in implementation—"sunk and/or demoralization costs"⁷—which may be lost if the plan is not completely carried out. Further, it can be argued that plans are like promises creating expectations on the part of the public or a portion

3. Plans need not be carried out by legal means or solely by legal means. By "implementation" I will mean roughly "the means of achieving or seeking to achieve a policy." See J. PRESSMAN & A. WILDOVSKY, *IMPLEMENTATION* (1973).

4. See generally M.J. LASKY, *UTOPIA AND REVOLUTION* (1976).

5. See J. DEWEY, *HUMAN NATURE AND CONDUCT* 265-77 (1922).

6. Interestingly, the costs of planning activities have not been studied by planners themselves.

7. A "sunk cost" is defined as a cost "which has already been incurred, and which, therefore, is irrelevant to the decisionmaking process." C.T. HORNGREN, *COST ACCOUNTING: A MANAGERIAL EMPHASIS* 952 (3d ed. 1972).

A "demoralization cost" is the total of 1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and 2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. Michelman, *Property, Utility and Fairness: Comments on the Ethical Fairness of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

of the public. Hence, these promises should be kept if expectations are not to be disappointed. Finally, it might be suggested that plans propose good things and those good things should, if possible, be achieved.

The trouble with all of these good reasons for carrying out plans is that these reasons might not hold true all of the time. There may not be much money spent on the plan. It might not be a good plan. There may be no expectation that it be carried out. No investment may be made on the basis of the plan.

Moreover, although a plan may technically be a "good plan," reflecting substantial investment and producing reliance, one might, in the abstract, think of reasons why it should not be carried out. Perhaps the wrong government entity adopted the plan. Or perhaps the plan, if implemented, will give too much power to the wrong people. Given the fact that sometimes plans should not be carried out, how should the law establish a process of plan implementation to determine when plans should or should not be implemented? One can take several approaches to this problem, and legislation is generally patterned after three distinct models that seek to insure a rational relationship between the planning process and the laws designed to implement the results of the process.⁸

At one extreme, one might not implement any plans systematically. The traditional model, the "advisory plan or representative democracy" model, is based on this approach; the plans are largely advisory, to be implemented by a separate set of laws passed by the legislature. Alleged shortcomings in the traditional model, however, resulted in plans being ignored and led to the development of several newer models based on different approaches to the implementation problem.

One newer approach is at the other extreme: the "administrative regulatory" model requires that if a plan is produced, it must be implemented. The model relies upon the regulations of the administrative structure to unite planning and implementation. The "administrative regulatory approach" should theoretically lead to more general public expectation that plans will be implemented as compared to the traditional "representative democracy" approach. In addition, there may be more initial public or private investment in

8. For a discussion of the various models in another context, see Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111 (1972).

preparing the plans, and there should be a greater incentive to make certain that, in some sense, the plans are good. The administrative model can be an "implementation plan" in which plan and regulations are amalgamated into one document. Recent environmental laws, for example, authorize such implementation plans.⁹ A second way to insure unification of implementation and plan through administration is a "decisional approach," which seeks to insure that planning considerations are injected directly into actual decisionmaking (rather than proceeding from a plan and then to a law implementing the plan and then to a decision of an administrator).¹⁰ The National Environmental Policy Act (NEPA), as amended, and the state mini-NEPA's exemplify this approach.¹¹

A third model, the "adjudicatory review model," is an attempt to establish some mechanism to distinguish between plans which should or should not be implemented. A "sliding scale" might be developed, by which a plan would be more or less implemented depending upon the relative worth of the plan, the level and number of expectations regarding the plan, the amount of investment made on the basis of the plan, the amount spent on the plan itself, the extent of constitutional values offended, and the legitimacy of the governmental body adopting the plan or the way in which it was adopted. This discretionary review approach is best exemplified by adjudicatory review of plan-implementation situations whereby courts or other review bodies determine on a flexible basis whether plans should be implemented. Recently, there have been both judicial and legislative efforts to strengthen the review approach.¹²

The experience with these approaches to plan implementation suggests the inherent shortcomings of each. These shortcomings are due more to the nature of planning and its relationship to decisionmaking, than to defects in the approaches themselves. Recent studies of the nature of planning in its social and political settings, as well as of

9. See notes 22-26 and accompanying text *infra*.

10. The underlying assumptions of the decisional model are that there is a decisionmaker, a moment of decision, and receptivity of the decisionmaker to deliberation. All of these assumptions have been seriously questioned. See I. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT* (1977) [hereinafter cited as I. JANIS & L. MANN].

11. See note 39 and accompanying text *infra*.

12. See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976) [hereinafter cited as Mandelker].

the psychology of the planner,¹³ suggest very basic problems with seeking to insure that all relevant laws are consistent with a plan. These basic problems require the conclusion that, at most, planning can only be one component of the implementing law or decision.

Thus, in the law of a welfare state, plans cannot be the ultimate rationale for the exercise of government power and/or decisionmaking; plans can only be a partial rationale for the exercise of expanded governmental power. Judicial review is needed both to determine the extent to which planning offers a proper rationale and to offer other sources of rationality for legitimating government decisions. Thus, we are forced to define kinds of rationality other than the instrumental rationality of planning.¹⁴

In the sections of the article to follow I will first flesh out the three models of planning implementation mentioned above and discuss briefly their unique legal problems. Second, I will identify the studies which suggest more basic reasons why plans are not easily linked to decisionmaking in the United States or elsewhere. Third, I will identify remedial and preventive legal approaches to securing a closer linkage between planning and implementation. In the final section, I will discuss the implications of my conclusions for the rationality of public decisions within the welfare state.

II. THE MODELS OF IMPLEMENTATION

A. *The Advisory Plan of Representative Democracy*¹⁵

Planning was introduced into the American political scene by means of advisory plans developed either by independent commissions or executive staff. In either case, the plan was advisory. For example, the local comprehensive land use plan was never implemented, and, as Charles Haar points out, courts did not require it to be implemented.¹⁶ Studies of national commission advisory plans

13. See I. JANIS & L. MANN, *supra* note 10 at 10.

14. See P. DIESING, *REASON IN SOCIETY: FIVE TYPES OF DECISIONS AND THEIR SOCIAL CONDITIONS* (1962).

15. The most complete argument for the use of the plan as an advisory document primarily for the legislature is set forth in T.J. KENT, *THE URBAN GENERAL PLAN* (1964).

16. See generally Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955).

suggest a similar pattern of ineffective implementation.¹⁷ Plans devised by the executive staff, whether for the elected executive or the legislature, often met a similar fate.

The introduction of advisory plans into the existing political machinery, without any significant readjustment of the political machinery itself, doomed the advisory plan to be largely an irrelevant add-on to the existing decisionmaking process. Nothing in the planning implementation machinery even guaranteed that the plan itself would be considered in the decisionmaking process.¹⁸

Yet the presence of a plan, no matter how rudimentary, was a continuing embarrassment because of its frequent inconsistency with ad hoc political decisionmaking. Either the plan was viewed as irrelevant and a waste of time, or inconsistent decisions were viewed as irrational or corrupt. Legislative language which required zoning to be "in accordance with" the plan constituted a continual invitation for complainants against zoning changes to invoke the comprehensive plan and the conformity clause on their behalf.

Despite these limitations of the advisory plan, such advisory formats have been adopted in recent local and state planning legislation. The advisory nature of a modern plan permits flexibility and a focus upon a process of planning rather than a specific product. On the other hand, as advisory planning processes are usually buried in administrative bureaucracies, they lose "public visibility," and the accountability of planning itself may be lost.¹⁹ For these reasons, it has been urged that new approaches to planning be adopted.

B. *The Administrative Regulatory Plan Model*²⁰

The growth of the administrative state leads predictably to reliance

17. See generally SOCIOLOGY AND PUBLIC POLICY: THE CASE OF PRESIDENTIAL COMMISSIONS (M. Komarovskiy ed. 1975).

18. Several possibilities for institutional reforms of advisory planning process suggest themselves. One could require that the plan and the implementation tools be considered and enacted together. Or one might require the planner to issue a formal opinion of the relationship of the plan to the implementation. "Middle range" statements of objectives linked to the implementation tool (e.g., zoning district maps) have been utilized.

19. To secure visibility of plans, it has been suggested that legislative action be taken on the plan or key policies of the plan. See D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 27-61 (1976 & Supp. 1978) [hereinafter cited as ENVIRONMENTAL CONTROLS].

20. I have called this the "administrative regulatory" model in order to emphasize

upon administrative means to insure that plans are formulated and carried out. But the ways in which this reliance is placed upon the administration may differ. On the one hand, the problem of plan implementation can be regarded as the failure to adopt sensible means to carry out unfulfilled plans, and hence implementation plans are needed to spell out how the goals are to be achieved. On the other hand, administrative action may be viewed as a process of ongoing decisionmaking and the problem as one of "informing" the decisionmaker with appropriate planning material. This is referred to above as the planning decisional model.

1. The Implementation Plan Model²¹

Rather than seek to develop two separate documents—a plan and an implementing device—and then establish a relationship between them, an alternate approach is to join plan elements and implementing regulations in one document—an "implementation plan" or a "management plan." Some of the early national plans were of this nature, such as the plans authorized under social security legislation.²² More recent environmental legislation, such as the Federal Water Pollution Control Act of 1972,²³ the Clean Air Act of 1970,²⁴ and the Coastal Zone Management Act of 1972²⁵ authorize state preparation of such implementation plans. States have also passed laws authorizing the preparation of local implementation plans.²⁶

The underlying assumptions of the implementation plan are customarily different from the advisory model of planning. The implementation plan assumes that the basic objectives, which are usually within a narrow range, are agreed upon, and the major planning task is to select the array of approaches necessary to achieve those objec-

that the plan consists largely of administrative regulations. This is an oversimplification as can be seen in the text.

21. "Implementation Plan" is the term used in the Clean Air Act, 42 U.S.C. §§ 1857c-5 (1976).

22. See Social Security Act of 1935, 42 U.S.C. §§ 301-1397(f); see e.g., 42 U.S.C. § 602 (provisions for state plans for aid to needy families with children).

23. 33 U.S.C. §§ 1251-1376 (1976).

24. 42 U.S.C.A. §§ 7401-7642 (1978).

25. 16 U.S.C. §§ 1451-1464 (1976).

26. An interesting example is Connecticut's Community Development Act, which provides that municipalities preparing a "community development action plan" include "an analysis and evaluation of ways and means, including administrative means to meet such needs." CONN. GEN. STAT. § 8-207(a)(3) (1977).

tives. For example, under the Coastal Zone Management Act of 1972,²⁷ the management program is "a comprehensive statement in words, maps, illustrations and other media . . . setting forth objectives, policies and standards to guide the public and private uses of lands and waters in the coastal zone,"²⁸ in light of the broad goals stated in the act.²⁹

Under the Clean Air Act of 1970, the Environmental Protection Agency (EPA) is required to establish national ambient air quality standards.³⁰ Each state is required to submit to the EPA an "implementing plan" for achievement of these standards.³¹ If the plan is unsatisfactory, the EPA is directed by Congress to develop an appropriate implementing plan.³² Under carefully limited circumstances, the EPA will approve revisions of the plan and a limited postponement of the implementation of the plan.³³ The law and regulations

27. 16 U.S.C. § 1454(b) (1976). For a discussion of the management program of the Coastal Zone Management Act, see ENVIRONMENTAL CONTROLS, *supra* note 19, at 231-32.

