TWENTY YEARS AFTER— RENEWED SIGNIFICANCE OF THE COMPREHENSIVE PLAN REQUIREMENT

*EDWARD J. SULLIVAN**

*LAURENCE KRESSEL***

INTRODUCTION

The relationship of planning to land use regulations has been a matter silently relegated, by the acquiescence of local government and the judiciary, to the back-waters of planning law. Recent indications suggest, however, that the planning and land use regulation relationship is, or soon will be, the subject of intensive legislative and judicial concern. Several factors have prompted the renewed interest in the comprehensive planning process: adverse judicial reaction to ad hoc decision-making at the local level, often thought to be replete with bias, ignorance and capriciousness;[1] concern for the environment

*Legal Counsel to the Governor of Oregon; Member, Oregon State Bar; Affiliate of the American Institute of Planners; Member, American Society of Planning Officials; B.A., St. John's University, 1966; Urban Studies Certificate, Portland State University, 1974; M.A., Portland State University, 1972; J.D., Willamette University, 1969.

**B.A., Harpur College (S.U.N.Y.), 1966; M.S.W., University of Michigan, 1968; J.D., Lewis and Clark College, Northwestern School of Law, 1975.

1. *See* R. BABCOCK, THE ZONING GAME 79-83 (1966). For a case study of rampant corruption in land use decision-making see Freilich & Larson, *Conflicts of Interest: A Model Statutory Proposal for the Regulation of Municipal Transactions*, 38 U.M.K.C.L. REV. 373, 390-98 (1970). *See also* Sullivan, *From* Kroner *to* Fasano: *An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L.J. 358, 359-69 (1974).

and an effort to prevent its destruction,[2] especially in sensitive areas;[3] attempts by citizen and planning groups, among others, to devise a planning process that will inventory, analyze and build upon possible alternatives in arriving at strategies and choices;[4] and increasing state participation in the planning process.[5]

The lack of clarity regarding the relationship between planning and land use regulation in the United States was highlighted twenty years ago in two articles by Professor Charles M. Haar. The first and most widely quoted, *"In Accordance with a Comprehensive Plan,"*[6] reviewed the legal history of the comprehensive plan requirement and judicial reluctance to invalidate land use regulatory schemes that were not predicated on such a plan. In the second article, *The Master Plan: An Impermanent Constitution,*[7] Haar advocated a relationship between planning and zoning analogous to that between a constitution and legislation in which the former provides legal parameters for the latter.

Twenty years have passed since Haar advocated the importance of the comprehensive plan. Part I of this Article reviews the case law and legislation that have addressed the relationship between planning and zoning to determine whether (and if so, what) meaningful changes have occurred. This part also briefly recapitulates the position taken by Haar in his first article and discusses three trends in the law of planning and land use regulation. While the conclusions of such an examination may be mixed, we believe there

---

2. *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. III, 1973); Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-58 (1970); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970); Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 (Supp. III, 1973).

3. *See* text at notes 161-85 *infra* (discussion on shoreline areas).

4. One of Oregon's goals is to devise a planning process that will inventory resources, develop alternative policies, and outline policy choices made by the relevant government. Goal No. 2 adopted by the Oregon Land Conservation and Development Commission, December 27, 1974 (copy on file at State Library, Salem, Oregon).

5. *See* notes 109-18 and accompanying text *infra* (discussion of Hawaii and Vermont planning legislation).

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

7. Haar, *The Master Plan: An Impermanent Constitution,* 20 LAW & CONTEMP. PROB. 353 (1955). Haar chose the constitutional analogy over alternatives making the plan merely an advisory document.

is a fairly strong trend in judicial decisions, and an even more definite trend in statutory law, toward Haar's concept of the comprehensive plan as a constitutional document for land use regulation. *Fasano v. Board of County Commissioners*,[8] *Baker v. City of Milwaukee*,[9] and Oregon's statutory land use scheme[10] are used to illustrate the trend toward a broad expansion of the role of the comprehensive plan.

Part II discusses the trend toward statewide land use planning. Important examples of legislative activity in this area are briefly outlined, including shorelands and wetlands protection acts. Part III identifies areas of planning law likely to be of major concern in the coming years: plan adoption and amendment, rationalization of the planning process, and pre-emption of local control by both state and federal land use planning activity.

I. The Zoning-Planning Enigma

Disagreements over the role of planning in the land use regulatory scheme inevitably lead back to the Standard Enabling Acts promulgated by the Department of Commerce in the 1920's. The proper relationship between these Acts[11] has never been analyzed to the satisfaction of planners, lawyers or the judiciary. In 1926 the Standard State Zoning Enabling Act (SZEA) empowered local governing bodies to adopt zoning regulations "in accordance with the comprehensive plan."[12] Two years later, the Standard City Planning Enabling Act (SPEA) empowered planning commissions to adopt and carry out a document variously referred to as the municipal plan, the master plan, the official plan, and the city plan.[13] The question arose whether the "plan" SPEA contemplated was intended to serve

8. 264 Ore. 574, 507 P.2d 23 (1973).

9. ..... Ore. ....., 533 P.2d 772 (1975), *aff'g in part, rev'g in part*, 17 Ore. App. 384, 520 P.2d 479 (1974).

10. *See* text at notes 141-50 *infra*.

11. Professor Haar wistfully characterized the overall plan as the "parent" of zoning, notwithstanding that the latter predated the former in the standard acts and on the statute books of most American cities and counties. Haar, *supra* note 6, at 1154. *See also* text at note 16 *infra*.

12. Advisory Comm. on City Planning & Zoning, U.S. Dep't of Commerce, A Standard State Zoning Enabling Act § 3 (rev. ed. 1926) [hereinafter cited as SZEA].

13. Advisory Comm. on City Planning & Zoning, U.S. Dep't of Commerce, A Standard City Planning Enabling Act (1928) [hereinafter cited as SPEA].

as the referent for SZEA's requirement of zoning in accordance with the comprehensive plan. While an affirmative answer has logical appeal, particularly to contemporary planners, one searches in vain for substantiation of such an intent in the model enabling acts or in their interpretation by the courts.[14]

The first stumbling block confronting a "planning precedes zoning" argument is the untidy historical fact that planning *followed* zoning in the standard enabling acts.[15] Moreover, the footnotes accompanying the standard acts stressed a functional separation between planning and decision-making that appeared to relegate the former to a dusty

---

14. *See* Wheeler v. Gregg, 90 Cal. App. 2d 348, 364, 203 P.2d 37, 47-48 (Dist. Ct. App. 1949), holding that a separate master plan is the referent for zoning "in accord with a plan."

15. Correspondingly, zoning preceded planning in most parts of the country. *See* Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN L. 65, 69 (1971). This point was noted in the leading case of Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957), holding that zoning "in accordance with a comprehensive plan" does not require a separate planning process. Reviewing the zoning-planning chronology, the court said:

> Thus the historical development did not square with the orderly treatment of the problem which present wisdom would recommend. And doubtless the need for immediate measures led the Legislature to conclude that zoning shall not await the development of a master plan. Accordingly, as of October 15, 1954, while there were 371 zoning ordinances in our State, there were 320 planning boards and but 112 master plans.

Id. at 165-66, 131 A.2d at 7. *See also* Hyland v. Mayor & Township Comm., 130 N.J. Super. 471, 327 A.2d 675 (App. Div. 1974), which found rezoning to be in accordance with a comprehensive plan when the plan had been adopted 10 months *after* the rezoning.

The planning lag, however, has been overcome to some extent by federal encouragement of comprehensive planning. *See* Housing Act of 1954 § 701, 40 U.S.C. § 461 (1970). In 1971 the states, metropolitan areas, regions, districts, counties, municipalities and Indian reservations receiving grants under the section 701 program totalled 425. BUDGET OFFICE, EXECUTIVE OFFICE OF THE PRESIDENT, CATALOGUE OF FEDERAL DOMESTIC ASSISTANCE § 14.203 (1972), cited in D. HAGMAN, URBAN AND LAND DEVELOPMENT CASES AND MATERIALS 57 (1973). *See also* Vestal, *Planning for Urban Areas: The Fight for Coherency*, 56 IOWA L. REV. 19, 36-38 (1970).

State legislation has also generated land use planning activity. In Oregon, for example, only 38 cities had comprehensive plans by 1969, a year in which progressive land use planning was enacted. By 1974, however, 154 out of the state's 238 cities and 23 of 36 counties had developed plans to comply with the law. OREGON LOCAL GOV'T RELATIONS DIV. REPORT (Jan. 1974) (copy on file with Edward J. Sullivan). For a table indicating the accelerating rate of planning in California in response to land use legislation in that state see Perry, *The Local "General Plan" in California*, 9 SAN DIEGO L. REV. 1, 3-4 (1971).

shelf.[16] Perhaps the relegation of planning to the background reflected an over-all scepticism toward the unproven city planning profession, which faced an uphill struggle against deeply imbedded American resentment of centralized power.[17] In any event, Alfred Bettmen's comment that the plan was "not intended to have any legal effect on the property,"[18] notwithstanding contrary language in the footnotes to SPEA,[19] articulated the still dominant view that the comprehensive plan against which zoning was to be tested was something other than that produced in the planning process under SPEA. Accordingly, the first cases to discuss the statutory requirements of zoning "in accordance with the comprehensive plan" looked to the comprehensiveness of the zoning ordinance itself rather than to an external standard embodied in a master plan.[20] A legislative

16. Footnotes to SPEA heavily stressed the advisory nature of the plan. Functional separation of planning from decision-making was thought to be necessary to insulate the plan from the vagaries of politics. Accordingly, it was recommended that the plan should not be approved by the city council but by the planning commission alone. SPEA, *supra* note 13, at § 8 n.44.

