CONSISTENCY WITH ADOPTED LAND USE PLANS AS A STANDARD OF JUDICIAL REVIEW: THE CASE AGAINST

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INTRODUCTION

Conversion of land from one use to another frequently does not result from a rational, incremental extension of existing uses into adjoining areas. The initiative to develop lies with the private property owner[1] and the dynamics of urban and suburban land markets lead the developer to search for the least expensive available land.[2] In most metropolitan areas the resulting growth has been an uneven spread in all directions.[3] It is conventional wisdom among planners that allowing private initiative to control the rate, sequence and loca-

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1. *See* D. MANDELKER, THE ZONING DILEMMA 47 (1971).

2. A recent study prepared for the Council on Environmental Quality and the Department of Housing and Urban Development concludes that for a fixed number of households, sprawl is the most expensive form of residential development in terms of natural resource consumption and economic and personal costs. REAL ESTATE RESEARCH CORP., THE COSTS OF SPRAWL 6 (1974).

3. For a discussion of the contrast between the growth patterns of the United States and Great Britain, which has followed a containment policy since World War II, see M. CLAWSON & P. HALL, PLANNING AND URBAN GROWTH 9-18 (1973).

tion of development forecloses certain land uses before a reasonable range of alternative allocations can be considered.[4]

All levels of government encourage this developmental pattern through subsidies to private development and minimal regulation of private location choices. The interstate highway system increased access and thereby opened most metropolitan areas to growth. Utilities are not used to control development, but rather are extended in response to it.[5] Historically, government land use regulation has protected the established landowner through techniques, such as subdivision regulations and zoning districts, that preclude uses adversely affecting the existing, and therefore preferred, use. Public ownership is confined to land necessary for governmental uses and public recreation facilities. Land banking, with subsequent sale or lease for projects consistent with public plans, is not widely employed. Parcels assembled for urban renewal are located in blighted inner city areas rather than on the suburban-exurban fringe where developmental pressures occur.

When land is converted from one use to another, application for an administrative or legislative rezoning provides the major form of land use regulation. Original zoning theory gave little thought to methods for changing zoning classifications. It was assumed that cities would grow by small increments. Thus zoning could rationalize the development process by recognizing and anticipating market-conferred values and could stabilize each area by excluding nuisances.[6] This and related assumptions have, of course, been proved incorrect.[7]

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4. *See, e.g.*, REPORT OF THE NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 222-24 (1968).

5. Public and private services have been priced so that charges "are likely to be no greater for the distant than for the close-in subdivision." M. CLAWSON & P. HALL, *supra* note 3, at 22-23. For an argument that utility extensions should be used to control urban growth see Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945, 946-52 (1974).

6. Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URBAN LAW. 1 (1973).

7. There were at least five crucial assumptions upon which the original system was built. First, a simplistic segregation of uses would result in a quality urban environment. Second, it would be possible, in drawing the zoning map, to formulate an intelligent all-at-once decision to which the market would conform. Third, the governors of the system would rarely change the rules. Fourth, non-conforming uses would go away. Fifth, municipal power would accomplish the goals. Most of these have proved to be wrong.

Id. at 2.

Since the demise of these assumptions, planners have attempted to control land use conversion by transforming zoning from a static system into a process of administrative allocation of land development opportunities. Cities have refused to make advance allocations, adopting instead techniques such as establishing holding zones, classifying all developable land for low density uses, and making the request for a zoning change the first occasion on which the reasonableness of any kind of development is considered.[8] Planned unit development ordinances and the classification of most major uses as conditional have injected a broad discretionary element into relatively non-discretionary systems because they subject changes in zoning to case-by-case review.

These theories of "change management," however, have not produced acceptable results. Such an administration of re-zonings fails to further two important national policies—protection and enhancement of environmental quality and the provision of decent housing at all income levels.[9] Furthermore, a sequence of zoning changes too often results in an inequitable distribution of land development