28. *Id.* § 1453(11) (1976).

29. The goals of the Coastal Zone Management Act are very generally stated, giving considerable discretion to the state. The Act states that, "(a) . . . it is the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the nation's coastal zone . . . [and] (b) to encourage and assist the states to exercise effectively their responsibilities through the development and implementation of management programs." *Id.* § 1452 (1976).

This is profitably compared with standards in the Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (1978), and standards in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976). The Clean Air Act contains goals similar to those of the Coastal Zone Management Act (*e.g.*, "to protect and enhance the quality of the Nation's air resources", 42 U.S.C.A. § 7404), but defines the federal role more strongly in relation to state programs ("provide technical assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs", *id.* § 7404(b)(3)).

The Federal Water Pollution Control Act has more specific goals ("to restore and maintain the chemical, physical and biological integrity of the Nation's waters . . . (1) [including the elimination of] the discharge of pollutants into the navigable waters . . . by 1985," 33 U.S.C. § 1251(a)), but allows similar broad discretion to the states ("[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources", 33 U.S.C. § 1251(b)).

30. 42 U.S.C.A. § 7409 (1978).

31. *Id.* § 7410 (1978).

32. *Id.* § 7410(c) (1978).

33. *Id.* For a discussion of some of the complexities of developing the plan, see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW (1977).

set forth the detailed requirements of the implementation plans.³⁴ In addition to setting forth a procedure for the adoption of the plans, EPA regulations require that the plans set forth the legal authority for their implementation, a set of "control strategies" (the combination of measures designated to achieve aggregate reduction of emissions), a compliance schedule, a surveillance system for determining air quality, procedures for review of new sources of air pollution, and a description of resources available to carry out the plan.³⁵

On the basis of this federal legislation, an ideal model of implementation plans might be developed consisting of a superior jurisdiction (in this case the federal government) which makes findings of fact and statements of objectives, and establishes criteria to be met by an inferior jurisdiction, which defines more specific policies, selects one program or a combination of alternative programs, adopts specific laws and regulations, and authorizes resources for carrying out the program. "Implementation" of a "plan" according to this model may then refer to either: the adoption of specific plans, laws, and regulations by the lower jurisdiction in accordance with the superior jurisdiction's findings of fact, statements of objectives, and establishment of criteria; or consistency between the lower jurisdiction's plans and subsequent actions.

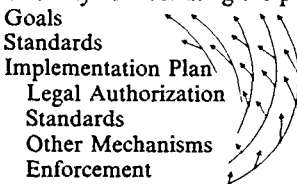
Unlike the more traditional comprehensive plan approach described above, the implementation plan approach is more complex since the elements of the plan are customarily discretely identified, which, in turn, increases the number of possible relationships among the action and planning elements.³⁶ The kind of consistency is important depends upon what elements of the plan are considered important.

The relationship between "implementation" and "plan" is initially

34. An alternative implementation plan approach that has not been used is to require a plan, but leave to the state (or locality) the task of specifying the means to be used and then establishing a monitoring system for accomplishment of the objectives.

35. 40 C.F.R. §§ 51.12-.20 (1977).

36. One way of illustrating the problem is with a schematic table:



The arrows illustrate the number of implementation relationships.

a matter of administrative and legislative concern. Customarily the inferior jurisdiction (*e.g.*, an existing state administrative agency), reviews existing laws, develops the plan elements, and, if necessary, asks the legislature for new laws to implement its plan. Then it turns to the superior jurisdiction's administrative agency for approval of the plan. Thus, there is no legislative "ratification" of the plan by either the superior or inferior jurisdictions. Implicit in this procedure is the assumption that only administrative control of the plan-implementation process can yield the coherence needed to have plans effectively implemented. The administrative attention to plan and implementation as a unified sequence is thus assumed to be a way of securing better implementation.³⁷

2. Informing Decisions Through Planning—The Decisional Model

A second method has been utilized to maximize implementation of plans. Sheldon Plager has entitled this alternative the "input" process:

[I]t would be designed to insure planning inputs—facts, policies, alternatives and identification of the consequences of the adoption of any of the alternatives—rather than simply insuring the presence or absence of a plan; in other words, the systems control thrust would be the specific issue before the decision-maker.

The system would be designed and tested to control the quality and quantity of the planning inputs. There would have to be local disinterested advice of a professional quality. There would have to be standards to determine who is qualified to advise and there would have to be some sort of overseer of the operation to insure that the system was functioning as designed.

The system would be designed to insure that planning inputs were effectively converged to the decision-maker at every level.³⁸

In one sense, the "input system" of planning is simply a recognition of the flexible advisory process of planning that has been embodied in many planning laws in the United States. But Plager wishes that the system *insure* planning inputs and that an overseer monitor the process. This form of planning and its relationship to decision-making has been utilized in the National Environmental Policy Act

37. In fact, the implementation plan may not be "administratively confirmed" since it may require the actions of several branches of government.

38. Plager, *The Planning Land-Use Controls Relationship: A Look at Some Alternatives*, 3 LAND USE CONT. Q. 26, 31 (1969).

of 1969 (NEPA).³⁹

In the landmark case of *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,⁴⁰ the D.C. Circuit held that, under NEPA, agencies must consider environmental issues in the systematic method outlined in the Act. A deluge of court cases has followed,⁴¹ notwithstanding the relative specificity of the NEPA statute in comparison with the vagueness of municipal master plan statutes, and despite the myriad federal regulations interpreting the statute. These cases have not arisen from an abstract and theoretical need for defining the relationship between planning and implementation. Rather, the cases arose as part of an environmental movement attempting to slow down proposed federal actions and force their reconsideration by imposing a prior planning requirement.

The cases subsequent to *Calvert Cliffs* have slowly outlined the relationship of "input" planning to decisionmaking.⁴² In order to review the impact of planning, the court first has to define its own scope of review. In so doing, the court has to define the extent to which it should be involved in determining "the adequacy" of planning inputs and who might raise legal questions concerning the planning and implementation process. Once these two questions are answered, the

39. 42 U.S.C. §§ 4321-4335 (1976) (42 U.S.C. § 4332(c) provides that the federal agency shall include in its recommendation a detailed statement on: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented).

A similar process may be utilized in flood control planning law, Flood Control Act of 1936, § 3, 33 U.S.C. § 701(a) (1976) (the impact approach takes the form of cost benefit analysis); transportation planning, 49 U.S.C. § 1653(f) (1976), 23 U.S.C. § 138 (1976); court-imposed requirements, *Scenic Hudson Preserv. Conf. v. Federal Power Comm'n.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (FPC is required to compare proposed project with any available and better-adapted alternatives); as well as in numerous state laws. For a discussion of State Mini-NEPAs, see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW (1977).

40. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

41. *See* *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971) (when an action is "federal"); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (S.D. Me. 1972) (how large must a major federal action be); *Kalur v. Resor* 335 F. Supp. 1 (D.D.C. 1971) (whether NEPA applies to the Army Corps of Engineers). *See generally* F. ANDERSON, NEPA AND THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973).

42. *See, e.g.*, *Lathan v. Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971).

court has to decide other questions as well. When is an action a "federal" action? How large must a "major" federal action be to require a planning statement? To which agencies do NEPA requirements attach? To what extent can federal agencies delegate the task of preparing statements? When must a statement be prepared? What are the standards for an adequate statement? Is a statement required for programs as well as projects? All of these questions bear upon the task of properly relating the planning input to the decision process.

The experience of NEPA as an example of an attempt to legally structure an input planning decisionmaking process is revealing. Generally, the process is credited with delaying and even stopping some projects. However, there is still the strong belief that the environmental impact statement is merely a rationalization of the already planned project.⁴³ This may reflect the earlier history of impact statements that were required of already planned projects; however, there is some evidence that even six years after the Act, the environmental planning process required by NEPA has not become the ideal input planning process of federal and quasi-federal agencies described by Plager.

Moreover, even if there is relevant and effective "input" planning, the problem remains of the relationship of impact planning to other comprehensive plans. Thus, a review of impact assessments for the proposed sewer projects funded under the Federal Water Pollution Control Act⁴⁴ suggests very little relationship between these assessments, the comprehensive plan of the community, and the comprehensive 208 planning process that is currently in the process of preparation.⁴⁵

There are other more deep-rooted problems with the input planning model. Input planning is based upon an ethical system of "consequentialism" in which the decisionmaker is expected to review the consequences of proposed actions and their alternatives. Such an approach does not require the explicit articulation of goals or a system of goals and policies customarily embodied in a plan. As a consequence, the decisionmaker is not confronted with "a plan" in the

43. See F. ANDERSON, *supra* note 41; Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URBAN L. ANN. 3 (1974); Strohbehn, *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 ECOLOGY L.Q. 253 (1974).

44. 33 U.S.C. §§ 1251-1376 (1976).

45. See Note, *Sewers, Clean Water, and Planned Growth: Restructuring the Federal Pollution Abatement Effort*, 86 YALE L.J. 733 (1977).

traditional sense, but rather an array of possible consequences of a particular action. Without a plan, the "input" planning process does not yield a clear way of determining the effect of the planning process itself upon the decision. Thus, if the decisionmaker decides to pursue an action despite an environmental assessment indication that some environmental problem will ensue, there may be no way of telling whether the decisionmaker merely ignored the input or weighed it carefully in his decision. The monitor of the input planning process is thus placed in the awkward position of seeking to judge whether the decisionmaker actually considered the environmental problem,⁴⁶ since the decisionmaker is not forced to articulate his goals and objectives as part of the deliberation process.⁴⁷

C. *The Adjudicatory Review Model*

The adjudicatory review method begins with a plan and an implementation device. Instead of the mere assumption or hope that a decisionmaker will carry out the plan, as in the case of advisory plans, or that the decision will be "informed" by planning considerations, there may be a legally established "review method" for determining whether a plan should be implemented based on how the plan and its implementation device "conform" or are somehow "consistent" with one another.⁴⁸ This model provides for a more discretionary approach to plan implementation, in contrast to the "advisory plan" and "administrative regulatory plan" models.

The establishment of a "review method" stems from the concerns of the planner and public of whether plans will be implemented effectively. There are actually two concerns which need to be carefully distinguished. The greater concern is whether a plan will be implemented at all. This leads to review methods for determining whether

46. This problem is evident in court reviews of the workings of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1976). *See, e.g.*, *Scenic Hudson Preserv. Conf. v. Federal Power Comm'n.*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (the Federal Power Commission was told to develop less environmentally damaging alternatives); *Brooks v. Volpe*, 350 F. Supp. 287 (W.D. Wash. 1972) (input statement was conclusory and required development of more detailed sources of information).