On the other hand, SPEA did accord some weight to the plan. Section 9, for example, *required* planning commission approval of certain public improvements subject only to council veto by a two-thirds vote. *See* MD. ANN. CODE art. 66B, § 3.08 (1970). Other language in the footnotes to SPEA also seemed to contradict the plan's limited role. *See* quotation in note 19 *infra.*

17. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 71 (8th ed. H. Reeve transl., P. Bradley ed. 1960). *See also* Key Realty Co. Zoning Case, 408 Pa. 98, 102, 106-08, 182 A.2d 187, 190, 192 (1962) (Bell, C.J., concurring), in which constitutional property rights are defended against the standardless "hodge-podge" of the comprehensive plan. An argument for decentralized (*i.e.* neighborhood) control is advanced in M. KOTLER, NEIGHBORHOOD GOVERNMENT (1969). For excellent critiques of master planning in the 1940's and 1950's see E. BANFIELD & J. WILSON, CITY POLITICS 187-203 (1963); J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

18. A. BETTMAN, CITY AND REGIONAL PLANNING PAPERS 42 (1946).

19. Section 2 of SPEA empowered municipalities to "make, adopt, amend, extend, add to or carry out a municipal plan." SPEA, *supra* note 13, at § 2. An accompanying footnote added: "The Act contemplates that the planning commission shall not only make the plan but also have a strong influence in protecting the plan against departures and in getting the plan carried out, and that, in the case of subdivisions and street locations, it shall even have a considerable degree of control." *Id.* at n.8.

20. Coley v. Campbell, 126 Misc. 869, 215 N.Y.S. 679 (Sup. Ct. 1926), and City of Olean v. Conkling, 157 Misc. 63, 283 N.Y.S. 66 (Sup. Ct. 1935), construed New York's zoning enabling act which predated SPEA but employed similar language. *See* note 81 *infra.*

presumption of validity further shielded most zoning decisions from judicial scrutiny.[21]

Critics of planless zoning, however, attracted an expanding audience as pressures for urban and suburban development revealed the inadequacies of the existing land use regulatory scheme. For example, while the zoning system supposedly insulated local government from the reach of special interests and limited the opportunity for ad hoc decision-making, the door was in fact held ajar for these evils by such devices as the zoning amendment, the variance, and the special exception.[22] Such "accommodation" or "flexibility" mechanisms, and the accompanying unguided discretion, undermined the certainty and simplicity of neatly mapped land use districts designed to keep each "pig in its own pen."[23]

Less than a generation after SZEA inaugurated zoning "in accordance with a comprehensive plan," it became apparent that the public welfare was in no way protected from the onslaught of development by landowners with "comprehensive" plans of their own and access

---

21. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 1 R. ANDERSON, THE AMERICAN LAW OF ZONING § 2.14 (1968).

For attacks on the denomination of zoning action as legislative in nature and entitled to a presumption of validity see Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (1971); Note, *The General Public Interest vs. The Presumption of Zoning Ordinance Validity: A Debatable Question*, 50 J. URBAN L. 129 (1972); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 138 (1972).

The presumption of validity has been rejected in favor of a quasi-judicial designation in Fasano v. Board of County Comm'rs, 264 Ore. 574, 580, 507 P.2d 23, 26 (1973) (discussed in text at note 88 *infra*); *accord*, West v. City of Portage, 392 Mich. 458, 459-61, 221 N.W.2d 303, 304-06 (1974). *See also* Freilich, Fasano v. Board of County Commissioners of Washington County: *Is Rezoning an Administrative or Legislative Function?*, 6 URBAN LAW. vii (1974). *But see* City of Phoenix v. Beall, 22 Ariz. App. 141, ..., 524 P.2d 1314, 1317 (1974) (preferring the legislative designation over the quasi-judicial approach but relying on a confused interpretation of Justice Douglas' opinion in Boraas v. Village of Belle Terre, 416 U.S. 1 (1974)).

22. R. BABCOCK, *supra* note 1, at 6-11.

23. *Id.* at 6; Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183 (1972); Note, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101 (1962). *See also* 801 Ave. C, Inc. v. City of Bayonne, 127 N.J. Super. 128, 316 A.2d 694 (App. Div. 1974) (overturning city practice of using variance as system for site plan review and ad hoc approval of high-rise apartments to meet housing needs).

to city hall.[24] The magic words of the enabling act were no match for the invocation of "guaranteed private property rights" and the accommodating posture of friends and business associates sitting on planning commission and local governing bodies.[25]

In his article *"In Accordance with a Comprehensive Plan,"*[26] which had a substantial impact on land use thinking, Professor Haar explored the potential of the plan requirement for harnessing the unruly regulatory process. After conceding that SZEA provided scant authority for requiring a separate master plan as a precondition to zoning,[27] Haar reviewed the various judicial interpretations of the statutory "plan." He ruefully concluded that the emphasis has been wrongly placed upon "whether the zoning ordinance is a comprehensive plan, not whether it is in accordance with a comprehensive plan."[28] As a separate master plan was not deemed mandatory, zoning decisions were judicially tested against a single constitutional standard that was easily satisfied, given the presumption of validity attaching to legislative acts.[29] Haar argued, however, that the comprehensive plan requirement should be read to create a second standard, one that would test individual zoning regulations against their "fidelity

24. The nightmare of modern "redevelopment" under corporate sponsorship is comically depicted in "The Apple War," Swedish Words, Inc. & Svensk Filmindustri (1971). In the film, plans to transform a beautiful meadow into a sprawling "recreational community" (unsubtly called "Deutschneyland") are repelled by the resourceful townsfolk without legal assistance. On the other hand, the nightmare of "redevelopment" by planners is depicted in Huxtable, *The Ludicrous Relocation of Covent Garden Market*, N.Y. Times, Jan. 12, 1975, § 2D, at 24, col. 1. The writer describes an "ambitious casebook of planning horrors . . . recognized as such, not by the planners, but by the people." *Id.* col. 3.

25. Freilich & Larson, *supra* note 1, at 390-98. The authors' review of corruption in New York's Suffolk County borders on the hilarious.

26. Haar, *supra* note 6.

27. *Id.* at 1157.

28. *Id.* at 1173. Haar's regard for the credibility of planning at that time was not shared by others. Banfield and Wilson, describing post-war city planning, wrote:

> Whether for one reason or another, most cities prepared documents called master plans. . . . Most of the planning was done in 1960 and 1961 by personnel who had little or no experience of master planning, and many of the plans, of course, were hastily contrived to satisfy the minimum requirements of the federal agencies. "Ninety day wonders," these plans were called by some of the planners who made them.

E. BANFIELD & J. WILSON, *supra* note 17, at 192.

29. *See* note 21 and accompanying text *supra*.

to the specific criteria of the master plan."[30] Only then can the proper relationship between planning and zoning be operationalized. Furthermore, only in this way can decisions by front line local officials, who face severe pressures from advocates of parcel "adjustments," be scrutinized against an ascertainable standard that reflects police power considerations:

> Such a requirement will mean that the municipal legislature has an ever-present reminder of long-term goals which it has been forced to articulate, and will give lesser play to the pressures by individuals for special treatment which tend over a period of years to turn the once uniformly regulated district into a patchwork. Further, it will give the courts a standard for review more sharply defined than the reasonable *in vacuo* test upon which they now are forced so largely to rely.[31]

Professor Haar's view of the statutory comprehensive plan as a type of land use constitution,[32] taking the form of a master plan on which a variety of regulatory devices might be based was, and may still be, a minority position, notwithstanding its irrefutable and significant distinction between planning and zoning. Twenty years after the appearance of his first article, a majority of American jurisdictions have not accepted the idea that a separate planning process is implicit in the concept of zoning in accord with a plan.[33] Ironically, courts frequently cite Professor Haar's work while upholding the unitary view of the statutory requirement (*i.e.* that a zoning ordinance itself can serve as the statutory "comprehensive plan"), although his references to that theory were almost exclusively by way of attack.[34] Indeed, it is probably fair to say that few articles have been more widely quoted and, at the same time, more narrowly relied upon,

---

30. Haar, *supra* note 6, at 1156.

31. *Id.* at 1174. *See generally* D. MANDELKER, THE ZONING DILEMMA 57-77 (1971).

32. Another characterization has been provided by Professor Ira M. Heyman, who states that "the planning process provides both the ingredients for a 'Brandeis brief' and the detailed arguments necessary to distinguish the treatment of what might otherwise appear to be similarly situated property owners." Heyman, *supra* note 23, at 234.

33. *See, e.g.*, Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973); Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973); Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 202 S.E.2d 889 (1974); Shelton v. Bellevue, 73 Wash. 2d 28, 39, 435 P.2d 949, 955 (1968).

34. Haar, *supra* note 6, at 1157-58.

than has *"In Accordance with a Comprehensive Plan."*[35] Yet, while the unitary view continues to dominate current planning law, a discernible trend exists toward the direction advocated by Haar. A review of relevant case and statutory law since publication of Haar's paper, as well as more recent land planning legislation, indicates that planless zoning, long a roadblock to needed land use reform, will soon be discredited.

Cases construing the relationship between land use regulation and the comprehensive plan can be divided into three general categories. The majority view, which developed from the backwards relationship between planning and zoning in the Standard Enabling Acts, considers zoning a self-contained activity.[36] Since a zoning scheme is equated with the statutory comprehensive plan, we refer to this line of cases as the *unitary* view.

A second line of cases reflects an increasing judicial predisposition to grant legal status, if not controlling weight, to official or master plans as distinct from zoning ordinances. Under this view, while a master plan is not a *sine qua non* of valid zoning, land use decisions are at least examined in light of the standards and policies set out in a planning document, if one has been adopted.[37] Because zoning under this view implements an over-all, although optional, planning process, these cases express a *planning factor* doctrine.

Finally, a growing minority of jurisdictions formally acknowledge the conceptual invalidity of the unitary "zoning as planning" principle. Under recently enacted legislative authority, courts in these jurisdictions require consistency between local regulatory action and a separately adopted, statutorily defined master or comprehensive plan.[38] We shall refer to these cases, under which the comprehensive plan has finally come of age, as expressive of a *planning mandate* theory.