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8. Most recent studies of zoning have criticized the traditional method of advance allocations of use districts on the ground that it requires localities to make too many decisions too soon. These studies recommend more flexible policies such as the use of holding zones and administrative approval so that specific land uses will not be located until a developer submits an application. *See* D. HEETER, TOWARD A MORE EFFECTIVE LAND USE-GUIDANCE SYSTEM: A SUMMARY AND ANALYSIS OF FIVE MAJOR REPORTS 13-14 (1969). These recommendations summarize the strategy many communities are now following through the use of floating zones, conditional uses, and planned unit development ordinances. By and large the courts have validated the use of these flexible techniques, but substantial, unanswered questions impede the use of these strategies to implement comprehensive plans. For example, can a municipality deny an application for development that meets the ordinance's standards merely because the community decides there is no need for the facility? In many jurisdictions this is not yet a valid ground for denial, but it is increasingly being recognized as such. *See* Pioneer Trust & Savings Bank v. County of McHenry, 89 Ill. App. 2d 257, 232 N.E.2d 816 (1967), *rev'd*, 41 Ill. 2d 77, 241 N.E.2d 454 (1968). Illinois appellate courts, however, have approved denials of special use permits under ordinances that require a showing of public necessity. *See* Comment, *Illinois Zoning: Every Use a Special Use*, 1974 U. ILL. L.F. 340, 349-50. *See also* Van Sicklen v. Browne, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (Ct. App. 1971); Lucky Stores, Inc. v. Board of Appeals, 270 Md. 513, 312 A.2d 758 (1973).

9. *See* A. DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA (1973); L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS (1973). For a discussion of environmental problems caused by current land use laws see TASK FORCE ON LAND USE & URBAN GROWTH, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH (W. Reilly ed. 1973) [hereinafter cited as TASK FORCE ON LAND USE & URBAN GROWTH].

opportunities[10] as well as inefficient land resource allocations.[11] Zoning, then, too often becomes merely a series of arbitrary, ad hoc choices.

One major proposal for reform in land use regulation is the formal subordination of zoning to planning,[12] *i.e.* using zoning only for implementation of choices made in an already existing land use plan.[13]

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10. "Equitable" is used in the sense in which Professor Michaelman has defined fairness. If decisions are fair, "the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision." Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967).

11. For a strong defense of the position that markets most efficiently allocate land uses see B. SIEGAN, LAND USE WITHOUT ZONING (1972). The same conclusions are reached in Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682-99 (1973).

12. In addition, two other major reforms have been proposed. The first of these is impact analysis—a detailed review of the impact of crystallized plans. The theory of impact analysis is unclear. Apparently it assumes that undesirable side-effects of a proposed development can best be minimized by imposing rigorous conditions on project site selection and construction rather than by excluding development from the location chosen. *See* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1155-56 (1972); *cf.* MODEL LAND DEV. CODE § 3-101 to -106 (Tent. Draft No. 2, 1970). The Code encourages traditional long-range planning procedures but suggests that "[t]hese efforts . . . are mainly to provide a framework for a systematized program of government action over a relatively short period of time after which the framework is expected to be readjusted." *Id.* at 93-94.

The second of these additional reforms is the increased use of land banking. A community would purchase land in advance of development and dispose of it consistently with a long-range plan. Recent studies of land use planning have uniformly recommended land banking. *E.g.*, PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 146-47 (1969); REPORT OF THE NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 4, at 251-52. *See also* Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897 (1972), which analyzes the purposes of land banking and the existing uses of this technique. For a preview of how a land bank might be administered see Note, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L. REV. 377 (1974).

13. *See* Haar, *"In Accordance With A Comprehensive Plan,"* 68 HARV. L. REV. 1154 (1955). A "land use plan" is defined as any formal process, apart from zoning, that allocates land development opportunities in advance of a specific request for a zoning change. This definition avoids confusion between a master plan and the comprehensive land use plan.

The original object of planning was a fixed end-state master plan, with a multicolored map indicating, in reasonably detailed fashion, desired or projected future land uses. Master planning has long been criticized as too rigid. Planners, therefore, have moved away from specific long-term projections toward flexible policy statements, often combined with a map indicating, in a less specific man-

Such a proposal, in effect, substitutes the planners' market projections and value preferences for those of profit-motivated land developers. It assumes that planners have a superior capacity to assemble and analyze the information necessary to evaluate the long-range consequences of alternative choices.[14]

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ner, the desired and projected locations of major land uses. *See* D. MANDELKER, *supra* note 1, at 60-63.

As a means of controlling land speculation, the flexible approach has the advantage of keeping developers off-balance and forestalling public opposition, since gains and losses have not been clearly distributed. For practical purposes, however, the fixed end-state and flexible approaches both involve advance allocation of land development opportunities. The difference between them is only one of degree and is not relevant to the question of the reception courts have given the requirement that zoning be consistent with some prior planning process.