47. *See Environmental Defense Fund v. Corps of Engineers*, 342 F. Supp. 1211 (E.D. Ark.), *aff'd* 470 F.2d 289 (8th Cir. 1972) (only required a good faith consideration of the merits of the project and consideration of abandonment of the project).

48. There is a massive literature on the question of conformity with the plan. For an excellent recent update, see Mandelker, *supra* note 12.

implementation pertinent to the plan takes place. Another, but analytically separate, concern is whether the plan will be implemented completely and effectively. This latter concern leads to laws establishing a process of "evaluation."

In the review approach, two sets of legislation are enacted: legislation enacted to implement plans, and specific legislation enacted to establish a review process to insure that the implementing law somehow reflects or implements "the plan." These latter laws establish a review process we may speak of as the "laws establishing a review method of implementation."

A simple example clarifies this point. The municipality may first adopt a plan by vote of its legislature.⁴⁹ This becomes the "legal" plan. Then, suppose the municipality adopts a zoning regulation to implement a master comprehensive plan. This is a *law implementing the plan*.⁵⁰ It may be asked: Does this zoning regulation *really* carry out that plan? Another law may then be passed which requires the zoning law to "conform to" or "be in accordance with" or "be consistent with" the plan.⁵¹ That law might be called *a law insuring surface implementation of the plan*.

Even though a reviewing body might determine that the regulation and plan conform, the regulation still might not be effective due to a variety of factors. It might then be asked: Why didn't the regulation or program work? Perhaps it wasn't "enforced,"⁵² or perhaps the program wasn't carried out well.⁵³ A law may then be passed requir-

49. See N.Y. GEN. CITY LAW § 31 (McKinney 1968); VA. CODE § 15.1-486 (1973). *But cf.* CONN. GEN. STAT. § 8-1 (1977) (either the Planning Commission or the Planning and Zoning Commission adopts the plan).

50. Other implementing laws for subdivision regulations, redevelopment projects, and economic development projects can also be regarded as implementing laws. See CAL. HEALTH & SAFETY CODE § 33220 (redevelopment law); § 34326 (subdivision law) (Deering 1975).

51. The precise meaning of "consistency" and the kind of consistency required has not been amplified by these laws. For one effort, see Ladwig & Boylan, Consistency Between Planning and Zoning—The California Experience and Its Application Elsewhere (American Institute of Planners Confer-In 1975) [hereinafter cited as Ladwig & Boylan].

52. The concept of enforcement has been limited traditionally to the laws pertaining to civil and criminal penalties. *But see* R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961) (the entire field of "sanction law" has opened up).

53. Increased attention has been given to the definition of performance standards in many fields of planning law in order to evaluate the quality of plan implementation more precisely.

ing the evaluation of a program in light of the plan. Such a law may be called *a law of plan implementation evaluation*.

The mechanical steps in the review method approach are thus assumed to be the following: 1) a plan is prepared and/or adopted; 2) a law to "ratify" the plan may be passed; 3) a law to implement the plan may be passed; 4) a law is passed requiring the implementing law to "conform to" or be "consistent with" the plan; 5) an official review body may or may not be established; 6) a review procedure may be automatically instigated to review conformity; 7) outside parties may or may not begin the review by complaining that the implementing law does not conform to the plan; 8) a reviewing body lays the tool "alongside" the plan to determine whether it "conforms;" 9) if the tool does not "conform," some sort of remedial action is proposed; and 10) enforcement may (or may not) follow.

This section of the article will discuss only the problems arising from laws seeking to insure surface implementation of the plan through the review method. The law of evaluation and enforcement will not be discussed. The central question presented here is: How effective are laws seeking to insure surface implementation of plans through a review method?

The discussion will examine the serious problems inherent in the attempt to carry out this particular approach, as well as recent adjustments in the law to solve these problems. At the outset, however, it may legitimately be asked whether such an elaborate process is not doomed to disappointment solely because of its initial complexity.⁵⁴

1. The Preparation of the Plan

In order for a plan to be implemented, it must be reasonably specific in its implications for action; the action proposed must be appropriate in the immediate future; the action itself may imply a sequence of steps to be taken; the plan requiring action should be complete and internally consistent; and the appropriate body must adopt the plan. Unfortunately, most plans do not meet these minimal requirements. The "first and second generation" of land use master plans were notoriously vague, primarily because the expertise was lacking to make them more specific.⁵⁵ But even some recent plans have been vague

54. This complexity has been hidden by the customary legal treatment of one or another aspect of the review method.

55. See Tarlock, *Consistency With Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URBAN L. ANN. 69 (1975).

unadopted orphans either because the cost of securing site-specific data is prohibitive,⁵⁶ or because of uncertainty and/or a lack of consensus regarding the general and specific objectives to be pursued by the plan.⁵⁷

Recently, planners have developed or acquired a variety of techniques for making their plans more specific, utilizing better information gained through planning processes which are more responsive to the community and more realistic in the treatment of value conflicts.⁵⁸ A more realistic recognition of the uncertainties of the future characterizes many recent plans,⁵⁹ and a consensus within the profession regarding the appropriate subject matter and methods of planning is developing.⁶⁰ Laws have been changed to rectify the past defects of planning: such laws may require more specificity in the planning process;⁶¹ new ways of seeking consensus;⁶² new methods of planning; and adoption of plans by legislative bodies.⁶³

Even if the problem of vagueness is overcome, however, a second obstacle to effective plans remains: the requirement that an immediate, organized, projected sequence of actions be spelled out in the plan. Instead of an organized sequence of actions, "wait and see" implementation techniques (*e.g.*, planned unit development, holding zones, etc.) have assumed increasing popularity because of the uncertainty of decisionmakers and planners.⁶⁴ These "wait and see" tech-

56. The cost of information is frequently cited as one of the major barriers to effective comprehensive planning. This cost, unfortunately, is ignored by laws establishing vague plans. The cost is then transferred either to those who must rely upon the plans or those who are affected by regulations based upon inadequate plans.

57. The critique of a lack of consensus underlying master planning is discussed extensively by A. ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* (1965).

58. For a general discussion of the state of the art, see AMERICAN INSTITUTE OF PLANNERS, *PLANNING IN AMERICA: LEARNING FROM TURBULENCE* (D. Godschalk ed. 1974).

59. Planning has begun to systematically take uncertainty into account. See R. MACK, *PLANNING ON UNCERTAINTY* (1971).

60. See note 58 *supra*.

61. See Mandelker, *supra* note 12.

62. See N. DALKEY, D. ROURKE, R. LEWIS & D. SNYDER, *STUDIES ON THE QUALITY OF LIFE* (1972).

63. For a discussion of the need for the legislative adoption of plans at the state level, see ENVIRONMENTAL CONTROLS, *supra* note 19.

64. See Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183 (1972).

niques are built into new implementing laws. The relationship of such techniques to the original plans is problematic. For example, within land use plans the status of certain land will thus be kept uncertain. Also, separate and often inconsistent short-term implementation plans (frequently oriented towards capital budgeting) are adopted to avoid the uncertainty of planning for longer time periods. Of course, "wait and see" techniques and short-term capital budgeting may be required to conform to the plan, but this approach meets difficulties of its own.

A third obstacle to the adoption of specific unified plans ready for action is the pluralism of modern government which results in a multiplicity of plans adopted at each level of government.⁶⁵ These plans, developed according to different schedules, with overlapping jurisdictions and differing planning requirements, make it extremely difficult for any one planning agency to unify the plans intellectually. Moreover, planning agencies may lack the authority to influence other plans. The law has responded by seeking to require that plans be in "conformity" with each other and be "coordinated" and "revised" by the comprehensive planning agency, but these requirements are notoriously ineffective.⁶⁶

2. A Law to "Ratify" the Plan

Frequently, plans are not adopted by the legislature, but simply are recommendations of an executive agency. Consequently, there may or may not be any legislative knowledge and/or understanding of a plan. But, as stated above, it is becoming more common to require some form of legislative adoption of plans.⁶⁷ In lieu of adopting the detailed plan itself, legislatures could adopt more specific statements

65. The legal system has yet to cope with the pluralism of plans. One mechanism is the A-95 review process, 42 U.S.C. § 5304(e). For a recent discussion of its functioning in relationship to the Community Development Act, see Landreth, *Four Elements—Planning, Citizen Participation, Housing Assistance and the A-95 Review—Under Title I of the Housing and Community Development Act of 1974*, 9 URB. LAW. 61 (1977).

66. One reason for the ineffectiveness of conformity requirements is that public planning agencies do not abide by regulations. All of the difficulties of NEPA attest to this conclusion. See generally Farrer, *Impact of NEPA Guidelines Upon the Judicial Decision Making Process: A Preliminary Study*, 6 URB. LAW. 645 (1974); Phipps, *Action-Forcing Under NEPA: Beyond the Environmental Impact Statement*, 14 URBAN L. ANN. 137 (1977).

67. See ENVIRONMENTAL CONTROLS, *supra* note 19, at 27.

of policies and objectives.⁶⁸ However, even a requirement of legislative adoption may not result in greater legislative awareness and understanding of the plan.⁶⁹ Moreover, the adoption of such a plan may have serious unanticipated and unfortunate consequences, resulting in "planning blight" and possible legal claims of taking without just compensation.⁷⁰

Even when the legislature has adopted a plan, the legislature may have completely forgotten the plan when it is time to adopt another law to implement the plan. Moreover, the clash of interests in the legislative process may obscure any serious legislative consideration of a plan as a whole.⁷¹

3. A Law Requiring the Implementing Law to Conform to the Plan

At the federal, state, regional, and local levels, a variety of laws require that the implementing law "conform" to or be "consistent" with the plan. A reviewing agency—either a court or an administrative agency—may be established by law to review the plan and its implementing law or regulation to assure that the two are "in conformity" or "consistent." Review may be self-initiated by the reviewing agency or at the instance of "outside" parties. Each of these alternatives is discussed below.

4. A Law to Implement the Plan

A theoretical consideration of the possible legislative approach to plan implementation reveals the problem of introducing planning into representative democracy. A comprehensive plan which covers a

68. *Id.* The adoption may be undertaken either by regular legislative adoption or by legislative resolution. The capacity of the legislature to intelligently adopt plans and implement devices for plans is beyond the reach of this article. But note that the legislative adoption of plans themselves raises the question of whether such adoption, in and of itself, constitutes "implementation" of the plan.

69. For an excellent theoretical view of the way in which a legislature must act without knowledge, see Kingdon, *Models of Legislative Voting*, 39 J. POL. 563 (1977).