---

35. The cases typically refer to Haar's observation that courts have not read zoning enabling acts to require a separate plan. *See, e.g.*, Grubel v. MacClaughlin, 286 F. Supp. 24, 30 (V.I. 1968); Pressman v. City of Baltimore, 222 Md. 330, 338, 160 A.2d 379, 383 (1960); Kozesnik v. Montgomery Township, 24 N.J. 154, 166, 131 A.2d 1, 7 (1957); Jackson & Perkins Co. v. Martin, 16 App. Div. 2d 1, 4, 225 N.Y.S.2d 112, 115 (1962). *See generally* Annot., 40 A.L.R.3d 372 (1971).

36. *See, e.g.*, cases cited note 33 *supra.*

37. *See* note 61 *infra.*

38. *See* note 73 *infra.*

A. *The Unitary View*

The case most often cited as representing the conception of zoning as a self-contained activity, reviewable only against a constitutional standard, is *Kozesnik v. Montgomery Township.*[39] In *Kozesnik*, two New Jersey townships amended their zoning ordinances to permit rock quarrying and processing operations in areas previously zoned for agricultural and residential uses. Plaintiff-landowners challenged the validity of these amendments alleging, *inter alia*, that the statutory requirement of zoning "in accordance with a comprehensive plan" had not been satisfied.[40] Noting that no master plan had been adopted by either township, plaintiffs argued that the zoning amendments were void since "there can be no comprehensive plan unless it is evidenced in writing *dehors* the zoning ordinance itself."[41]

While plaintiffs' "planning precedes zoning" theory concededly had "good housekeeping"[42] on its side, the court offered a three-part rationale for rejecting plaintiffs' position and held that "[a] plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by the statute."[43] First, the court observed that the state planning act, though authorizing the creation of a planning commission and a master plan, was permissive rather than obligatory.[44] Secondly, the state's zoning act, while containing the standard requirement of zoning in accordance with a comprehensive plan, nowhere equated such a plan with the optional master plan of the planning act. Adoption of the zoning act prior to the planning act was deemed supportive of this point.[45] Lastly, the inherent meaning of the statutory phrase "comprehensive plan" did not imply to the court the necessity of a separate document.[46] The regulations in question, therefore, met the statutory requirement because they were in accordance with the adopted comprehensive ordinances of both townships.

Since *Kozesnik* unfortunately represents the present majority position regarding the comprehensive plan requirement, particularly when

39. 24 N.J. 154, 131 A.2d 1 (1957).
40. *Id.* at 164, 131 A.2d at 6.
41. *Id.*
42. *Id.* at 165, 131 A.2d at 7.
43. *Id.* at 166, 131 A.2d at 8.
44. *Id.* at 165, 131 A.2d at 6.
45. *Id.*, 131 A.2d at 7; Haar, *supra* note 6, at 1154.
46. 24 N.J. at 165, 131 A.2d at 7-8.

no master plan has been adopted by the locality, a few comments on the court's approach are in order. After initially acknowledging that planning and zoning were conceptually distinguished in another case,[47] the court's analysis began with a brief inquiry into the purpose to be served by the statutory requirement of zoning in accordance with a comprehensive plan. That purpose, the court believed, was to prevent "a capricious exercise of the legislative power resulting in haphazard or piecemeal zoning."[48] It remained only for the court to define "comprehensive" as "something beyond a piecemeal approach"[49] and "plan" as "an integrated product of a rational process"[50] in order to conclude that the zoning scheme conformed to the assumed objective of the statutory requirement.

Perhaps, as Haar had commented two years earlier, the court's approach did not "do extreme violence to the statutory language."[51] Moreover, from a strictly short-term viewpoint, the *Kozesnik* rationale permitted the necessary day-by-day decisions on land use to be made with judicial approval, until a planning process, though belated, could be undertaken. Nonetheless, the rationale is the narrowest and, from an environmental and land use planning perspective, the most short-sighted interpretation of the comprehensive plan requirement.

By assuming that a comprehensive zoning ordinance could serve as the single referent for a police power analysis, the court accorded such documents an undeserved rationality and integrity.[52] A zoning ordinance considered in some respects "comprehensive" should not be confused with a total physical and social planning process that articulates specific land use policies and goals and that is scrutinized by a

47. *Id.*, 131 A.2d at 7. The court cited Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (Sup. Ct. 1938), in which zoning was described as "the separation of the municipality into districts." Planning, on the other hand, was "a term of broader significance" connoting a "systematic development contrived to promote the common interest in matters that from the earliest times have been considered as embraced within the police power." *Id.* at 149, 198 A. at 228. Nonetheless, *Kozesnik* did not integrate these two functions by viewing planning as a framework within which to regulate land use.

48. 24 N.J. at 165, 131 A.2d at 7.

49. *Id.*

50. *Id.*

51. Haar, *supra* note 6, at 1173.

52. Planning documents of the day may not have been much better. One writer has described them as little more than "civic new year's resolutions." N. LONG, THE POLITY 192 (1962). *See also* E. BANFIELD & J. WILSON, *supra* note 17; J. JACOBS, *supra* note 17.

cross section of public and private interests prior to adoption. Testing the decision in *Kozesnik*—that quarrying and processing were suitable uses of the land—in terms of its relationship to local zoning ordinances adopted ten years earlier may have prevented a capricious exercise of the legislative power, but it did little more.[53] The absence of capriciousness should not be the sole standard in making decisions that permanently affect the use of land.[54] In failing to interpret the statutory plan as demanding the integration of zoning into an over-all planning framework, the court virtually neutralized the potential value of the comprehensive plan requirement as a means of forcing local decision-makers to justify their actions in light of the community welfare by taking into account projections for future over-all development as well as immediate needs.

Notwithstanding that *Kozesnik* symbolizes the unitary view, the decision may contain elements that imply a broader conception of the functional value of the comprehensive plan requirement. The court noted that one of the townships involved, subsequent to its adoption of a general zoning ordinance in 1941, began to develop a master plan.[55] Although never formally adopted, the plan apparently served as the basis for updating the township's zoning ordinance.[56] Among the plan's recommendations was the use of the area under consideration in *Kozesnik* for quarrying operations.[57] Conceivably this recommendation, though not expressly relied upon by the court, contributed to its decision to uphold the permissive zoning amendments.[58] If so, a connection may be established between *Kozesnik* and a number of other comprehensive plan decisions that may be

53. Other courts have concluded that the "arbitrary and capricious" concept is inadequate as a minimal standard for zoning review. In Fasano v. Board of County Comm'rs, 264 Ore. 574, 581, 507 P.2d 23, 27 (1973), the court flatly stated: "We reject the proposition that judicial review of the county commissioners' determination to change the zoning of the particular property in question is limited to a determination whether the change was arbitrary and capricious." The county's adopted comprehensive plan was then invoked as the proper standard of review. *Cf.* text at note 52 *supra.*

54. Haar, *supra* note 6, at 1174.

55. 24 N.J. at 170, 131 A.2d at 14.

56. *Id.*

57. *Id.*

58. *See* Bartlett v. Middletown Township, 51 N.J. Super. 239, 268-69, 143 A.2d 778, 794-95 (App. Div. 1958), in which the comprehensive plan was equated with a zoning ordinance, itself a product of "extensive" study involving planners and input from the community.

considered transitional holdings, signaling a move from a strictly unitary view to one in which the plan is accorded controlling weight in evaluating local land use decisions.

B. *The Planning Factor*

Courts that acknowledge the importance of the planning factor in land use decision-making do not attempt to alter the zoning/planning hierarchy institutionalized in the standard acts. They do, however, accord significance to the comprehensive plan requirement, thereby disabusing the land market of the misconception that land regulation can be pursued without reference to an over-all policy framework and, at the same time, further community values. The planning factor cases insist upon a demonstrable relationship between zoning action and an articulated land use policy providing a "basic scheme for land use."[59] While the policy referent need not exist outside the zoning ordinance and map,[60] an adopted separate master plan provides a preferred standard of review.[61]

The case that best articulates the planning factor approach is *Udell v. Haas*.[62] At issue was a hastily adopted down-zoning of an area historically zoned for commercial development to exclusively residential use. Convincing evidence was presented that the change was directly aimed at frustrating plaintiff's intention to develop two businesses on property assembled in reliance on the commercial designation.[63] The court denied the zone change, relying primarily on the

59. Udell v. Haas, 21 N.Y.2d 463, 470, 235 N.E.2d 897, 901, 288 N.Y.S.2d 888, 894 (1968).

60. In *Udell* the comprehensive plan was found in a statement of "developmental policy" incorporated into the town's zoning ordinance and map. *Id.* at 473-74, 235 N.E.2d at 902, 288 N.Y.S.2d at 896.

61. Biske v. City of Troy, 381 Mich. 611, 621-23, 166 N.W.2d 453, 459-60 (1969), *aff'g in part, rev'g in part*, 6 Mich. App. 546, 149 N.W.2d 899 (1967) (adopted plan would be evidence of reasonableness of zoning action, but a plan had not been adopted). In another Michigan case, Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970), the court enjoined rezoning that was not related to a general plan. Once again, a separate plan had not been adopted. The court dismissed the unitary theory, which states that the original *zoning ordinance* could substitute for a master plan: "[T]he defendant city . . . has never adopted a . . . master plan for the physical development of the municipality and its environs nor has it done so within the mentioned 'enabling statute,' *save only as may be uncertainly implied from the city's original zoning ordinance or carried in the possibly variant memories of city officials.*" *Id.* at 176, 174 N.W.2d at 795 (emphasis added).

62. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

failure of local officials to meet the statutory requirement that zoning be in accordance with a comprehensive plan.[64]

As in *Kozesnik* the court turned to Professor Haar's review of the planning/zoning relationship.[65] While *Kozesnik* minimized the planning function, the unmistakable emphasis in *Udell* was on the plan as a constitutional document.[66] Conceptual deficiencies of the unitary theory were alluded to in the warning that "our courts must require local zoning authorities to pay more than mock obeisance to the statutory mandate that zoning be 'in accordance with a comprehensive plan.' "[67] Later, the court noted that "the difficulties involved in developing rational schemes of land use controls become insuperable when zoning or changes in zoning are followed, rather than preceded, by study and consideration."[68]

Striking down the "reactionary" rezoning, the *Udell* court noted that the only reliable standard for zoning review—the land use policy—had already been implemented by a zoning designation consistent with appellant's objectives.[69] The court's conception of zoning as a tool for implementing a policy contained in the plan echoed arguments advanced by Professor Haar over a decade earlier. In a passage that nearly paraphrases Haar's language, the court concluded: "If there is any justification for this interference with appellant's use of his property, it must be found in the needs and goals of the community as articulated in a rational statement of land control policies known as the 'comprehensive plan.' "[70]

---

63. *Id.* at 473, 235 N.E.2d at 903, 288 N.Y.S.2d at 897.

64. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

65. *Id.* at 469-70, 235 N.E.2d at 902, 288 N.Y.S.2d at 894. The opinion quotes Haar's critique of those comprehensive plan interpretations that have failed to see planning as an integral aspect of land use regulation. On the other hand, many courts have cited Haar on narrower grounds, in effect ignoring his attack on planless zoning. *Cf.* note 35 *supra.*

66. The notion of the plan as a policy-based framework was articulated many years earlier in City of Utica v. Hanna, 202 App. Div. 610, 612, 195 N.Y.S. 225, 227 (1922). New York courts, however, never equated the statutory comprehensive or well-considered plan with a separate master plan. Cutler, *Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law,* 37 BROOKLYN L. REV. 483, 486 (1971); Note, *Comprehensive Plan Requirement in Zoning,* 12 SYRACUSE L. REV. 342, 346-47 (1961).

67. 21 N.Y.2d at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

68. *Id.* at 471, 235 N.E.2d at 901, 288 N.Y.S.2d at 895.

69. *Id.* at 472-73, 235 N.E.2d at 903, 288 N.Y.S.2d at 896.

70. *Id.* at 476, 235 N.E.2d at 905, 288 N.Y.S.2d at 899.

Other courts have similarly given weight to the planning factor in their approach to land use decisions.[71] The thought in *Udell* was that rezoning in disregard of a planning process was unsupportable. Other courts, however, have held that the absence of a *formally adopted* master plan severely weakens the presumption of validity accorded zoning decisions.[72] Both approaches attempt to read planning meaningfully into the statutory comprehensive plan requirement. Standing alone, these cases appear to be only a minor attack on the entrenched unitary theory. They can also be viewed, however, as immediate forerunners of statutory reform in states that have recently required conformance between formally adopted land use plans and regulatory action.[73] In addition, the planning factor cases provide well-reasoned authority for those seeking to bring the law into line with contemporary environmental and land use considerations.[74]

---

71. O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 780-83, 42 Cal. Rptr. 283, 286-88 (Dist. Ct. App. 1965) (decided prior to California's requirement of consistency between zoning and a "general plan" in CAL. GOV'T CODE §§ 65850-60 (Deering 1973)); City of Louisville v. Kavanaugh, 495 S.W.2d 502 (Ky. 1973) (refusal to rezone to multi-family use was held arbitrary on the basis of the plan); Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972) (denial of rezoning petition was held arbitrary on the basis of the master plan). *See also* F. H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, 190 N.W.2d 465 (Iowa 1971) (when an inconsistency between zoning and designation in the master plan exists, the plan does not control if consistency would cause hardship to existing business); Doran Invs. v. Muhlenberg Township Bd. of Comm'rs, 10 Pa. Commw. 143, 309 A.2d 450 (1973) (if statutory requirements set forth in planned unit development ordinance are met, Township cannot refuse developer's application for permit even if approval is contrary to comprehensive plan).

The plan has also been relied on in the "planning factor" cases to strike down allegedly arbitrary rezoning. *See* Udell v. Haas, 21 N.Y.2d 413, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

72. Forestview Homeowners Ass'n, Inc. v. County of Cook, 18 Ill. App. 3d 230, 242-43, 309 N.E.2d 763, 772-73 (1974); Raabe v. City of Walker, 383 Mich. 165, 178-79, 174 N.W.2d 789, 796 (1970).

73. CAL. GOV'T CODE §§ 65850-60 (Deering 1973); PA. STAT. ANN. tit. 53, § 10703 (1974). The American Law Institute's Model Development Code does not require a plan but provides incentives for plan adoption. MODEL LAND DEV. CODE (Proposed Official Draft No. 1, 1974). *But cf.* Doran Invs. v. Muhlenberg Township Bd. of Comm'rs, 10 Pa. Commw. 143, 309 A.2d 450 (1973).

74. In Baker v. City of Milwaukee, 17 Ore. App. 389, ..., 520 P.2d 479, 482 (1974), *aff'd in part, rev'd in part,* ..... Ore. ....., 533 P.2d 772 (1975), the Oregon Court of Appeals rejected the contention that zoning in accordance with a well-considered plan required that city zoning conform to an adopted master plan. On appeal to the Oregon supreme court, heavy reliance

C. *The Planning Mandate*

A slowly developing judicial posture favoring planning has merged with legislative action in numerous states especially sensitive to the inadequacies of unguided land regulation.[75] In terms of the comprehensive plan requirement it is important to consider the trend toward a judicial mandate that localities plan and adopt regulatory measures within the planning framework. The remarkable concurrence between Oregon's legislative and judicial branches promoting a strong planning requirement makes that state an appropriate point of departure for a discussion of the planning mandate doctrine.

Unlike most states that adopted SZEA,[76] with its now-famous requirement that zoning be "in accordance with a comprehensive plan,"[77] and states that enacted SPEA,[78] employing the term "master plan,"[79] Oregon typically avoided well-trodden paths. Oregon's *city* zoning enabling legislation was passed in 1919,[80] before the standard acts were drafted, and merely required that city zoning enabling legislation be "in accordance with a well-considered plan."[81] In 1947 Oregon *counties* were given the authority to zone if they had a "development pattern" by which their actions could be judged.[82] In

---

was placed on the "planning factor" cases. Brief for Oregon Environmental Council & Oregon Chapter of American Institute of Planners as Amicus Curiae at 18-22, Baker v. City of Milwaukee, ... Ore. ....., 533 P.2d 772 (1975). *See also* notes 81-84 and 102-105 and accompanying text *infra.*

75. For a discussion of noteworthy examples of recent statutory reform in this area see Part II *infra.*

76. SZEA, *supra* note 12.

77. *Id.* § 3.

78. SPEA, *supra* note 13.

79. *Id.* § 6.

80. Law of March 4, 1919, ch. 300, [1919] Ore. Laws 539 (now ORE. REV. STATS. §§ 227.010-.310 (1973)).

81. ORE. REV. STATS. § 227.240(1) (1973). This language was apparently derived from the 1917 version of New York's city zoning enabling statute. Law of May 15, 1917, ch. 483, [1917] 2 N.Y. 1463 (now N.Y. TOWN LAW § 263 (McKinney 1965)).

It has been suggested that no distinction exists between the statutory "well-considered" plan and the "comprehensive" plan. Note, *Comprehensive Plan Requirement in Zoning, supra* note 66, at 346. A literal reading would imply that the former at least contemplates a planning process on which to base regulatory action. In Baker v. City of Milwaukee, ... Ore. ....., 533 P.2d 772 (1975), *aff'g in part, rev'g in part,* 17 Ore. App. 384, 520 P.2d 489 (1974), the Oregon Supreme Court adopted the planning mandate theory for those Oregon cities that had adopted plans.

82. Law of April 19, 1947, ch. 537, [1947] Ore. Laws 948 (now ORE. REV. STATS. §§ 215.010-.999 (1973)).

1963 the "development pattern" phrase was replaced by the "comprehensive plan" requirement and mandatory adoption of the plan by the planning commission was imposed.[83]

In spite of such legislation, little discussion is found in early Oregon appellate decisions of the terms "comprehensive" or "well-considered" plan.[84] Even after 1969, when reform legislation was enacted,[85] Oregon courts continued to place scant reliance on the plan as a standard for reviewing land use regulatory decisions.[86] The break came in the landmark case of *Fasano v. Board of County Commissioners*,[87] decided by Oregon's supreme court in 1973.

Fasano must be viewed against the backdrop of S.B. 10,[88] passed by the Oregon Legislature in 1969. The bill gave localities two years in which to adopt comprehensive land use plans and zoning ordinances.[89] The Governor was authorized to "prescribe, amend . . . and administer"[90] the plan and ordinance in any locality failing to meet the 1971 deadline. Although the grant of executive power to plan and impose land use regulations was opposed by steadfast home rule advocates[91] among others, S.B. 10 emerged as a clear expression of legislative policy requiring both planning and land use regulation.

The crucial task of further defining the planning/regulation relationship fell to the Oregon supreme court when review was granted in *Fasano*. The county commissioners had approved an application

---

83. Law of June 24, 1963, ch. 619 § 3, [1963] Ore. Laws 1297.

84. *See, e.g.*, Page v. City of Portland, 178 Ore. 632, 165 P.2d 280 (1946); Berger v. City of Salem, 131 Ore. 674, 284 P. 273 (1930); Kroner v. City of Portland, 116 Ore. 141, 240 P. 536 (1925).

85. Law of June 3, 1969, ch. 324, [1969] Ore. Laws 578 (now ORE. REV. STATS. §§ 215.505-.990 (1973)). The bill is commonly known as S.B. 10.

86. Sullivan, *supra* note 1, at 366-67. *See also* MANDELKER, *supra* note 31, at 72-75.

87. 264 Ore. 574, 507 P.2d 23 (1973).

88. Law of June 3, 1969, ch. 324, [1969] Ore. Laws 578 (now ORE. REV. STATS. §§ 215.505-.990 (1973)).

89. *Id.* § 1.