The term "comprehensive land use plan" is not used since the term "comprehensive plan" has come to stand for a variety of concepts, some only vaguely related to planning. Confusion over the meaning of the term "comprehensive plan" stems from its use in the Standard State Zoning Enabling Act at a time when no clear relationship existed between planning theory and the rationale for market intervention. *See* text at notes 25-27 *infra.* Section 3 of the Act provides that zoning "regulations shall be in accordance with a comprehensive plan." 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]. The drafters failed to agree on the relationship between the plan and a zoning ordinance. *See* T. KENT, THE URBAN GENERAL PLAN 28-38 (1964); note 25 *infra.* The section, however, has been interpreted to require only the adoption of a zoning ordinance consistent with the constitutional guarantee of equal protection, rather than the preparation, adoption and implementation of a master plan separate from the zoning ordinance.

Many cases have required only geographical comprehensiveness on the ground that if any part of the city is zoned, fairness to landowners requires that all parts be zoned. *See* Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); Haar, *supra,* at 1158-59. Even in states with enabling legislation requiring the preparation of a plan, courts have concluded that the zoning ordinance may constitute the plan; changes, therefore, need only meet constitutional standards. *See* Hawkins v. City of Richmond, ... Ind. App. ....., 286 N.E.2d 682 (1972), *construing* IND. CODE §§ 18-7-5-3, -37 (1971). The ALI Model Code, § 2-101(3), allows a unit of government to regulate only part of its jurisdiction, "relying on constitutional standards to protect against its abuse." MODEL LAND DEV. CODE § 2-101, at 29 (Tent. Draft No. 2, 1970). This is consistent with recent judicial considerations of partial zoning. *See* Scarborough v. Mayor & Council, 303 A.2d 701 (Del. Ch. 1973), holding that a county with authority to zone may rationally decide to exclude incorporated municipalities from a zoning ordinance.

14. Land banking rests largely on the same assumption, although it makes planners more responsible for the consequences of their decisions than does the subordination of zoning to planning. Impact analysis, on the other hand, rejects the superiority of planners' public information assembly and evaluation and assumes that public intervention can only solve short-run, well-defined problems.

Until recently there has been little need for courts to analyze the relationship between planning and the administration of land use controls because most land use decisions were clearly ad hoc and planning was not perceived as having an operative impact. This situation is no longer prevalent. Citizens are successfully demanding the preparation of land use control plans. Developers and citizen groups now recognize that community policy is most effectively influenced by challenging the planning assumptions at the adoption stage rather than waiting for a focused land use controversy.[15]

This Article examines the conceptual basis and judicial recognition of the formal subordination of zoning to planning. First, the planner's viewpoint is examined, including his claim to expertise as a justification for public intervention into the land market in contravention of the choices made by private developers. Secondly, the treatment accorded comprehensive plans by the courts is explored, focusing on judicial receptivity to the argument that zoning changes should be consistent with the adopted plan. Thirdly, other uses of plans as a standard of judicial review are surveyed, with emphasis on the "activist" approach of intensive review. Lastly, the proper role for land use plans in judicial reasoning is delineated.

I. The Planner's Viewpoint: Its Development and Conceptual Underpinnings

When a court considers a legislative decision to grant or deny a rezoning that is concededly inconsistent with an adopted plan, the court is in effect reviewing a legislative determination not to follow the plan. If minimal standards of rationality are met, no unconstitutional taking will be found. Since a legislative body must be able to exercise its inherent powers, all zoning is subject to a legislative change of mind. Constitutional principles, therefore, permit a legislative body to ignore even existing and adopted plans as only advisory.

In spite of this orthodox analysis, lawyers continue to argue that a grant or denial of a rezoning allegedly inconsistent with an adopted plan is invalid. The basis of this argument is the allegation that the planning choice is rational and departures therefrom should be presumed arbitrary.[16]

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15. Reliance on land use plans will be increased by state legislation that mandates the preparation of local plans, at the risk of state preemption, and more importantly establishes procedures to monitor their quality and implementation.

16. The issue raised by this argument is, of course, whether exercise of the zoning power is an exercise of a legislative function. The same argument would

Courts are beginning to weigh more carefully the evidence relied upon by local legislative bodies to support zoning decisions and are beginning to determine the weight that should be given to planning choices. Part of this determination is a forced inquiry into planning assumptions.