70. See Hagman, *Planning and Regulatory Acquisition*, 1 URB. L. AND POLICY 5 (1978).

71. This very occurrence provides one rationale for establishing a reviewing agency which later seeks to determine the relationship of the implementing law to the plan, but it confronts that reviewing agency with a difficult problem: Was the legislature in its later action, with more specific knowledge of the conflicting interests involved, seeking to tacitly amend the original plan?

wide range of subject matter could hold implications for a myriad of existing and proposed laws. Obviously, a legislature, itself divided into a complex committee structure, could at most consider a narrow range of laws salient to the plan (assuming even minimal knowledge of the plan by legislative members). Under these circumstances, although these selected laws might be consistent with the plan, they might be inconsistent with other laws not considered in their relationship to the plan. It is probably safe to assume that given the large body of laws with which the legislature must contend, especially at the state and federal level, there will always be a significant body of laws which are not consistent (at least in their implications) with the official plan.

5. A Law Establishing a Review Body

In theory, the determination of whether a law conforms with a plan could be made by the planning agency itself, the "implementing agency" (the legislature), another administrative agency, or by the courts. There is very little discussion in legal or planning literature of what might be the appropriate reviewing body or bodies at the local level. One could naively posit a four-stage review process beginning with the implementing agency's review of consistency, followed by a superior administrative body, the legislative body, and the courts. Aside from the complexity of such an approach, determining the order of review may tacitly determine controversial questions of which considerations (*i.e.*, legislative, administrative, or judicial) should prevail.

6. Automatic Self-Initiated Reviews

Upon passage of a law requiring "conformity" or "consistency," the legislature and/or the respective administrative agency may immediately move to secure such consistency. In a recent review of California's new law, Ladwig and Boylan found that many planning agencies and/or local legislatures moved immediately to change their zoning laws to secure consistency.⁷²

On the other hand, Ladwig and Boylan found that some planning agencies and boards changed their *plans* to secure consistency with their implementing laws. This latter result illustrates a significant weakness in the conformity or consistency requirement as a device

72. See Ladwig & Boylan, *supra* note 51.

for insuring implementation of a plan: this device may simply produce a rationalization of already existing implementation.⁷³ Cynics may argue that all plans simply provide a rationale for existing laws in the process of their taking into account existing implementation. But of course plans may be, and often are, a basis for criticism of existing laws and regulations as well as stimulants for change. One important aspect of the California experience is that the adjustment between plans and implementation took place at a time immediately after passage of the new state law requiring consistency. In the California situation, the new law requiring consistency stimulated the review process. As indicated below, in most instances there is a long period of time between adoption and implementation of a plan, on the one hand, and the subsequent review of plans and actions to determine conformity on the other. This lapse of time between initial adoption of plans and the eventual review for consistency allows for substantial inconsistencies between plan and implementation, or the conditions for implementation, to develop. In such a case, the general public and the major actors base their expectations on the present pattern of implementation rather than the plan itself. Hence a set of expectations are produced which are at variance with the plan, and the reviewing body is forced to decide between expectations and the original plan.

Rather than an immediate adjustment between plan and implementation, as in the California situation, the law often establishes a process by which plans are updated or implementation is periodically adjusted at a later time. This may be a complex process. To illustrate, suppose that there is a proposed federally funded highway (an implementing action). The funding for this highway would have to be approved by the relevant A-95 review agency established under the Demonstration Cities and Metropolitan Development Act of 1966⁷⁴ and Title IV of the Intergovernmental Cooperation Act.⁷⁵ Theoretically, this reviewing agency should not approve highway funds if they do not “. . . contribute to the fulfillment of comprehensive planning.”⁷⁶ The Secretary of Transportation need not approve

73. See R. BROOKS, *NEW TOWN AND COMMUNAL VALUES* (1974). (For example, Harvard County blithely altered its comprehensive plan to accommodate the new planned city of Columbia.)

74. 42 U.S.C. § 3301 (1976).

75. 42 U.S.C. § 4231 (1976).

76. *Id.* § 4231(c).

the highway for funding unless "he finds that such projects are based on a continuing comprehensive transportation planning process . . ."77 and meet "criteria established by him for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban areas."⁷⁸ Moreover, the highways must be "consistent" with any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended. Under the regulations, certification of transportation planning requires "consistency of the transportation plan with the approved state air quality implementation plan."⁷⁹

There are four characteristics of such review systems regardless of the specific form. First, at least initially, such a system of review is a "low visibility review" system reserved largely to the administrative agency with little legislative, judicial, or public participation. Second, the review often involves the reconciliation of action with several plans rather than relating one implementation tool to one plan. This multiplicity obviously makes the determination of consistency more complex. Third, the relationship of plan to implementation is a general one. Thus, reference is often made to "a planning process" rather than a specific plan; indeed the plan itself may be very general. Finally, it often appears that any "finding" of conformity is discretionary; both the statute qualifying the requirement of conformity (by such terms as "contribute to" or "are based on") and the regulations often simply say the administrator must "consider" the relationship of the implementing tool to the plan. These characteristics make it difficult to argue with most administrative determinations of "conformity." Most importantly, as the cases discussed below suggest, "consistency" may result in nonimplementation of plans, and indeed, the courts may permit such nonimplementation.⁸⁰

77. 23 U.S.C. § 134 (1976).

78. 49 U.S.C. § 1603 (1970).

79. 23 U.S.C. § 109(j) (1976).

80. Administrative complexity and flexibility are justifications often given for such a state of affairs. Wildovsky and Pressman offer one justification for such flexibility in implementation. The authors, in studying the implementation of one economic development project, found seventy key junctures where agreement has to be reached with other agencies in the implementation process. With so many potential veto points, the chance of noncompletion of the plan was great. Rigid adherence to conformity with multiple plans would undoubtedly make implementation of any one plan more difficult, if not impossible. See J. PRESSMAN & A. WILDOVSKY, *IMPLEMENTATION* 93 (1973).

7. Reviews Initiated by Outside Parties

It is important to distinguish the different kinds of review situations initiated by outside parties. The review may be stimulated by an application for funds or permits by a private or public agency, as in the A-95 review process. This is not likely to be an adversary process. Or public or private third parties may complain about the issuance of funds or a permit, and claim such issuance was not in conformity with the plan. Administrative agencies and/or courts may be asked to resolve the conflict. Four situations may thus be usefully distinguished: 1) reviews stimulated by applications of public agencies and resolved administratively (this may or may not involve further court review); 2) reviews stimulated by private applications for permits and resolved administratively (this may involve a system of administrative appeals and/or court review); 3) reviews stimulated by third-party objections and resolved administratively (with further appeals possible); and 4) reviews stimulated by third-party objections and resolved directly in the courts.

a. Reviews Stimulated by Application of Public Agency and Resolved Administratively

Public agency applications for federal funds may be reviewed for consistency with one or another plan. One example is the A-95 review process under the Demonstration Cities and Metropolitan Development Act of 1966⁸¹ and the Intergovernmental Cooperation Act.⁸² Similarly, public agency applications for a variety of permits may trigger review to determine the compatibility of the project with a plan. Under the Rhode Island Coastal Resources Management Council Act,⁸³ for example, selected applications proposing certain uses in the coastal zone must apply for a permit from the Council. The Rhode Island Division of Natural Resources (now a part of a larger Department of Environmental Management), with responsibility for developing recreation areas, must apply to the Council for a proposal to develop a beach for public use. Where third-party interests do not enter strongly, the approval process is likely to be a process of low visibility negotiation between equals rather than review and approval by a superior decisionmaking body.

81. 42 U.S.C. § 3334 (1976).

82. 42 U.S.C. §§ 4231-4241 (1976).

83. R.I. GEN. LAWS §§ 46-23-1 to -17 (Supp. 1978).

b. Reviews Stimulated by Private Applications for Permits and Resolved Administratively

The customary permit application (*e.g.*, for a building permit or a "development assent") initially involves a review process by a lower level administrator to determine compliance with the myriad regulations governing permit issuance. If the regulations are relevant to the implementation of the plan, this review will be a tacit determination of compliance with the plan. On the other hand, a variety of applications for permits are not susceptible to routine determinations of compliance with regulations, but rather consist of requests which receive specific scrutiny by administrative boards. Thus, under land use control laws, requests may be made for special exceptions, subdivision approvals, variances, or zoning amendments at the local level. Or there may be a request for a permit where formal applications and administrative review by a hearing board are expected, such as the request for a construction permit to build a nuclear reactor, or a permit for a source of air or water pollution.

Unfortunately, these reviews of private applications may produce very little explicit attention to the proposed relationship between a plan and the specific application. A review of selected state and local permit hearings and the author's participation in such hearings indicates that even in these hearings, there is relatively little attention to a plan.⁸⁴

c. Reviews Stimulated by Third-Party Objections and Resolved Administratively

Third parties may enter the administrative process by asserting that the proposed action by a public or private agency does not accord with the plan. These situations are likely to raise the issue of plan implementation most explicitly, as the following example demonstrates. On May 4, 1973, the Rhode Island Commission for Human Rights requested the A-95 review committee to turn down the request of the cities of Warwick and Cranston, Rhode Island, for planning funds, pointing to "formally adopted patterns" of racial exclusion in the plans, land use regulations, and housing programs in those cities.⁸⁵

84. An account of case studies of participation in plan-related hearings is set forth in R. Brooks, *The Law of Advocacy: Case Studies and a Progress Report* (submitted for publication 1978).

85. Brief of the Rhode Island State Commission for Human Rights to the Techni-

The complainants used what was then a new administrative arena to make their case—the A-95 Review Process, authorized by the Demonstration Cities and Metropolitan Development Act⁸⁶ and the Intergovernmental Cooperation Act⁸⁷ to permit the review of federal grant applications. Specific regulations required that a state or regional appointed clearing house make comments on the extent to which the proposed projects advanced the achievement of “balanced settlement patterns.”⁸⁸

Warwick and Cranston submitted applications through the A-95 Review Process for Section 701 planning assistance for comprehensive planning, land use policy preparation, and housing programs. The complainants viewed these applications as an essential part of an ongoing planning, zoning, and housing policy which operated to exclude black and poor people from the communities.⁸⁹ As a result of the action of the Rhode Island Commission for Human Rights, the City of Cranston withdrew its application for planning funds. The A-95 Review Committee found that the Warwick multi-family zoning ordinances were “substantially exclusionary,” but recommended

cal Review Committee of the A-95 Review Process Requesting Adverse Recommendations on the 701 Planning Applications of Warwick and Cranston (1973) [hereinafter cited as Brief].

The crux of the argument of the brief was as follows:

Far from acting to change these patterns, both Cranston and Warwick have formally adopted patterns of exclusion in their plans, land use regulations and housing programs. Neither community has built low-income family housing. Warwick has adopted clearly exclusionary apartment regulations as well as implementing a “neighborhood veto system” on multi-family units.

Id. at 1, 23.

86. 42 U.S.C. § 3334 (1976). *See* note 81 and accompanying text *supra*.

87. 42 U.S.C. §§ 4231-4241 (1976). *See* note 82 and accompanying text *supra*.