90. *Id.*

91. Indeed, one staunch anti-planner remarked to a legislative committee considering the bill: "In the previous hearing on SB 10, testimony was given that if you scratch a farmer long enough you will find a subdivider. I say that if you scratch a professional planner long enough, you will find either a bureaucratic sociologist, an American Socialist, or an American Communist. I have yet to meet a practical minded planner." Testimony of Paul C. Ramsey, *Hearings on SB 10 Before the House Planning & Dev. Comm.*, Apr. 8, 1969 (on file at the State Archives, Salem, Oregon).

to rezone part of a single family area to permit the development of a mobile home park under a planned unit development designation.[92] The court rejected this action citing, as the standard for zoning review, projections of the adopted comprehensive plan.[93] In language that has profoundly affected land use law in Oregon, and perhaps in other states,[94] the court said:

> We believe that the state legislature has conditioned the county's power to zone upon the prerequisite that the zoning attempt to further the general welfare of the community through consciousness, in a prospective sense, of the factors mentioned above.[95] In other words, except as noted later in this opinion, it must be proved that the change is in conformance with the comprehensive plan.[96]

Furthermore, the Oregon court correctly distinguished the planning and zoning functions:

> Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.[97]

The court, therefore, rejected the unitary view of planning and zoning and imposed a duty upon local officials to premise land regulations on policies set out in the separately prepared and adopted comprehensive plan.

At the time *Fasano* was decided, the Oregon Legislature was considering S.B. 100, which it subsequently passed, to strengthen the role of planning in the land use regulatory process.[98] S.B. 100 required that zoning, subdivision ordinances, and all state and local government actions be in compliance with city and county comprehensive

---

92. 264 Ore. at 577, 507 P.2d at 25.

93. *Id.* at 583, 507 P.2d at 28.

94. *See, e.g.*, West v. City of Portage, 392 Mich. 458, 469, 221 N.W.2d 303, 308 (1974); Freilich, *supra* note 21, at vii.

95. Note that the court refers here to the considerations entering into formulation of a comprehensive plan.

96. 264 Ore. at 583, 507 P.2d at 28.

97. *Id.* at 582, 507 P.2d at 27.

98. ORE. REV. STAT. §§ 197.005-.430 (1973).

plans.[99] A state agency with the power to adopt or amend local plans was authorized to review such plans.[100] The Act further provided a means to review implementation ordinances, as well as actions taken at all levels of government, for consistency with approved local plans.[101]

The most recent part of this re-evaluation of the relationship between planning and zoning in Oregon came with *Baker v. City of Milwaukee*.[102] In *Baker*, plaintiff brought a mandamus action to compel the city and its officials to conform city zoning regulations to a subsequently adopted comprehensive plan. The City successfully argued at the lower court levels that there was no statutory requirement that zoning be in accordance with a plan and that the plan, adopted by resolution, could not supersede zoning regulations adopted by ordinance.

In reversing, the Oregon supreme court stated that since the City had adopted a plan, it was required to zone so that the plan was not frustrated.[103] The court relied on *Udell* and commentary by Professor Haar as authority. Furthermore, the court found that a plan, as a "constitutional" document for land use planning, was superior to zoning regulations, due to the inherent relationship of the two functions, whether the plan was adopted by resolution or by ordinance.[104] Finally, the court noted that the obvious conflict between the plan and the zoning maps conflicted with the statutory requirement that regulations be "in accord with a well-considered plan."[105]

Thus the Oregon approach to interpreting enabling legislation gives meaning to the ambiguous term "well-considered" or "comprehensive" plan. The comprehensive plan has been properly recognized as a process of forethought rather than a *fait accompli* or "end

99. *Id.* § 197.175-.185.

100. *Id.* §§ 197.300, 197.325.

101. *Id.*

102. ..... Ore. ....., 533 P.2d 772 (1975), *aff'g in part, rev'g in part* 17 Ore. App. 389, 520 P.2d 479 (1974).

In response to *Baker* the 1975 Oregon legislature attempted to grant the LCDC the power, upon application, to resolve conflicts between the comprehensive plan and rezoning ordinances. The bill failed to pass both houses. *See* S.B. 122, 58th Leg. Assembly (Ore. 1975).

103. This requirement meant that no area could be zoned for a use more intensive than that provided for by the plan, though less intensive uses were permissible.

104. The court made extensive use of O'Loane v. O'Rourke, 231 Cal. App. 774, 42 Cal. Rptr. 283 (Dist. Ct. App. 1965), which reached the same functional result. *O'Loane* held that a plan, although adopted by resolution, could be submitted to referendum, because of its land use policy implications.

product," as under the unitary theory. The approach was initiated by the legislature and given full meaning in the courts. To a large extent, then, Oregon has passed from "planning equals zoning" to a separate planning or "planning mandate" approach.[106]

Notwithstanding advances made in the area of planning requirements, the proper relationship between the plan and regulatory measures remains unsettled. For example, *Fasano*'s discussion of standards for measuring conformity to the plan will surely require additional explication.[107]

---

105. ORE. REV. STAT. § 227.240(1) (1973).

106. Several other states have reached a similar result through the legislative process. *E.g.*, CAL. GOV'T CODE §§ 65850-62 (Deering 1974); PA. STAT. ANN. tit. 53, § 10703 (1974). *See also* Plager, *The Planning Land-Use Control Relationship: A Look at Some Alternatives*, 3 LAND USE CONTROLS Q., No. 1, at 26 (1969).

107. The court held, *inter alia*, that proof of conformity would require, in addition to consistency with the projections of the plan, a showing of "a public need for a change of the kind in question" and, further, that the "need would be best served by changing the classification of the particular piece of property in question as compared with other available property." 264 Ore. at 584, 507 P.2d at 28. One might argue that the criteria of "need" and "other available property" function as time-sequence control techniques, imparting a timing element to the plan.

In an extended footnote, the court illustrated the operation of these criteria. On the issue of need for the change in question, the court noted that a record disclosing "that the governing body had considered the facts relevant to this question and exercised its judgment in good faith" would satisfy the test. *Id.* at 586-87 n.3, 507 P.2d at 29 n.3.

It is established that absolute identity is not required between the plan's projections and the zoning designation of a given parcel. Bissell v. Washington County, 12 Ore. App. 174, 506 P.2d 499 (1973) (denial of rezoning to conform to plan's designations upheld on grounds that circumstances were not yet appropriate). *See also* Baker v. City of Milwaukee, ... Ore. ....., 533 P.2d 772 (1975), *aff'g in part, rev'g in part*, 17 Ore. App. 389, 520 P.2d 479 (1974).

A similar problem confronts the California courts in interpreting that state's requirement of "consistency" between the plan and land use measures. *See* Comment, *"Zoning Shall be Consistent with the General Plan"— A Help or a Hindrance to Planning?*, 10 SAN DIEGO L. REV. 901 (1973). In an attempt to clarify California's "consistency" requirement, the legislature amended the statute to read: "A zoning ordinance shall be consistent with a city or county general plan only if: . . . (ii) The various land uses authorized by the ordinance are *compatible* with the objectives, policies, general land uses and programs specified in such a plan." Act of August 9, 1972, ch. 639, § 2, [1972] 1 Cal. Laws 1190-91 (now CAL. GOV'T CODE § 65860(a) (Deering 1974) (emphasis added)). Whether the compatibility standard sheds much light on the "consistency" requirement under the California statute remains to be seen. An opinion by California's Legislative Counsel interpreted the consistency requirement as follows:

> Whether or not a particular zoning ordinance and general plan are in agreement or in harmony would of course depend on their specific terms. How-

II. Legislative Trends in Planning

Several state legislatures have been more decisive regarding the role of the plan *vis à vis* land use regulations than have the courts. The following review of recent state planning enabling legislation, while not all-inclusive, demonstrates the trend toward increased state participation in the planning process and a greater emphasis on planning than is found in the standard acts.[108]

A. *Hawaii*

In 1963 Hawaii withdrew from its county governments (Hawaii does not have city government) the delegated power to plan and zone, creating instead a Land Use Commission with power to divide the state into major land use categories.[109] The legislation was a major step away from the typical arrangement in other states at that time, *i.e.* full delegation of such powers to local government.

In effect the establishment of four major land use categories by the Commission involves a planning process.[110] Once categories are established, the State Department of Land and Natural Resources governs zoning in natural resource areas. Within rural and agricultural districts, the Commission sets land use standards and the

---

ever, a zoning ordinance which permits either a greater or less intense land use than that permitted by the general plan would not be in agreement with or harmonious with the general plan and, in our opinion, would not be consistent with the general plan.

Letter from George H. Murphy, California Legislative Counsel, to the Hon. John T. Knox, Feb. 2, 1972, in AB 1301 and Local Land Use Decisions, Report by County Counsel to County of San Diego Board of Supervisors, app. B (Sept. 1972) (copy on file with Edward J. Sullivan).

108. For a comprehensive survey of legislation in this area see Environmental Policy Div., Congressional Research Serv., Library of Congress, 93d Cong., 1st Sess., National Land Use Policy Legislation, 93d Congress (Comm. Print 1973) (Senate Committee on Interior and Insular Affairs).

109. Act of June 17, 1963, ch. 205, [1963] Hawaii Laws 315, *as amended*, Act of May 5, 1965, ch. 32, [1965] Hawaii Laws 27, *as amended*, Act of July 11, 1969, ch. 182, [1969] Hawaii Laws 328 (now Hawaii Rev. Stat. §§ 205-1, -3, -7 to -15 (1968), §§ 205-2, -4 to -6 (Supp. 1974)). The Commission also has the power to revise these boundaries in narrowly circumscribed situations. *See* Hawaii Rev. Stat. § 205-4 (Supp. 1974). For a case stressing the procedural difficulties inherent in such a change see Town v. Land Use Comm'n, ... Hawaii ....., 524 P.2d 84 (1974).

110. Hawaii Rev. Stat. § 205-2 (Supp. 1974) specifically provides: "In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county."

county administers them.[111] With Commission approval, however, the county may allow other uses compatible with the district. The counties still retain zoning control over the urban areas.[112] Thus planning and land use regulation in Hawaii are functions undertaken by both state and local government.