A. *Planner's Assumptions*

Since planning theory is largely divorced from what planners actually do,[17] it is an exercise in futility, in one sense, to determine the weight courts should give to planning decisions by examining planning theory. Nevertheless, planning theory remains an important reference point for two reasons. First, many areas of the country are trying to make planning theory work and they are, in fact, making decisions based on traditional assumptions. Secondly, courts need a general model of planning in order to formulate standards for the review of planning choices.

The legitimacy of a planning choice rests on the assertion that collective intervention produces a net gain in society's aggregate welfare.[18] The planner's claim is that his or her proposal will promote the most efficient allocation of available resources.[19] A planning choice would be readily perceived as legitimate if, by curing market imper-

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be made to challenge quasi-judicial action of an administrative agency. Thousands of judicial decisions state that the drawing of a zoning map and its subsequent alteration are legislative functions, reviewable only for procedural error or to determine if constitutional rights have been violated. Despite the view that local legislative bodies are entitled to the same deference shown state and national bodies, courts are beginning to seriously question traditional classifications of zoning functions and the standards of judicial review flowing from these classifications. For an analysis of the standards courts are developing and rationales for those standards see Section III of this Article.

17. In practice their contributions to land use allocations are often modest but very useful civil engineering judgments.

18. *See* Wheaton & Wheaton, *Identifying the Public Interest: Values and Goals*, in URBAN PLANNING IN TRANSITION 152 (E. Erber ed. 1970) [hereinafter cited as URBAN PLANNING].

19. In recent years it has been argued that equity considerations in planning should be given a weight equal to that of efficiency. *See* Dyckman, *Social Planning in the American Democracy*, in URBAN PLANNING, *supra* note 18, at 27. The use of systematic, expertly-run planning to reduce social inequities has been justly criticized. For example, Professor Piven has argued, "Systematic Planning, the use of management expertise, the introduction of service innovations—all of these developments can be used to reduce the inequities in our society. But they can also be used to conceal and increase those inequities." Piven, *Social Planning or Politics*, in URBAN PLANNING, *supra* note 18, at 45, 50.

fections, it achieved an allocation equivalent to that produced by a perfectly competitive market. Too often, however, the aggregate gains of a planning choice cannot be demonstrated. The planning choice is not designed to force internalization of external costs, which are difficult enough to quantify, but is based upon the assumption that the planner's re-distributive values are superior to those of the market and will result in a net gain to the aggregate welfare.[20]

Planners assert that land use allocation is amenable to rational evaluation, that collective goals can be evaluated and welded into a single hierarchy of community objectives, and that planners can expertly resolve goal conflicts.[21] The planner's choices derived from their overall perspective, however, risk being arbitrary since planners bear little responsibility for distribution of the costs or benefits of their activity. Furthermore, the choices are unlikely to rest upon a widespread consensus that would silence those adversely affected by short-term losses with the assurance of long-term efficiency gains.[22] Thus the choices may be unacceptable to many members of the community because they appear unfair. The failure to consider the opportunity costs of the decision will make the planner's efficiency claims vulnerable to disproof.

B. *The Planning Profession's Identity Crisis*

The planner's claimed ability to comprehensively analyze a city and make more accurate land use projections than those of the free market stems from the reform tradition of planning, which asserted the superiority of decision-making by neutral experts.

The basic concepts of master planning[23] are that a city is a complex,

20. *See* A. ALTSHULER, THE CITY PLANNING PROCESS 311-12 (1966).

21. *Id.* at 301-02.

22. *See* Dunham, *Property, City Planning and Liberty*, in LAW AND LAND 28-29 (C. Haar ed. 1964).

23. Master planning is a fusion of several important movements. The "city beautiful" movement was the first planning concept, and it attempted to re-create the physical grandeur of Europe. Then the ideas of park planners, such as Fredrick Law Olmstead, began to merge with the urban reform movement, which viewed planning as a means of population dispersal to relieve inner-city congestion. With this merger came the dynamic planning theories that replaced the more static city beautiful idea. The "city functional" movement followed and initiated the thought of designating areas for particular activities and attempting to establish satisfactory spatial relationships between them. This movement, in turn, combined with the German idea of "scientific management," which postulated that planning was a technical process capable of quantifying desired public

dynamic system and that, if the welfare of all groups is to be advanced, the city's development must be coordinated in space and over time.[24] The Standard State Zoning Enabling Act (SZEA)[25] in large measure adopted the central idea of master planning, but the lawyers who developed the present structure for land use controls opted for a narrow theory of market intervention and hence a narrow theory of planning as well.[26] Unfortunately, little systematic thought had been given to the relationship between planning and market intervention at the time land use controls became operational. By and large planners attempted only to achieve the objectives of free circulation, pro-