88. Paragraph 5, Part I, Attachment A, OMB Circular No. A-95 cited in Brief, *supra* note 85, at 6.

89. *See* Brief, *supra* note 85. *Inter alia*, the brief requested the Technical Review Committee of the A-95 Review Process to make the following findings:

* * * *

5. The applications are not consistent with and do not contribute to the realization of comprehensive state plans—the DCA housing plan, the State land use policies plan or the State development goals statement.

6. The applications conflict with the programs of the Department of Community Affairs and the Statewide Planning Program, both committed by law to advancing a pattern of balanced settlement.

7. The applications conflict with the plans and programs of the Rhode Island Commission for Human Rights, which is committed to open housing and a balanced settlement policy for Rhode Island.

Id. at 24, 25.

funding of the policy application subject to change in those ordinances. In response, the Mayor of Warwick promised that he would request the city council to repeal both the zoning ordinance in question and the requirement of Zoning Board of Review or city council concurrence for each multi-family petition; the mayor also promised to request the city council to establish multi-family districts. These proposals were later enacted.

Although consistency with the state plan was an important consideration in this case, consistency with other federal laws and regulations was also important, and it was the latter consistency upon which the arguments focused.

d. Reviews by Public Agencies, Resulting in an Administrative Determination of Consistency, Followed by Court Review

The most obvious use of judicial review is where the zoning board has adopted or failed to adopt an amendment, and the party allegedly harmed appeals, claiming the action is not in accordance with the plan. But other less obvious situations give rise to judicial review. Although the A-95 Review Process case discussed above⁹⁰ was "resolved" at the administrative level, some A-95 review situations, as well as certain analogous situations, have led to court actions. Courts must review the administrative determination of "consistency" in such cases.

In *City of Bowie v. Board of County Commissioners*,⁹¹ the court reviewed the city's complaint to enjoin the county from the sale of bonds and construction of an airport. The plaintiffs claimed the airport was inconsistent with the metropolitan plan. The court rejected the argument, agreeing with the lower court's reasoning that,

'While it is true that the review involved here is a prerequisite under the law to the county's obtaining a federal grant in connection with the development of the airport, it is not a legal requirement for the construction of the airport. It is only a requirement with respect to receiving a federal grant. There is no indication that the reviews could not be obtained, and the court concludes that this should not be such a barrier as to justify injunctive relief.'⁹²

90. See notes 85-89 and accompanying text *supra*.

91. 271 A.2d 657 (Md. 1970).

92. *Id.* at 659.

Urban renewal is another setting in which conformity issues arise. For example, in *Bridgeport Taxpayers Association v. City of Bridgeport*,⁹³ plaintiffs sued to enjoin the construction of a parking garage as part of the renewal program. They argued that the garage represented a substantial modification of the renewal program in violation of Section 8-142 of the Connecticut statute⁹⁴ which states that, “[a]ny urban renewal project undertaken pursuant to Section 8-141 shall be undertaken in accordance with an urban renewal plan for the area of the project.”⁹⁵ The court rejected the claim, pointing out that the renewal plan by statute “exists from time to time” and the proposed parking garage was consistent with the essentially “commercial purpose” of the plan.⁹⁶

It is this area of consistency determination—review by the courts—to which the courts and legal scholars have paid most attention. Yet the attention paid to this problem is entirely disproportionate to its importance in the implementing process. This is only one method of securing implementation, and it is not the method most frequently used.

8. The Reviewing Body's Determination of Compliance

The attempt to measure conformity, either by the administrative agency or the court, is not an easy task. Daniel Mandelker⁹⁷ has noted that the general vagueness of plans makes the measurement of actions in terms of the plan difficult. Ladwig and Boylan⁹⁸ have attempted to specify a method of determining consistency, recommending the use of matrices, continual preparation of supplementary zoning policy memoranda, and zoning mapping policies in addition to the basic plan and zoning ordinance as a means of determining consistency.

Another approach is the growth control system tested in *Golden v. Planning Board of Town of Ramapo*.⁹⁹ In *Ramapo*, the New York Court of Appeals sustained the constitutionality of an amendment to

93. 26 Conn. Supp. 239, 217 A.2d 718 (Super Ct. 1965).

94. CONN. GEN. STAT. § 8-142 (1978).

95. *Id.*

96. 26 Conn. Supp. at 248, 217 A.2d at 724.

97. Mandelker, *supra* note 12.

98. See Ladwig & Boylan, *supra* note 51.

99. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *cert. denied*, 409 U.S. 1003 (1972).

the town zoning ordinance whereby subdivision development would not be permitted until the availability of proposed municipal services reached a specified level, according to scheduled completion dates in the town's eighteen-year capital plan. The court stated that, "[t]he 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."¹⁰⁰ Such an approach inevitably leads to reliance not upon a static plan, but upon a continuing planning process. However, the requirement of consistency may force the formalization of that process so that all policy guidelines are reduced to writing, providing guidance for the discretion of the decisionmaking body. Such a method, however, must be flexible; it must allow for a change in the goals of the plan if the need arises, a staging of uses (*e.g.*, the adopting of holding uses), an ability to permit alternative compatible uses, and a review of specific applications which may or may not be compatible with general plan categories.

9. Remedies for Lack of Conformity

When review has taken place and a specific proposed action is found not in accordance with the plan, what is done about it and what should be done about it? There are few detailed studies of the results of a finding of lack of conformity; one exception is the California study by Ladwig and Boylan mentioned above.¹⁰¹

Catalano and DiMento have conducted a followup study of California's legislative mandate of consistency and found the following results:¹⁰²

Number of Responses Reporting:

1. Change only in zoning	4
2. Change in both with plan as dominant	20
3. Change in both with zoning as dominant	2
4. Change only in plan	4
5. Change in both with no dominant yet emerging	10
6. No action to comply	6

Catalano and DiMento interpret the results as indicating that the re-

100. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

101. See Ladwig & Boylan, *supra* note 51.

102. Catalano & DiMento, *Mandating Consistency between General Plans and Zoning Ordinances: The California Experience*, 8 NAT. RESOURCES LAW. 455, 464 (1975).

quirement of consistency has indeed increased the salience of the planning process and has brought zoning more into accord with the plan. It is not apparent from the study, however, whether specific applications under the zoning ordinances will be guided by that ordinance or whether amendments, variances, and special exceptions will make conformity meaningless.

10. Summary Conclusions on the Review Method

The use of a reviewing agency to insure compliance of plan and implementation is, at best, a weak and rickety mechanism for insuring plan implementation. The review occurs *after the fact* when commitments to actions inconsistent with the plan might already have been made. Administrative review is customarily a "low visibility" process, subject to the pressures of negotiation. Serious review probably does not occur unless there are third-party complaints, which arise only in a minority of cases. Even if review does take place, there are numerous reasons (discussed below) why the reviewing agency may not require compatibility of implementation with the plan. And even where compatibility is sought, technical problems may make it impossible to attain anything more than compatibility with the planning "process" rather than with the plan itself. Finally, followups, where incompatibility has been found and remedies sought, indicate an ambiguous picture as to whether the action is adjusted to fit the plan.

In this light, it is doubtful that the review method leads to a meaningful process of plan implementation. Obviously, certain improvements may be made: current suggestions include development of more specific plans;¹⁰³ continual updating of the plan;¹⁰⁴ the use of various mechanisms to link plans to implementing tools;¹⁰⁵ availability of funds for persons harmed by reduced property values due to the adoption of more specific implementable plans;¹⁰⁶ provision for legislative adoption of the plan or parts of it;¹⁰⁷ development of more

103. See, e.g., CAL. GOV'T CODE § 65850 (Deering 1974).

104. *Id.* § 65857.

105. *Id.* § 65860.

106. See Hagman & Misczynski, *Windfalls For Wipeouts: Land Value Capture and Compensation*, in AMERICAN SOCIETY OF PLANNERS ORGANIZATION (1978).

107. See, e.g., CAL. GOV'T CODE §§ 65850, 65857, 65860 (Deering 1974).

effective conflict-reducing mechanisms as part of the plan process;^{107a} and the establishment of mechanisms for continual "convergence" of different plans into one plan.¹⁰⁸ But these approaches will not resolve the problem of plan implementation, even if they are added to a strengthened consistency requirement by courts and/or legislatures: *it is necessary to look at the problem from a broader perspective.*

Students of the societal aspects of planning place plan implementation in this broader perspective. A societal view is based upon sociological and political science theory buttressed by studies of national planning.¹⁰⁹ Broadly speaking, these studies conclude that a planning society must have the capacity to produce a consensus within groups and individuals committed to the changes required by planning. Such changes are formulated by a controlling, policy-making "overlayer" of leaders and planners, which must be socially or politically established. Moreover, an organizational structure must be present to implement the plans, with state power available and authority for ultimate enforcement of the plan. Controlling networks among planners, leaders, and administrators to ensure continuing plan implementation are needed. Such broad social theories of planning suggest that only a few societies may be appropriately structured to conduct minimally effective guided change in accordance with plans. The narrow legal tools of "implementation plans" or adjudicatory review methods are merely the veneer of a needed societal structure adequate for guided change. The more specific problems of the law of implementation, discussed below, may thus reflect basic inadequacies in our societal structure itself.

III. PROBLEMS WITH THE IMPLEMENTATION MODELS AND REASONS FOR NON-IMPLEMENTATION

A. *The Advisory Plan Approach and its Relation to the Adjudicatory Review Method*

The recent dissatisfaction with the advisory plan model of plan implementation has not come from frustrated planners. Rather, the dis-

107a. See Rothblatt, *Multiple Advocacy: An Approach to Metropolitan Planning*, 44 J. AM. INST. PLANNERS 193 (1978).

108. A convergence requirement as part of a Waterford, Connecticut's proposed town charter is suggested in R. Brooks, *Reflections on the Limitations of Municipal Charters* (July 1973) (unpublished thesis).

109. See A. ETZIONI, *THE ACTIVE SOCIETY* (1968); E. HAGEN & S. WHITE, *GREAT BRITAIN: QUIET REVOLUTION IN PLANNING* (1966).

satisfaction rests with the courts which, upon review of administrative agency action, often find that the action apparently ignored constituencies, procedures, or values which courts believe should be accorded some attention by administrative agencies. Since courts are often confronted with vague and inadequate legislative mandates for the agency in question, and since the applicable administrative procedure act frequently does not give sufficient substantive guidance, courts may turn to the planning requirements placed upon an agency by the legislature as a means of controlling agency action. Implementation of developed plans is less a concern than the use of plans as a convenient rationale for substantive court review. Whatever the consequence, court review of hitherto advisory plans has resulted in at least partial adoption of the adjudicatory review method by the courts. A review of selected cases in which courts have reviewed implementation's conformity with a plan offers a starting point for understanding some of the reasons why plans are not implemented.