B. *Vermont*

In 1969 Vermont also entered the land use field from a state-wide perspective, passing legislation that, as amended, provides for a state-wide plan and control over major development proposals.[113] A State Environmental Board[114] and nine regional District Commissions administer a system of development permits,[115] prepare both Capability and Development[116] and land use plans[117] for legislative adoption, and change the boundaries of the land use plan or capability plan classification.[118]

Thus the Vermont system provides for state planning without pre-empting local government and utilizes a permit system giving both state and local governments a veto power over undesirable development.

---

111. *Id.* §§ 205-5 to -6.

112. *Id.* § 205-5.

113. VT. STAT. ANN. tit. 10, §§ 6001-91 (1973), *as amended*, §§ 6001, 6001a, 6025-27, 6043, 6046, 6085-86, 6089 (Cum. Supp. 1974). The planning process requires adoption of a Capability and Development Plan setting forth specific state policies, adopted by the legislature, to encourage growth in Vermont, *id.* § 6042 (1973), and a land use plan, adopted by the State Environmental Board, based on policies in the Capability and Development Plan, *id.* § 6043 (Cum. Supp. 1974). The land use plan is then approved by the governor and the legislature. *Id.* § 6046.

114. *Id.* § 6021 (1973).

115. *Id.* § 6026 (Cum. Supp. 1974). The term "development" is a broad one, defined in section 6001(3) to include all major construction activities within the state. The permit system is administered under Sections 6081-91.

116. *See* note 113 *supra.*

117. The land use plan, upon adoption by the Board, will become the land use criteria for any project having supra-local impact. VT. STAT. ANN. tit 10, § 6043 (Cum Supp. 1974).

118. *Id.* § 6047 (1973). As in Hawaii, there are stringent criteria for such changes focusing on the suitability of the land for the purpose sought, trends of development, and changes in conditions since adoption of the plan. The Vermont courts are aware of the requirements of procedural due process in such cases. *See In re* Preseault, 130 Vt. 343, 346-47, 292 A.2d 832, 834-35 (1972).

C. *Maine*

Maine passed its Site Location Law in 1970.[119] The law gives the state Board of Environmental Protection the power to approve or deny[120] development that may substantially affect the environment.[121] Compared with legislation elsewhere, the Maine model is less planning-oriented. Rather, the Act emphasizes the strict criteria of the permit-granting process.[122]

The State Planning Office, Planning Council, and Planning Director are responsible for preparing and administering the Maine Comprehensive Plan and coordinating activities of the state with respect to physical development.[123] From a state agency perspective, therefore, Maine has a strict system of site approvals for individual public or private projects and a planning process that is the measure for physical development undertaken or approved by state agencies.[124]

D. *Florida*

The Florida Legislature made sweeping changes in that state's system of land use regulation by the enactment of the Environmental

---

119. ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973). For a discussion of the Maine legislation and a comparison to that of Vermont see Walter, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 MAINE L. REV. 315 (1971).

120. The Board was formerly the Environmental Improvement Commission. ME. REV. STAT. ANN. tit. 38, § 341 (Supp. 1973). Note, however, that the Maine Legislature has delegated to the Maine Land Use Regulation Commission the authority to adopt land use regulations for the "unorganized and deorganized areas of the State," to provide for review of development, and to adopt a comprehensive plan for such areas by January 1, 1975. *Id.* tit 12, §§ 681-89 (1974).

121. As in Vermont the definition of development affecting the environment is quite broad, including any development utilizing 20 acres of land or more and involving dwelling or excavation. Also included are governmental, charitable, industrial and commercial development. *Id.* tit. 38, § 482 (Supp. 1973).

122. Such criteria include consideration of soil types, traffic movement, and financial capability. The burden is on the applicant to meet each criterion. *Id.* § 484.

123. *Id.* tit. 5, §§ 3301-07 (Supp. 1973), *as amended*, §§ 3304-05 (Supp. 1974). *See also* Delogu, *Suggested Revisions in Maine's Planning and Land Use Control Enabling Legislation*, 20 MAINE L. REV. 175 (1968).

124. The dramatic changes made by the Site Location Law have so far withstood constitutional and statutory attacks. *In re* Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973); *In re* Spring Valley Dev., 300 A.2d 736 (Me. 1973); King Resources Co. v. Environmental Improvement Comm'n, 270 A.2d 863 (Me. 1970). *See also* Wilkes, *Constitutional Dilemmas Posed by State Policies Against Marine Pollution—The Maine Example*, 23 MAINE L. REV. 143 (1971).

Land and Water Management Act of 1972,[125] which emphasizes a permit process over a planning process. After procedures for notice and comments are met, a state-wide Administrative Commission[126] may designate "an area of critical state concern."[127] Thereafter, local government regulations affecting such areas must comply with state rules. In addition, the Administrative Commission is required to develop standards for "Developments of Regional Impact."[128]

The Florida Land and Water Adjudicatory Commission was established to resolve conflicts regarding the use of land in areas of critical state concern or relating to developments of regional impact. The Commission may deny an application or approve it, with or without additional conditions.[129] Decisions of the Commission are subject to judicial review under the Florida Administrative Procedures Act.[130]

Thus Florida emphasizes a development permit process that is designed to provide for state review of local actions affecting more than one entity. The approach is a modified system of the American Law Institute's Model Land Development Code,[131] which also does not require a plan as a condition precedent for land use regulation.[132]

---

125. FLA. STAT. ANN. §§ 380.012-.10 (Supp. 1974). As in Vermont and Maine, the broad nature of development covered by the legislation indicates a legislative change towards greater state participation in the land use process. *Id.* § 380.04. *See also* Jacobsen, *Survey of Environmental Legislation*, 26 U. MIAMI L. REV. 778 (1972).

126. The Governor and his cabinet constitute the Administrative Commission. FLA. STAT. ANN. § 380.031(1) (Supp. 1974).

127. Such designation includes areas having sufficient impact upon "environmental, historical, natural or archeological resources," a proposed major facility or other area of major public investment, or an area of major development potential (including new communities). *Id.* § 380.05(2). The legislature itself designated the Big Cypress Area as one of critical state concern by the Big Cypress Conservation Act of 1973. *Id.* § 380.055.

128. *Id.* § 380.06. The administrative commission must submit all criteria for development with regional impact to the legislature for approval by both houses. Under this section, a local government must *consider*, when passing upon such applications, whether the development, (1) complies with an adopted state land use plan for the area; (2) is consistent with local land use regulations; and (3) is consistent with the report of the applicable regional planning agency.

129. *Id.* § 380.07.

130. *Id.* § 120.68 (Supp. 1974).

131. MODEL LAND DEV. CODE (Proposed Official Draft No. 1, 1974).

132. *Id.* §§ 2-210, 2-211. These sections require the adoption of a land development plan only in connection with planned unit developments and specially planned areas. Otherwise a plan is not required for the exercise of land use regulation.

E. *California*

California voters approved an initiative known as the California Coastal Zone Conservation Act of 1972.[133] The Act establishes one state-wide commission and six regional commissions to pass upon permits for development within a permit area.[134] The State Commission also has the power to prepare a coastal zone plan[135] to be submitted to the legislature by December 31, 1975.

It is the permit system, not the plan, that has generated the greatest controversy.[136] While construction in progress is not affected, any development proposed after the effective date of the Act must receive regional commission approval[137] following specific findings of fact.[138] Appeals may be taken to the State Commission[139] and to the courts.[140]

The California scheme emphasizes both a permit system and a planning process for the protection of coastal areas and requires that the planning process be performed by a state agency.

---

133. CAL. PUB. RES. CODE §§ 27000-650 (Deering Supp. 1975).

134. The definition of development is broad and almost all-inclusive. *Id.* § 27103. Generally, development within 1000 feet of non-tidal areas and 1000 yards of tidal areas is subject to the act. *Id.* § 27104.

135. *Id.* § 27001(b). The "coastal zone" is the shoreline area of the state from the outer limits of the state's territorial jurisdiction to the highest elevation of the nearest coastal range (or in Los Angeles, Orange and San Diego Counties, the shorter distance between such elevation or five miles from the mean high tide level). *See id.* § 27100.

136. *Id.* § 27104. Under the system, developments planned for a defined "permit area" along the coast require approval from a regional zone conservation commission. *But see* San Diego Coast Regulatory Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973) (once development was underway a non-conforming use status was granted).

137. CAL. PUB. RES. CODE § 27400 (Deering Supp. 1974). Approval requires a majority of the entire commission, but certain activities (*e.g.*, dredging and filling) require a two-thirds vote of the entire commission. *Id.* § 27401.

138. The burden is on the applicant to show conformity with the Act's criteria. The commission must also make findings as to such conformity. *Id.* § 27402. Under certain circumstances, conditions may be imposed upon the development to reduce the activity's negative effects on the environment. *Id.* § 27403.

139. *Id.* § 27423.

140. *Id.* § 27424. Private actions are encouraged by the Act since anyone may bring an action for equitable and declaratory relief without bond, maintain an action for civil penalties, and recover costs and attorney fees. *Id.* §§ 27425-26, 27428.

F. *Oregon*

Oregon has also provided for increased state participation in planning.[141] A new agency, the Land Conservation and Development Commission (LCDC), was established by S.B. 100[142] and given the power to adopt state-wide planning goals to which all local plans must conform.[143] LCDC also has the power to designate activities of critical state concern.[144]

S.B. 10, passed in 1969,[145] preceded S.B. 100[146] and required each city and county to plan and zone, or make substantial progress in that direction, on penalty of having the Governor do so.[147] S.B. 100, however, provides an over-all state policy for local planning and a means by which local plans can be reviewed by the Commission for conformity to the goals.[148] More significantly, local zoning and subdivision ordinances,[149] and state and local actions and plans[150] may be reviewed for conformity with state goals.

---

141. *See* MacPherson & Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 WILLAMETTE L.J. 414 (1974). *See also* Schell, *Summary of Land Use Regulation in the State of Oregon*, in SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93d CONG., 2d SESS., STATE LAND USE PROGRAMS, SUMMARIES OF LAND USE REGULATION IN EIGHT STATES 55 (Comm. Print 1974) (includes a 50-state survey of planning legislation).