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outputs. Scientific management also assumed that a single scientific solution existed for each problem and that those solutions would advance efficiency and convenience. *See* M. SCOTT, AMERICAN CITY PLANNING SINCE 1890 123 (1969). The relationship between planning and the urban reform movements, which attempted to purify the city of politics and run it along business-like lines, has been traced many times. *See, e.g.*, E. BANFIELD & J. WILSON, CITY POLITICS 138-50, 187-203 (1963). *See also* Cohen, *The Changing Role of the Planner in the Decision-Making Process*, in URBAN PLANNING, *supra* note 18, at 174, 175-76.

24. It is interesting to note the hypothesis that planning physical space for predetermined uses is an undesirable tendency men develop in adolescence to control unknown threats by eliminating "the possibility for experiencing surprise. By controlling the frame of what is available for social interaction, the subsequent path of social action is tamed." R. SENNETT, THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE 81-82 (1973).

25. SZEA, *supra* note 13. For a discussion of the theories of the function of the general plan and its relationship to zoning that were advanced at the time the Standard State Zoning Enabling Act was drafted see T. KENT, *supra* note 13, at 28-38. Kent reports that the drafters generally agreed that the function of the plan was to guide the future physical development of the community but that they failed to agree on the relationship between the plan and a zoning ordinance. Section 6 recommended adoption of a general plan that was defined in four footnotes. "In the first footnote the authors state flatly that the zoning plan is to be included as an integral part of the general plan; and in the second, third and fourth footnotes, they contradict themselves and state that the general plan must remain general . . . and that zoning is simply one method of carrying out the general policies dealing with private property . . . ." *Id.* at 38. These latter statements seem to reflect the fear of Bettman (one of the drafters) that the general plan might be construed as an encumbrance against property, and thus it should be kept separate from the zoning ordinance. Bettman, *City and Regional Planning Papers*, in HARV. CITY PLANNING STUDIES XIII 23-43 (1956). Bassett subsequently further narrowed the function of the plan, arguing it should be confined to showing existing zoning districts and the future location of streets and public works. E. BASSETT, THE MASTER PLAN 65-66 (1938).

26. Bassett limited zoning to giving legal sanction to the status quo while preventing only the grossest disorders. His theory of planning logically emphasized that it was a process of coordinating the location of public works with private development. E. BASSETT, *supra* note 25, at 142-43.

vision of adequate land for uses the community desired to encourage, and preservation of stable neighborhoods.[27]

While the idea that planning was more than preservation of the status quo never truly died, it simply never became operational. During the 1930's, as planners became increasingly alienated from the market, the static theory of master planning as a fixed-end state objective was replaced by theories that emphasized planning as a "continuous process" that would shape and guide the physical growth and arrangement of towns in harmony with their social and economic needs.

By the 1950's planners were breaking away from what they considered the narrow focus on physical development and beginning to argue that social and economic needs must also be included. Today the argument for the new comprehensiveness has been resolved at the theoretical level in favor of including both social and economic factors.[28] As planning's orientation has become more comprehensive, however, its objectives have become more diffuse, and the planner's case for the legitimacy of market interference more tenuous.

The identity crisis within the planning profession continued into the 1960's. Some planners urged that the profession give up its claim to neutral, technical expertise and adopt the adjudicatory model of decision-making. Planners were to advocate specific "causes" subject

27. Mocine, *Urban Physical Planning and the "New Planning,"* 32 J. AM. INST. PLANNERS 234 (1966), lists the following basic objectives of physical planning: (1) maximization of economic efficiency by predicting physical facility needs and coordinating the size and location of such facilities with activity locations; (2) maximization of desired relationships between land uses; (3) allocation of scarce land resources to desired activities; and (4) provision of a pleasing general urban design.