1. The Different Status of Plan and Law

The underlying paradigm of the relationship of planning to law is quite simple. Law is viewed as a tool, a device for implementing "the plan." This paradigm obviously reflects the common practice by which a plan is developed; *e.g.*, a master plan, and then a variety of specific laws (such as zoning ordinances) passed to implement it. This practice, however, need not be the only relationship between the two, as illustrated by *O'Loane v. O'Rourke*.¹¹⁰ The issue in that case was whether the general plan was subject to the referendum requirements of the California law. The court held that the plan was "legislative" in character and hence a referendum could take place. This case suggests that one way of "implementing" the plan is to enact it—to make it law. This is not the usual practice in the United States, although other countries apparently legislate their plans with the force of law.^{110a} The obvious danger of such an approach is that a plan is frequently vague and general, and lacks enforcement clauses; consequently, it is subject to attack as being void for vagueness. If, on the other hand, it is made more specific, its flexibility may be lost

110. 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).

110a. The French economic plan *in theory* was supposed to be adapted. See S. COHEN, *MODERN CAPITALIST PLANNING: THE FRENCH MODEL* (1969). "Structure plans" are approved by the County council under English land planning law. See P. MCAUSLAND, *LAND, LAW AND PLANNING* 224 (1975).

since rapid legislative changes are not likely. Thus, where rapid changes in conditions are possible and where the lawmaking body is a large legislature-type entity, the plan is not likely to be formally enacted.

Without formal enactment of the plan, problems of its relationship to formal laws passed to implement it are posed. Charles Haar¹¹¹ points out that the courts accord more respect to the instruments of implementation than to the original plan itself, because the implementation tools are formally adopted. Such respect can be rationalized as respect for law which is enacted by a representative structure.

2. The Weak Statutory Language Linking Plan and Law

The typical zoning enabling act adopts fairly loose language for specifying the relationship between plan and law.¹¹² Even the most recently proposed land use regulations often do not tie the implementation tools to the plan. But the loose language reflects a specific attitude towards planning on the part of legislatures. Legislatures desire to retain flexibility and keep options open. They are loath to hand over to planners and administrators the powers which come with language tightly tying plans to implementation.

3. The Timing of Plan and Regulation

It would be simpler to view laws as neatly implementing plans if plans were developed first and laws afterward. But due to the relatively recent development of plans in all fields and the ancient and venerable history of laws and regulations, the problem arises as to how to hold regulations in conformity with plans when the regulations were passed first.¹¹³ Although planners have adopted some devices for changing ordinances and their application over time to

111. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

112. See D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT: CASES AND MATERIALS* 212 (1973). For example, the Standard State Zoning Enabling Act stipulates only that zoning "regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed," as the plans of the community change. U.S. DEP'T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* § 4 (rev. ed. 1926).

113. See *Raabe v. City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970) (a municipality's rezoning of property is invalid when the city has not previously adopted a general plan for physical development).

bring them into conformity with the master plan, many plans and their corresponding regulations do not provide for such an approach.

4. Delay Resulting from the Plan—The Use of Planning as a Delaying Mechanism

All planning takes time, and if laws and regulations are to await the completion of the plan, considerable delay can result. Due to the private market's reliance upon stable plans or regulations, delays in developing plans can result in costs to the developer. Thus, courts, when presented with situations in which development is halted to complete a plan, face the serious dilemma of injuring private parties or permitting planless development.

5. "Taking" Resulting from the Plan

Underlying the issues of delay is the deeper and more general problem of whether the plan operates "to take"—*i.e.*, to unconstitutionally restrict the use of private property. The "taking" consequences of a plan are somewhat different from "taking" by explicitly enacted laws or regulations. First, the exact extent of its implementation is in doubt. Second, the plan is general and its precise impact upon private ownership is often uncertain.

6. The Future Orientation of the Plan

A plan may be based upon projections of future development and prescriptions for future development. This future orientation can weaken the plan's effect. To be sure, the plan can function, like the law, to channel action by fixing expectations regarding future governmental and private actions. But faith in the plan's future depends upon several things: first, the legitimation of planning and the status of the planner in the community and society; second, the accuracy of the projections, the factual basis of the plan, and the general quality of the plan; and finally, the history of implementation or lack of implementation of the plan.

If there is a lack of faith in the future of the plan, then the plan might have to give way to the present development desires of private individuals. The plan might survive such a challenge, however, if the proponents of the plan can show either that the plan is in the process of being updated or that past departures from the plan were justified

on grounds not applicable to the present case.¹¹⁴ As indicated in *Biske v. City of Troy*,¹¹⁵ a court will not necessarily strike down a plan simply because it deals in the future.

7. The Abstract Nature of Plans

The implementation of plans may fail because of the necessarily abstract nature of the plan. Frequently developed by professional consultants, and developed with the spirit of "neutral technical competency," plans often do not encounter and struggle to resolve the basic conflicts of interest in a community until time of implementation.¹¹⁶ The case of *F.H. Uelner Precision Tool & Dies, Inc. v. City of Dubuque*,¹¹⁷ illustrates the problem. The plan and the implementing rezoning failed to confront the serious problems of an industrialized and commercial area that was to be upgraded by the plan and regulations. The court faced the conflict and was forced to "compromise" the original plan.

8. The Redistributive Nature of the Plan

The plan and its subsequent implementation means not only taking from some, but giving to others. A plan can result in a bonanza to a private party. The question then arises, whether such private benefits are to be permitted. The court in *Wine v. Boyar*¹¹⁸ found a corresponding "public" benefit despite private enrichment and consequently upheld the plan.

9. The Unconstitutionality of Devices for Implementing the Plan

The case of *Golden v. Planning Board of Town of Ramapo*¹¹⁹ illustrates the lesson that implementing devices, especially novel ones, must run the gauntlet of constitutional objections. In *Ramapo*, there were several objections: the enabling act did not authorize the tech-

114. See Seith, *How to Use the Comprehensive Plan in a Zoning Case*, 52 CHI. B. REC. 283, 288 (1971).

115. 381 Mich. 611, 166 N.W.2d 453 (1969) (inference that zoning ordinance would have been valid if its relationship to future needs was not "too speculative").

116. Planners and planning commissions seek to avoid unnecessary "showdowns" and hence postpone serious policy decisions.

117. 190 N.W.2d 465 (Iowa 1971).

118. 220 Cal. App. 2d 375, 33 Cal. Rptr. 787 (1963).

119. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, cert. denied, 409 U.S. 1003 (1972). See notes 99-100 and accompanying text *supra*.

nique employed; there was no authority to refuse to issue permits outright (as the plaintiffs' interpreted the device); the device was "exclusionary"; and there was a "taking". Even though the court rejected each of these claims, the point is that plan implementation is not the consummate value, despite what planners might think. Plans may have unanticipated and harmful consequences visited upon third parties, since a growth control scheme may, for example, exclude low-income persons, or the planned development of a town may devastate a water supply, harming those dependent upon it.

10. The Static Nature of the Plan

A plan, in the case of a master land use, is completed once every few years. Customarily, although amendments can be made, the plan as a whole remains intact for several years. But change does occur and provisions are made in land use regulations (*e.g.*, zoning amendments) if there is, for example, a substantial change in the neighborhood. What happens in the case of a static land use plan and changing zoning devices and conditions? The case of *Aspen Hill Venture v. Montgomery County Council*¹²⁰ illustrates this situation. The original plan provided for the rezoning of a commercial area. A later planning study found no need for such an area. The court found that private property rights, which were consistent with the old (though perhaps outdated) master plan, were not susceptible to challenges by any later planning studys.

11. Several Plans and/or Studies

Although one plan may be the "officially adopted" plan, there may actually be several plans and/or studies of varying scope at various jurisdictional levels with which to contend. It is difficult to avoid dealing with all of the plans and/or studies, since typically the "officially adopted" plan is not an enacted law and may in many jurisdictions be "advisory". This situation is also illustrated in *Aspen Hill Venture*.¹²¹

12. Summary

These instances of judicial refusal to require implementation indicate that there are broader principles at work. Although a plan is an

120. 265 Md. 303, 289 A.2d 303 (1972).

121. *Id.*

instrumentality for advancing the general welfare, the government can commit a variety of injustices through its planning. It can further the private interests of its officials and their friends and relatives. It can ignore fundamental personal or property rights protected by the constitution. It can fail to promote the general welfare in a manner which treats persons equally. Underlying most of the situations in which courts review plans and fail to implement them is one of these generic kinds of injustices.¹²² Courts, however, necessarily rationalize their decisions by explicit appeal to the values infringed upon.

Despite the cases illustrating situations in which plans should not be implemented, there has been a recent effort to tighten the relationship between plan and implementation through court interpretation, new statutes, and recommendations of prestigious commissions.¹²³

B. *Implementation Plan Approach*

Another approach to tightening the relationship between plan and implementation is the use of the "implementation plan." Although this approach, which joins plan and implementation in one document, appears to guarantee implementation, it does not obviate the problem of the relationship between comprehensive planning and implementation.

In addition to issues regarding the constitutionality of such plans, issues have arisen concerning the vagueness of certain control strategies adopted in the plans.¹²⁴ Issues also have arisen as to who may legally demand enforcement of the plans.¹²⁵ Questions have been raised as to the ability of courts to determine whether the strategy will achieve the results proposed.¹²⁶ When and under what circumstances revisions and postponements may be granted has also been

122. From this point of view, planning laws define the general welfare to be pursued by the plan, the protection of personal and property rights threatened by the implementing plan, and the guarantee of equality found under the plan.

123. See Mandelker, *supra* note 12, at 8.

124. *E.g.*, *Friends of the Earth v. United States Env'tl. Protection Agency*, 449 F.2d 118 (7th Cir. 1974) (Seventh Circuit held that although the EPA air pollution control plan was not as specific as it might be, the court could not substitute its judgment for that of the agency).

125. *E.g.*, *Friends of the Earth v. Carey*, 535 F.2d 165 (7th Cir. 1976) (Seventh Circuit found that the section of the Clean Air Act that provides for citizen suits ensures that citizens will be welcome participants in supplementing the EPA in vindicating environmental interests).

126. *E.g.*, *id.* at 173 ("Nor may the district court deny citizen enforcement of an approved state implementation plan on the ground that the task of supervising en-

the subject of several law suits.¹²⁷ Probably the most important issue arising out of transportation control plans is whether such plans are to be implemented at all.¹²⁸ Thus, the availability of "an implementation plan" does not guarantee implementation, since, in fact, states and cities have failed to implement their transportation control plans.¹²⁹

There is good reason for the failure of the implementation plans. The adoption of the implementation plan assumes a prior process by which someone selects and defines the goals to be achieved. It is also assumed that a range of acceptable methods exists or can be devised to achieve these goals. Thus, in the Clean Air Act,¹³⁰ for example, Congress broadly defined the goals and standards to be achieved, leaving the federal administration and the states to define the more specific standards and methods which implementation plans may adopt.¹³¹ But if there is no real consensus regarding the importance of specific goals and standards, then the plan will not be implemented, especially if other values are threatened.