142. ORE. REV. STAT. § 197.030 (1973).

143. *Id.* § 197.040(2)(a).

144. *Id.* §§ 197.400-.430. The Act sets forth three activities for which the Land Conservation and Development Commission could require a permit, in addition to all other permits required by law: transportation systems; water and sewer lines, and solid waste disposal sites; and the planning and siting of public schools. *Id.* § 197.400.

145. Law of June 3, 1969, ch. 324, [1969] Ore. Laws 580 (now ORE. REV. STAT. §§ 215.505-.990 (1973)). *See* text at notes 89-91 *supra*.

146. ORE. REV. STAT. §§ 197.005-.430 (1973). *See* text at notes 98-101 *supra*.

147. Law of June 3, 1969, ch. 324, [1969] Ore. Laws 578 (now ORE. REV. STAT. ch. 215 (1973)). When S.B. 100 was passed in 1973, however, the Governor's authority passed to the Land Conservation and Development Commission. ORE. REV. STAT. §§ 215.505-.535 (1973). The cost of planning done by the Commission is to be deducted from the local share of liquor and cigarette moneys. *Id.* § 197.330.

148. ORE. REV. STAT. §§ 197.005(2), .325.

149. *Id.* §§ 197.300(1)(a),(d). In these instances standing is conferred upon state agencies, cities, counties, special districts, and "any person or group of persons whose interests are substantially affected. . . ." *Id.* § 197.300(1)(d).

150. *Id.* §§ 197.300(1)(b),(c). In contrast to provisions in comprehensive plans and ordinances or regulations, standing in cases of governmental actions is conferred only upon other governmental agencies.

The Oregon system, then, requires a plan by each local government upon which all actions (state and local) shall be based, and provides a means for coordinating such plans and adjudicating differences. Thus the planning and implementing regulations and governmental actions are coordinated under a uniform program.

G. *Massachusetts*

In 1969 Massachusetts passed a "Snob Zoning" law, prohibiting local communities from interfering with the development of their just share of low- and moderate-income housing.[151] The state legislature provided specific guidelines to be used by the Board of Zoning Appeals in determining whether an application to build low- and moderate-income housing is "consistent with local needs."[152] The guidelines,[153] in effect, prevent applications by certain defined organizations[154] for such housing from being denied on the basis of local zoning ordinances and restrictions. Massachusetts, then, is less concerned with planning per se than with the specialized problem of housing supply for lower income groups. The housing problem is one of state-wide significance.[155]

---

151. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (1973).

152. *Id.* § 20.

153. Utilization of the guidelines is a complex process. The granting or denial of an application must be "consistent with local needs," and is irrebutable before the Board of Zoning Appeals if low- and moderate-income housing at the time of the application comprises 10% of the total housing units reported in the latest census for that district, or if such housing already exists on sites greater in number than a figure derived from two formulas provided in the statute. *Id.*

Board of Appeals v. Housing Appeals Comm., ... Mass. ....., 294 N.E.2d 393 (1973), upheld this statutory scheme, acknowledging that, in the interests of the state as a whole, the legislature had withdrawn certain aspects of the zoning power. *Id.* at ....., 294 N.E.2d at 407-10. From the statute's legislative history, the court concluded that in order for the statute to accomplish its goal of streamlining procedures for facilitating the approval and eventual construction of low- and moderate-income housing, the Board must possess the power to override local zoning ordinances and by-laws that are not "consistent with local needs." *Id.* at ....., 294 N.E.2d at 407. The court did not view the statute as an absolute requirement upon the community if its 10% minimum is not yet met. The Board need not automatically grant permits. Rather, the statute, as interpreted, merely prevents the Board from relying on local requirements and regulations that prevent the use of the requested site as grounds for *denial* of a permit. *Id.* at ....., 294 N.E.2d at 413.

154. MASS. GEN. LAWS ANN. ch. 40B, § 21 (1973).

155. Board of Appeals v. Housing Appeals Comm., ... Mass. ....., ..., 294 N.E.2d 393, 407-10 (1973). *See also* Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37 (1974).

H. *New York*

Concerned with the future of the Adirondacks region, most of which is publicly owned, the State of New York passed the Adirondack Park Agency Act in 1971.[156] The Agency proposed and the legislature passed a regional plan[157] that included shoreline restrictions to be enforced by the Agency.[158] Because of the importance of this vast area of public land to the State, the Agency was given the power to review local land use programs[159] and certain major projects of supra-local concern.[160]

The New York legislation combines planning with a system of permit review to provide for the fulfillment of legislative goals for the Adirondacks.

I. *Shoreland and Wetland Protection Acts*

Several states have passed legislation specifically designed to protect coastal wetlands or shorelines. This legislation, however, is not based upon a state-wide planning or permit-granting procedure.

In Massachusetts the Commission of Conservation controls the dredging, filling, alteration or pollution of coastal[161] and inland wetlands.[162] In flood plain or seacoast areas, notice to several state and local agencies is required prior to dredging or filling.[163] Thus less emphasis is placed on planning than on the regulation of activities.

Michigan has a vigorous program for shoreland and wetlands protection. Under the Shorelands Protection and Management Act of 1970,[164] the State Water Resources Commission and State Depart-

156. Art. 27, §§ 800-19, ch. 706, [1971] 2 N.Y. Laws 1853.

157. *Id.* § 805.

158. *Id.* § 806.

159. *Id.* § 807.

160. *Id.* § 808.

161. MASS. GEN. LAWS ANN. ch. 130, § 105 (1972).

162. *Id.* ch. 131, § 40A (Supp. 1974). In the case of either coastal or inland wetlands, an aggrieved party may petition the superior court within 90 days after notice from the Commission to determine whether the Commission's order should be rendered inoperative because it results in a taking. If a taking is found the state may acquire, by eminent domain proceedings, a fee or lesser interest. This method of review is exclusive on this issue. *But see* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

163. MASS. GEN. LAWS ANN. ch. 131, § 40A (Supp. 1974); Note, *Coastal Wetlands in New England*, 52 B.U.L. REV. 724 (1972).

164. MICH. STAT. ANN. §§ 13.1831-.1845 (1973).

ment of Natural Resources are required to undertake engineering studies to determine areas in need of regulatory protection. If the risk of adverse environmental impact is high, the township, city, village or county is given three years to adopt land use regulations, subject to Commission approval. Should the local governing body fail to adopt such regulations the Commission is directed to prepare and hold hearings upon a plan for such areas and to submit the plan to the Governor and the legislature.[165]

Under Michigan's Natural Rivers Act of 1970,[166] the State Natural Resources Commission designates a "natural river area" with adjacent or related lands "as appropriate to the purposes of the designation" and develops a comprehensive plan for such areas binding upon other state agencies.[167] The Commission may itself acquire land with the consent of the landowner[168] and suggest zoning regulations to incorporated areas. In addition, the Commission has the power to review any ordinances adopted by an incorporated area.[169]

Michigan's Inland Lakes and Streams Act of 1972[170] requires permits for dredging and filling in such waters. The permit may be conditional in order to lessen adverse environmental effects. The Michigan system, therefore, bridges the gap between planning and regulation by permit.

The New Jersey Legislature has created an agency under the Hackensack Meadowland Reclamation and Development Act[171] to develop a plan for the Hackensack area[172] and, if necessary, acquire land by eminent domain.[173] The courts have liberally interpreted the legislation to hold that the denial of development is not a tak-

165. *Id.* § 13.1842.

166. *Id.* §§ 11.501-.516.

167. *Id.* § 11.503. Parallel legislation is found for Oregon's Willamette River in ORE. REV. STAT. §§ 390.310-.368 (1973), which provides for the adoption of a plan by the Land Conservation and Development Commission that shall be the basis for state and local regulation.

168. MICH. STAT. ANN. § 11.505 (1973).

169. *Id.* § 11.508. The Commission is empowered to review the sufficiency of local regulations, suggest new ones, and adopt them if local regulations are inadequate.

170. *Id.* §§ 11.475(1)-(15).

171. N.J. STAT. ANN. §§ 13:17-1 to -86 (Supp. 1974).

172. *Id.* § 13:17-9. All development must be in accord with the adopted plan and the Commission has power to review. *Id.* §§ 13:17-13 to -15.

173. *Id.* § 13:17-34.

ing.[174] Moreover, the delegation of sweeping powers to the administrative agency has been upheld,[175] and such power is held to be in addition to those of other state and local agencies.[176] In sum, New Jersey employs an amalgam of planning and permit power to achieve environmental goals.

Other states are continuing a planning and permit system for wetlands protection of certain areas. Connecticut requires an environmental plan for wetlands[177] in addition to a permit system.[178] Washington's Shoreland Management Act of 1971[179] requires state approval of Master Programs for shoreline use[180] and a system of development permits, also renewable by the state.[181] Wisconsin requires its Department of Natural Resources to prepare a plan for manageable waters and shorelands[182] and allows local government to pass regulations to implement such plans.[183] Finally, Delaware prohibits heavy industry from its coastal areas[184] and severely regulates other uses.[185]

---

174. East Rutherford Indus. Park, Inc. v. State, 119 N.J. Super. 352, 291 A.2d 588 (L. Div. 1972).

175. Meadowlands Regional Redevelopment Agency v. State, 63 N.J. 35, 304 A.2d 545 (1973).

176. Municipal Sanitary Landfill Authority v. Hackensack Meadowlands, 120 N.J. Super. 118, 293 A.2d 426 (App. Div. 1972).

177. CONN. GEN. STAT. ANN. § 22a-8 (1973). The plan, required to be adopted by September 1, 1972, must be reviewed every two years. These stringent regulations have generated much controversy as to their validity. Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Comment, *Wetlands Statutes: Regulation or Taking*, 5 CONN. L. REV. 64 (1972).