The problems of the implementation plan approach are revealed not only in the litigation context (as in the transportation control plan situations), but also in the administrative process context, as illustrated by the Coastal Zone Management Act of 1972¹³² and its administration, which also authorizes implementation plans. This act is an effort to establish flexible criteria for implementation plans or programs, and has resulted in considerable confusion at the state and local level as to precisely what a coastal plan requires. Here, the goals were left somewhat general, and the specific plans provoked litigation.¹³³

forcement would be unduly burdensome or require the court to grapple with 'highly technical' problems").

127. *E.g.*, *Train v. National Resources Def. Council*, 421 U.S. 60 (1975) (since Congress determined that the EPA could reliably and feasibly predict the results of revisions of its plans, EPA findings to allow exceptions to federal mandatory pollution deadlines in certain carefully specified circumstances should be upheld).

128. *See Padnos & Selig, Transportation Controls in Boston: The Plan That Failed* (National Academy of Sciences Committee on Environmental Decisionmaking (1976)).

129. However, the specific nature of an implementation plan may more readily permit third-party suits to force implementation of plans.

130. 42 U.S.C.A. §§ 7401-7642 (West Supp. 1977).

131. *Id.* § 7401. *See* note 29 *supra*.

132. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976).

133. The California and Massachusetts Coastal Management Programs are cur-

C. *The Input Planning Approach*

The difficulties of advisory, adjudicatory, and implementation plan models are not escaped by the "input planning" approach. At what point in the decisionmaking process must planning take place? Which decisionmaker must consider the planning? Should the planning apply to programs as well as projects? What are the standards for an adequate planning input? These are some of the many questions which have been litigated under NEPA.¹³⁴ It would be fair to conclude from this volume of litigation that despite extensive court review, NEPA, in many cases, has not succeeded in preventing use of planning input as a rationalization for decisions previously agreed upon.¹³⁵

This brief review of the alternative methods of plan implementation and the reasons for non-implementation suggests that more complex factors may be at work which make plan implementation a most difficult objective to obtain. Experience with the various approaches to plan implementation suggests a need to reexamine the suitability of formal legal mechanisms for achieving plan implementation.

IV. THE EMPIRICAL FINDINGS REGARDING PLAN IMPLEMENTATION

Concurrent with attempts to devise new ways to guarantee plan implementation, studies questioning the feasibility of carrying out planning in the United States have been completed. These studies suggest serious problems with the current methods of planning.¹³⁶ Undoubtedly, planners are not in complete agreement as to the

rently under litigation by the American Petroleum Institute. *See* American Petro. Inst. v. Robert Knecht, Civil Action, No. 78-684 (D.D.C., filed Sept. 6, 1978); American Petro. Inst. v. Robert Knecht, No. Cv77-3375-RJK (C.D. Cal., filed Aug. 31, 1978).

134. *See, e.g.*, Mobil Oil Corp. v. FTC, 430 F. Supp. 855 (S.D.N.Y. 1977) (FTC must file environmental impact statement *before* it decides to proceed on course of action which will significantly affect the environment); Environmental Defense Fund v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971) (adequacy of research input should be judged in light of scope of proposed program and extent to which existing knowledge raises the possibility of potential adverse environmental effects).

135. *See* Fairbox, *A Disaster in the Environmental Movement*, 199 SCIENCE 743 (February 17, 1978).

136. *See* I. JANIS & L. MANN, *supra* note 10.

proper methods of planning.¹³⁷ Studies of the political contexts of planning,¹³⁸ the psychology of the planner,¹³⁹ and the societal context of planning¹⁴⁰ have concluded that effective planning and implementation require relatively unique political, social, and psychological circumstances.

These problems form the basis for one of the most thoughtful considerations of this topic. A. Dan Tarlock¹⁴¹ argues that "the legitimacy of planning devices has not been established."¹⁴² Planners have failed both to effectively control land use and to advance two important national policies—protection of environmental quality and provision of decent housing at all income levels. Plans lack any agreed-upon methodology. Assumptions that planning devices can produce efficiency and a net gain of welfare have not been demonstrated. Plans assume a hierarchy of goals based upon a widespread consensus which is arbitrarily posited since they "bear little responsibility for distribution of the costs and benefits of their activity."¹⁴³ Tarlock argues that given the limits of planning, the plan should not be controlling. Nevertheless, Tarlock concedes that planners' conclusions are sometimes relevant, that courts must weigh that contribution, and that courts must "peer behind" the plan in order to validate a decision.¹⁴⁴ According to Tarlock, a court, in reviewing whether a proposed change is in accordance with a plan, may be seeking to control arbitrary action of municipalities by placing a duty upon localities to justify their departure from a plan, and imposing a deliberative *process* but not a comprehensive plan. Tarlock recommends that courts use plans in situations where the proposed change threatens established neighborhood stability, where careful studies have preceded the planning, and where the plan itself does not result in arbitrary land reservation. In the case of the denial of a request

137. J. FRIEDMAN, *RETRACKING AMERICA: A THEORY OF TRANSACTIONAL PLANNING* (1973).

138. A. ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* (1965).

139. See J. FRIEDMAN, *RETRACKING AMERICA: A THEORY OF TRANSACTIONAL PLANNING* (1973).

140. See A. ETZIONI, *THE ACTIVE SOCIETY* (1968).

141. Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URBAN L. ANN. 69 (1975).

142. *Id.* at 101.

143. *Id.* at 76.

144. *Id.* at 81.

consistent with the plan, the court must demonstrate that a new set of values now guides the community. Finally, the court may require a plan where municipal actions appear clearly arbitrary.

Tarlock, however, does not address the questions of how *effective* planning—when it does take place—is to be successfully implemented, and how ineffective planning is to be recognized and discounted. Moreover, he fails to recognize that in many cases, it is the failure of the underlying institutional mechanisms for implementing plans, and not inadequacies in the plan itself, which accounts for the “failure of planning”. Thus, the more fundamental problem which Tarlock does not address: When planning is ineffective or institutions are not available for carrying out the plan, what are the ways of rectifying the situation? And if decisions must be rationalized on some basis other than an appeal to the plan, what form of reasonable appeal to values is available?

A more careful analysis of the problems in the methodology of planning and more discerning psychological, political, and societal analysis of the context of planning is required to answer these questions. The intellectual limitations of modern planning methods are summarized in the theoretical critiques of both comprehensive planning¹⁴⁵ and incremental decisionmaking techniques.¹⁴⁶ Comprehensive planning has been criticized as unfeasible because it is not adapted to man's limited problem-solving capacities, the inadequacy of information, the costliness of analysis, the diverse forms in which specific policy problems arise, the need for strategic sequences of analytical moves, and the failure to develop agreed upon evaluative criteria. As a consequence, incremental ad hoc planning methods have been recommended. The major criticism of the incremental approach is that it *describes* most planning activity rather than *prescribing* what should be the planning method. The incremental method does not even accurately describe the way in which major decisions are made. Nor does the incremental method suggest how organized scientific methods and conclusions might be brought to bear upon decisionmaking.

These intellectual problems are illustrated by actual case studies.

145. See A. FALUDI, *A READER IN PLANNING THEORY* (1973).

146. See generally Hirschman & Lindblom, *Economic Development, Research and Development, Policy Making: Some Converging Views*, 7 *BEHAVIORAL SCIENCE* 211 (1962); Lindblom, *The Science of “Muddling Through”*, 19 *PUB. ADMIN. REV.* 79 (1959).

The limits upon the attainment of full information is reflected in case studies of the failure of the use of models in many planning efforts, including implementation plans.¹⁴⁷ The problems of forecasting as part of the comprehensive planning process have also been well documented.¹⁴⁸ Intellectual techniques for clarifying goals and developing agreements about goals have been continually under fire.¹⁴⁹ Serious flaws have been identified in the use of impact analysis and cost-benefit analysis to assess alternatives, as well.^{149a}

Unfortunately, legal commentators on planning tend to be intolerant of deficiencies in planning methods, while silently tolerating a complete lack of explicit methodology in legal decisionmaking. They fail to recognize that there is a gradually developing consensus and commitment within the planning profession regarding the appropriate use of methods, an identification of the limits of those methods, and an improvement of the admittedly inadequate methods now employed.¹⁵⁰ As a consequence, the problem is not one of implementing inadequate plans resulting from a static art of planning, but rather that of implementing an admittedly inadequate plan produced by an ever changing and improving art of planning.

Even if the planning were completely satisfactory, studies of the political content of the planning process reveal fundamental reasons for the failure to achieve implementation. Meyerson and Banfield's classic study of planning¹⁵¹ concluded that both the fragmentation of jurisdictions within a large city and the pluralism of interest groups make it impossible to attain any unitary conception of public interest to guide decisionmaking. Numerous studies have confirmed this conclusion.¹⁵²

The achievement of planning goals based upon the assumption of

147. See B. ACKERMAN, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974).

148. See Herman, *Energy Demand Forecasting: Prediction or Planning?*, *J. AM. INST. PLAN.* 4 (Jan. 1979).

149. See A. ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* (1965).

149a. See generally P. SELF, *ECONOCRATS AND THE POLICY PROCESS: THE POLITICS AND PHILOSOPHY OF COST BENEFIT ANALYSIS* (1975).

150. See W. LEYS, *ETHICS FOR POLICY DECISIONS* (1968).

151. M. MEYERSON & E. BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTEREST—THE CASE OF PUBLIC HOUSING IN CHICAGO* (1955).

152. For a recent questioning of the pluralist approach, see G. DONNHOF, *WHO REALLY RULES? NEW HAVEN COMMUNITY POWER REEXAMINED* (1978).

centralized decisionmaking requires either a discovery of hidden forms of centralized power behind the facade of apparent pluralism,¹⁵³ or the creation of a new centralized decisionmaking mechanism, either through informal strategies of politicians,¹⁵⁴ planners,¹⁵⁵ or through efforts to establish formal coordinative mechanisms.¹⁵⁶ Recent case studies by political scientists of efforts to implement plans through such techniques are relatively pessimistic in their conclusions.^{156a}

Such studies also suggest that the use of implementation plans (or review techniques for insuring a relationship between plan and implementation) does not guarantee that the plan will be implemented. The study of attempted plan implementation in *Gautreaux v. Chicago Housing Authority*¹⁵⁷ is useful to shed light on the complexities of the topic. In the late 1940's, the Chicago Housing Authority (CHA) adopted a policy of distribution of low-income housing throughout the city.¹⁵⁸ Proposals for housing sites had to be approved by the city council. The council disapproved most of the specific site recommendations for housing in white areas and approved alternative sites.