178. CONN. GEN. STAT. ANN. §§ 22a-28 to -45 (1973).

179. WASH. REV. CODE §§ 90.58.010-.930 (Supp. 1974).

180. *Id.* § 90.58.090.

181. *Id.* § 90.58.140.

182. WIS. STAT. ANN. § 144.26 (1974).

183. *Id.* § 59.971. This approach has worked adequately despite strong challenges. In the landmark case of Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Supreme Court of Wisconsin found no taking by the use of severe local regulations. But in Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973), such regulations were found to lack a reasonable basis.

184. DEL. CODE ANN. tit. 7, § 7003 (Non. Cum. Supp. 1972). "Heavy industry use" is comprehensively defined in § 7002(e). The prohibition also extends to "offshore gas, liquid, or solid bulk transfer facilities," but does not include public sewage treatment or recycling facilities. *Id.* § 7003. The "coastal zone" itself is defined by use of Delaware highways and roads. *Id.* § 7002(a).

185. *Id.* § 7004. Except for existing uses, any activity not prohibited must receive a permit from the State Planner who must consider economic and en-

It is safe to conclude that shoreland acts combine planning with regulation and that the more advanced programs stress both functions.

III. The Future of the Comprehensive Plan—Some Possible Scenarios

The quickening pace of legislative action in the planning field and the slowly developing judicial acceptance of the comprehensive plan provide some new directions for planning law. The following is a list of possibilities for planning that are not mutually exclusive and flow from current trends.

A. *Increased Emphasis on Plan Adoption and Amendment Procedures*

Little development has occurred in the area of formal procedural requirements for the adoption of local plans. SPEA merely required adoption of a plan by planning commission resolution following a public hearing. The hearing was to be preceded by notice published only once in a newspaper of general circulation.[186] This format was followed by most states in their planning enabling legislation. SPEA provided for adoption of the plan a section at a time[187] and for amendments thereto.[188] The minimal weight accorded the plan by the courts[189] and by SPEA itself[190] is indicative of the low station to which the plan had fallen.

---

vironmental impact, aesthetic effect, need for supporting facilities, effect on the neighborhood, and local comprehensive plans. This represents the total planning impact of Delaware's Coastal Zone Act. *Id.* §§ 7001-13. An appeal may be taken under § 7007 to the Coastal Zone Industrial Control Board, which uses the same criteria as the State Planner, and to the state superior court under § 7008. The Delaware legislation parallels the "condemnation-if-a-taking" feature of the Massachusetts legislation cited in note 163 *supra.*

186. SPEA, *supra* note 13, at § 8. The hearing process to SPEA provides a basis for public comments and possible amendments at the hearing stage. *See* note 16 *supra.*

187. SPEA, *supra* note 13, at § 8. The piecemeal adoption of a plan allows for consideration of neighborhoods, other territories, entities or plan elements as necessary.

188. *Id.* SPEA does not provide separate means for treating small area replannings such as the quasi-judicial approach taken with respect to small area rezonings in Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973). *Cf.* Marggi v. Ruecker, ... Ore. App. ....., 533 P.2d 1372 (1975).

189. *See* Part I *supra.*

190. *See* note 16 *supra.*

The recent trend, however, is toward an increased emphasis on the plan and upon procedures for its adoption.[191] The heavy emphasis given the plan has led to questions regarding its submission to a general voter referendum.[192] Given the increased emphasis upon the plan, procedures for its adoption will be closely watched and tested by litigants.[193] In addition, though the use of a replanning device for a small area as a condition precedent to rezoning once passed comparatively unnoticed[194] under the "legislative" guise, the evil to be avoided may be so great[195] that plan changes for small areas may be subject to the procedural rules required of small tract rezonings.[196]

B. *Greater Expectations of the Planning Process*

While SPEA and most other acts provide that plans will do everything necessary to make us healthy, safe and moral,[197] historically such plans were often disregarded as merely advisory opinions. Unfortunately, the belief that the plan amounted to little more than an opinion withstood the advent of extensive federal funding under

191. *E.g.*, Goal No. 2 of the Oregon Land Conservation and Development Commission, *supra* note 4, at 7, adopted December 27, 1974, and effective January 1, 1975, requires: (1) consistency of ordinances, regulations, and actions with local comprehensive plans; (2) a planning process that stresses factual basis, alternative choices, and an indication of the choice taken; (3) availability of the proposed plan and supporting material prior to adoption for public comment; (4) adoption of a comprehensive plan after a public hearing preceded by notice; and (5) periodic revision of comprehensive plans after public hearing. *See also* Perry, *supra* note 15.

192. *See* O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (Dist. Ct. App. 1965), in which the court found that a plan, even though not required, produced an effect on the local community such as to constitute a "legislative act," referrable to the people. *But see* 36 OP. ORE. ATT'Y GEN. 960 (1974), in which the Attorney General stated that while a plan had all of the characteristics of legislation, it was not referrable (although implementing ordinances were referrable).

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

194. Malafronte v. Planning & Zoning Bd., 155 Conn. 205, 230 A.2d 606 (1967).

195. *See* Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969).

196. The Oregon Court of Appeals came to this conclusion in Marggi v. Ruecker, ... Ore. App. ....., 533 P.2d 1372 (1975).

197. *See, e.g.*, SPEA, *supra* note 13, at § 7, which, among other things, speaks in terms of providing for "a coordinated, adjusted and harmonious development" to promote "health, safety, morals, order, convenience, prosperity and general welfare."

section 701 local planning.[198] Under the 701 program, planning or engineering consultants often used the same basic plan for several municipalities.[199]

The State of California initiated an attempt to standardize the content of plans by requiring that land use, circulation, housing, and open space be included in all plans.[200] While these elements had to be considered, no established guide or procedure was provided to facilitate such consideration.

Oregon took a different direction. As noted earlier,[201] Oregon law requires the adoption of state-wide planning goals to which local plans, state and local ordinances, regulations, and actions must conform.[202] These goals, adopted in 1974, stress a planning process in lieu of an end result couched in terms of the general welfare or required plan elements. For example, agricultural and forestry lands must be inventoried with a view towards their protection,[203] urbanizable areas must be inventoried and reviewed periodically in conjunction with capital improvement programs and development activities,[204] and energy needs must be considered.[205] The goals themselves are specific and are referable to an articulated state development policy. Sufficient flexibility is provided by allowing change by the Commission without legislative action.

Oregon's movement toward weighing specific factors as a part of the planning process is underscored by writers in the planning and environmental fields, most notably Ian McHarg.[206] He stresses inventories of physical and social resources as a basis for planning choice, thereby obviating the objection that planning is a matter of opinion.

Adoption of the plan is a matter that should be left to the body ultimately responsible for making day-to-day enforcement decisions,

198. Housing and Urban Development Act of 1954 § 701, *as amended*, 42 U.S.C. §§ 4501-32 (1970), provided federal grants for local planning efforts.

199. In Oregon and California the statutory requirement to plan has been a boon for planners. Whether or not this has led to a commensurate improvement in the *quality* of planning remains to be seen.

200. CAL. GOV'T CODE § 65302 (Deering 1974). For an analysis of this requirement see AB 1301 and Local Land Use Decisions, *supra* note 107.

201. *See* text at notes 98-101 *supra*.

202. ORE. REV. STAT. § 197.250 (1973).

203. Land Conservation and Development Commission, *supra* note 4, Goal Nos. 3, 4.

204. *Id.* at No. 14.

205. *Id.* at No. 13.

206. *See* I. MCHARG, DESIGN WITH NATURE (1969).

in order to assure that body's commitment to the plan.[207] If planning becomes a viable process, the complexity of litigation regarding implementation measures should become easier to handle.[208]

C. *The View of Planning as a Supra-Local Function*

As seen in Part II, the trend is toward greater state (and possibly federal[209]) government participation in the local planning process. Such participation may take three approaches: (1) complete or nearly complete pre-emption of planning by the state (as in Vermont or Hawaii); (2) state participation only in areas or over activities of unique state concern (as in Florida, California, Oregon, Massachusetts, New York, and those states that have shoreline acts); or (3) state participation by developing particularized and flexible planning criteria against which local plans and implementation actions may be measured (as in Oregon).

Whatever approach is chosen, it is now clear that the time of full delegation of planning and land use regulatory powers to local governments is fast ending. The issue is no longer whether the state will assume such powers, but when and in what form.

Conclusion

The purpose of this paper has been to trace the development of the comprehensive plan and its impact on land use regulations. While the nature of the plan and its impact on land use regulations were cloudy at best in 1955 when Haar first addressed himself to these issues, considerable activity in the field has recently occurred—especially on the part of state legislatures.

Although absolute certainty of prediction is never possible, past developments and present trends are indicative of possible future actions. We may well anticipate an increase in the number of states

---

207. In 1973 the Oregon Legislature transferred responsibility for county comprehensive plan adoption from the Planning Commission to the local governing body for precisely these reasons. Ore. Rev. Stat. § 215.050 (1973).

208. An excellent argument can be made that the proliferation of environmental policy acts is due, in large part, to the absence of an adequate planning process.

209. *See* S. 268, 93d Cong., 1st Sess. (1973). This bill, sponsored by Senator Henry Jackson, would have provided federal funds to the states for planning if the planning process met minimal federal requirements. *Id.* at § 201(a). While it failed in the House of Representatives, the bill is expected to be re-introduced in the 94th Congress.

that require a comprehensive planning process combined with a more precise articulation of the standards for judging the plan in light of general state policies. Greater emphasis may be placed upon the plan than upon regulatory ordinances implementing it. State participation may increase in activities and over areas in which the state has a greater interest than localities. We might expect to see a shift from planning composed of designated "elements" to plans that require a process of rational choice among alternatives. Small changes in plans may be treated as quasi-judicial acts. And finally, zoning as a plan-implementation device may be de-emphasized in favor of a discretionary permit system.

If the states mandate a planning process, provide a means of review, and reserve the bulk of planning and implementation decisions for localities, and if the courts treat land use decisions as they do other administrative decisions, we may yet achieve a rational and workable land use system.