In 1966, Negro tenants and applicants for public housing in Chicago sued the CHA and HUD, alleging that the CHA deliberately chose sites in the "Negro Ghetto" in violation of federal statutes^{158a} and the Fourteenth Amendment. In February 1969, the district court entered summary judgment against the Housing Authority on the grounds that it violated the respondents' constitutional rights by selecting public housing sites and assigning tenants on the basis of race.¹⁵⁹ The court directed the CHA to build the next 700 units in

153. See F. HUNTER, *COMMUNITY POWER STRUCTURE: A STUDY OF DECISION-MAKERS* (1953).

154. The "executive centered" coalition of Mayor Lee of New Haven is one example. See R. DAHL, *WHO GOVERNS?* (1961).

155. See F. RABINOVITZ, *CITY POLITICS AND PLANNING* (1969).

156. Such coordinative mechanisms may include interagency agreements promoted by executive order, or a review of the adequacy of such orders. See Asselin, *Executive Orders: Discretion vs. Accountability*, 51 *CONN. B.J.* 383 (1977).

156a. See A. ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* (1965); M. LEVIN & N. ABEND, *BUREAUCRATS IN COLLISION* (1971).

157. 503 F.2d 930 (7th Cir. 1974).

158. *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907, 909 (N.D. Ill. 1969).

158a. 42 U.S.C. §§ 1981, 1983 (1976); Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976); 28 U.S.C. §§ 2201, 2202 (1976).

159. *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

white areas. The court also ordered the CHA to thereafter locate seventy-five percent of its new housing in predominantly white areas outside Chicago, and to modify its tenant selection procedures.¹⁶⁰ Although the lower court initially adopted a plan aimed only at Chicago, the court of appeals ordered a metropolitan based plan.¹⁶¹ The Supreme Court upheld the order of the court of appeals.¹⁶² The Court believed such a plan was implementable since the CHA had authority throughout the metropolitan area and HUD, under new federal law, had housing financing techniques for encouraging housing in the metropolitan area.

The case study reveals numerous ways in which the law both hindered and facilitated the planner's policy. On the one hand, the federal housing act,¹⁶³ at the most general level, proposed the very policy to be pursued. Furthermore, the original housing law provided resources for planning the detailed steps to carry out the policy, and promised funds for assistance in implementation. On the other hand, the state law¹⁶⁴ assigned the responsibility for comprehensive planning to another planning agency and the approval of sites to the city council. The federal and state laws enabled the creation of separate suburbs. The CHA itself was fashioned by a law which established an "independent" board of "non-political" housing commissioners.¹⁶⁵ Thus, even before court action began, various laws creating multiple bodies, each with some jurisdiction over the implementation process, hindered the achievement of the CHA's original policy.

The extended court case in Chicago illustrates the dual role of the law. On the one hand, the legal development of the Fourteenth Amendment and statutes facilitated constitutional claims invoked by

160. *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969).

161. 503 F.2d 930 (7th Cir. 1974).

162. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

163. Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976), prohibits racial discrimination in federally-assisted programs, including housing programs. It was this statutory prohibition that HUD was held to have violated by its funding of CHA's housing projects. *Gautreaux v. Chicago Housing Authority*, 498 F.2d 731, 740 (7th Cir. 1971).

164. ILL. ANN. STAT. ch. 67-1/2 §§ 8.2, 9 (Smith-Hurd 1978).

165. Illinois state law allows the governing body of any city, village, or incorporated town, having more than 25,000 inhabitants to determine by resolution that there is a need for a local housing authority. The presiding officer of the municipality shall then *appoint* five housing commissioners. *Id.* ch. 67-1/2 § 3 (Smith-Hurd 1978).

the plaintiffs who were seeking enforcement of the original but now lapsed Housing Authority policy. The court, by ordering a new planning effort, was reaffirming continuation of the original policy. However, the court's action (although later reversed) in regard to the federal Low-Rent Housing Program affected other federal programs. The court halted Model Cities funding which blocked the implementation of Model Cities plans.¹⁶⁶ The new plan, as adopted by the court and as upheld by the Supreme Court, extended to the metropolitan area as a whole and was in fact a significant extension and modification of the original CHA policy.

In light of this brief history of *Gautreaux*, several conclusions may be drawn. First, it is impossible to decide whether the law "helped" or "hindered" the plan. Second, it seems clear that if it was desirable to implement the original plan, a review statute requiring the housing program to "conform to the original housing plan" would probably have been ineffective since other laws would be ignored by such a requirement. Third, and most importantly, if one were to suggest ways of altering the existing laws in order to facilitate implementation, no one "generic law" could be offered which would somehow guarantee that the plan would be carried out. It might be suggested that laws reducing the legal "pluralism" of decisionmaking boards might encourage plan implementation. For example, merger of the comprehensive planning function and the housing authority might have resulted in more feasible and acceptable long-term plans. However, such a merger might have negative effects in other policy arenas. It might be suggested that laws with alternative financing for housing should have been provided initially; after all, the court ultimately relied on new housing financing methods. But such a recommendation comes with the benefit of hindsight. Moreover, new methods of housing financing may not be successful either. In short, the case study demonstrates that there are no legal shortcuts to implementation. These legal devices simply appear to be unable to overcome the political barriers to effective planning.

Unfortunately, there are other obstacles as well. Another dimension of the plan implementation problem is the economic dimension.

166. *Gautreaux v. Chicago Housing Authority*, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd*, 457 F.2d 124 (7th Cir. 1972) (notwithstanding prior determination that the Chicago Housing Authority was engaged in perpetuating segregated housing by its selection of sites for low rent housing, district court abused its discretion in enjoining HUD from releasing any funds to finance City's Model Cities Program which had minimal involvement with low cost public housing).

One major distinction must be made between situations where plan implementation depends upon the affirmative action of the private market to fulfill the plan's goals and situations where public action is prepared to affirmatively fulfill the goals. (Obviously, there are situations where mixed public/private action, *e.g.*, urban renewal, may be involved.)¹⁶⁷

Daniel Mandelker¹⁶⁸ has demonstrated that one cannot depend upon the market to aid affirmatively in implementing the comprehensive plan. Even when incentives are provided through the urban renewal process, the development may not take place.¹⁶⁹ There are, however, requirements in older urban renewal legislation and new town development that the incentives offered to the developer be designed to encourage development in accordance with the plans.¹⁷⁰

Aside from the political limitations on planning implementation, a final perspective on the limits of planning and its implementation is offered by the psychological studies of decisionmaking.¹⁷¹ These studies suggest that stress is the source of decisional conflicts,¹⁷² and offer several ways to cope with the stress of decisionmaking.¹⁷³ But many of these coping strategies are not conducive to planning. Laws requiring input of planning into decisionmaking may not affect those determinant conditions which lead decisionmakers to avoid planning, and hence decisionmakers will merely rationalize their choices.

To summarize, the present laws which seek to insure plan implementation through adjudicatory models or administrative models of planning appear largely irrelevant to the more basic political, psychological, and societal factors contributing to ineffective planning. Such a conclusion suggests that rather than focusing upon current narrow legal approaches to legalizing plan implementation, it is necessary to identify the fundamental reasons why plans are not implemented, and enact legislation to make the political, economic,

167. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

168. D. MANDELKER, *THE ZONING DILEMMA* (1971).

169. I have tried to show a similar problem in my book on the development of the new town of Columbia, Maryland. See R. BROOKS, *NEW TOWNS AND COMMUNAL VALUES* (1974).

170. Concerning new towns, see Brooks, *The Policy Issue of New Towns: One Failure of the Law to Guide Planning in America*, 8 URB. LAW. 94 (1976).

171. See I. JANIS & L. MANN, *supra* note 10.

172. *Id.* at 45-52.

173. *Id.* at 45-81.

societal, and psychological settings more conducive to carrying out plans. Such a broader focus may require the relative centralization of political power, the use of positive incentives, organizational reforms to diminish situations that discourage planning, and the promotion of a new social structure for planning activity. But even if such changes do take place, one can expect that much decisionmaking will still not be guided by plans. It does not follow, however, that such planless decisions must be regarded as "irrational".¹⁷⁴ From this point of view, the problem of the law of plan implementation is not simply one of maximizing planning in all decisions, but rather that of determining the different kinds of rationality appropriate in the decisions to be made.

V. CONCLUSION

Failure to implement plans may be viewed as merely a minor defect in the United States' governmental structure. As such, it would appear to require minor adjustments in the existing machinery of government. I have suggested that the failure may be due to deeper political, social, economic, and psychological aspects of our society. Some theorists believe, however, that the separation between plan and action is expressive of an even deeper dichotomy between theory and practice—a dichotomy which is the product of the current liberal and industrial welfare state.¹⁷⁵ These theorists would view planning as an instrument of bureaucracy which is the central institution of the modern state. As such, planning is based upon the central tenets of bureaucracy—the importance of impersonal rules, the distribution of power based upon merit, and the required functioning of people within present roles.

Thus, the planning process itself is based upon the unresolved conflicts within the modern bureaucratic state. These conflicts include the inability to find agreed-upon moral content for the impersonal rules intended to guide the bureaucracy, the struggle between roles assigned to the bureaucracy and class interests of society, the failure

174. Wayne Leys cogently argues that there are many ways of deliberating, and discusses a series of "critical questions" developed by various systems of ethics. *See* W. LEYS, *ETHICS FOR POLICY DECISIONS* (1968). Paul Diesing identifies "five types of decisions" and the way in which different forms of reason apply to them. *See* P. DIESING, *REASON IN SOCIETY: FIVE TYPES OF DECISIONS AND THEIR SOCIAL CONDITIONS* (1962).

175. *See* R. UNGER, *LAW IN MODERN SOCIETY* (1976); R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

to find adequate justification for the distribution of power based upon bureaucratic "merit", and the destructive impact which impersonal role requirements have upon personality. The reason planning and implementation do not mesh is that planning itself is symptomatic of those unresolved conflicts within the bureaucratic state. Thus, just as there is no agreed upon content for bureaucratic rules, there is no content for its "impersonal plans". The impersonal plans run head on into various class interests at the point of implementation. Doubts about requiring actions to conform to plans may be, in part, doubts about the legitimacy of distributing power to planners. Moreover, the frequent negative reactions to pre-set plans may be the personal expression of revolt of the normal personality against impersonal roles.

Such a broad, admittedly vague, diagnosis suggests the need to resolve the fundamental conflicts of the modern state as a preface to the reorganization of planning and its role. According to these theorists, such a resolution requires "the attack on imperialism in international relations, the subversion of the principle of class within the nation state, and the confinement of the principle of role or merit through democracy internal to the bureaucratic institutions."¹⁷⁶ These actions become the preliminary steps to any legal reorganization of the role of planning and action.

It is at this juncture that the efforts to democratize planning through citizen participation and decentralization have relevance to planning implementation. Such citizen participation efforts should not be viewed as a cynical method to co-opt citizen groups and facilitate short-term plan implementation, but rather as one of a number of ways to diminish the impact of class-biased plans, modifying the principle of distribution of power based upon the alleged expertise of the planner and securing increased democracy within bureaucratic institutions. It is through such reforms that planning may ultimately be more appropriately implemented.

176. R. UNGER, *KNOWLEDGE AND POLITICS* 252 (1975).

NOTES