The most influential justification for planning for stable neighborhoods is Perry, *The Neighborhood Unit Formula,* in URBAN HOUSING 94 (W. Wheaton, G. Milgram & M. Meyerson eds. 1966). For the debate on this concept see Isaacs, *Attack on the Neighborhood Unit Formula, id.* at 109 and Mumford, *In Defense of Neighborhood, id.* at 114.

28. *See* Webber, *Comprehensive Planning and Social Responsibility: Towards an AIP Consensus on the Profession's Roles and Purposes,* 29 J. AM. INST. PLANNERS 232 (1963). In the late 1950's and early 1960's sociologists such as Herbert Gans and urban critics such as Jane Jacobs challenged the planner's assumption that the physical environment plays a major role in people's lives. Endorsing the new comprehensiveness, they disagreed "that reshaping this [physical] environment was the most urgent priority for social action to achieve the good life." H. GANS, PEOPLE AND PLANS: ESSAYS ON URBAN PROBLEMS AND SOLUTIONS 1-2 (1968). *See also* J. JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 428-48 (1962).

only to vague professional constraints against the advocacy of specific solutions.[29] Others have urged planners to become more influential in day-to-day decision-making by shedding their apolitical role and participating directly in the policy planning process. Herbert Gans has called for planners trained in policy formulation:

> By planning I mean the method and process of decision-making which includes the proper formulation of the problems which the city needs to solve (or of the goals it wishes to achieve); the determination of the causes of these problems; and the formulation of those policies, action programs, and decisions which will deal with the causes to solve the problem, and will do so democratically and without undesirable financial, political, social or other consequences.
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> This conception of planning is, of course, totally different from either traditional comprehensive physical planning or the AIP's new definition of comprehensive planning.[30]

Gans's call for a rejection of the old comprehensive planning is a repudiation of the rational model of planning.[31] This model, which exerted the greatest influence on planning theory until recently and is the model to which courts refer when they call for comprehensive planning to control exercise of the zoning power,[32]

> sets forth a planning-policy process consisting of five interrelated steps. These are: (1) identifying and evaluating objectives, (2) translating objectives into design criteria, (3) utilizing design criteria to devise plans for the optimal development of specified systems or achievement of objectives, (4) evaluating the

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29. Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331 (1965). This change in focus resulted from the realization that public works projects, such as those supervised by Robert Moses in New York, often destroyed stable urban neighborhoods, and that commercial and multi-family developments were destroying suburban amenities.

30. Gans, *The Need for Planners Trained in Policy Formulation*, in URBAN PLANNING, *supra* note 18, at 239, 240-41. For a criticism of this position see Rondinelli, *Urban Planning as Policy Analysis: Management of Urban Change*, 39 J. AM. INST. PLANNERS 13 (1973).

31. For a more detailed discussion of the failure of the rational model of decision-making to become operational and the consequences of the new political role of the planner on judicial acceptance of consistency with an adopted plan as a criterion for judicial review see Section II of this Article *infra*.

32. *See, e.g.*, Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

consequences of alternative planned courses of action, and (5) implementing the plan through appropriate public policies.[33]

The rational model has gradually been abandoned because the critical assumptions upon which it is based have often proved wrong. The model assumes a hierarchical planning system in which "a set of goals and their weights would be prespecified for a consideration in evaluating alternative land use policies. From the set of goals, a disaggregated set of social indicators would emerge which provide signals for actors within the system. The actors in responding to this set of social indicators would maximize some weighted or unweighted set of goals."[34]

While goal formulation through the political process is assumed as a given, public officials too often refuse to set goals, thereby shifting the task to planners.[35] Planners, as do all reformers, tend to minimize the importance of conflict, and they assume that consensus is possible without recognizing the deep value cleavages involved in many land use conflicts. Their biases, therefore, often lead to the selection of goals unacceptable to their client groups.[36] And in addition to the problem of goal formulation, the high cost of obtaining information makes accurate projections either unavailable or available only at prohibitive cost.

In order to avoid both of these problems, decision theorists, such as Robert Lindblom, have urged planners to consider incremental, rather than comprehensive, solutions.[37] Lindblom's theory of incrementalism rejects the idea that all change can be controlled, thus rejecting the central tenets of both the rational model and Gans's policy planning model. The rational model assumes that norms of the system are given and that the planner's only task is to translate those norms into technical decisions. The policy planning model assumes a group of elite idealists who "conceive of the decision-making situation as authority to engage in social planning by clari-

33. R. BURBY, PLANNING AND POLITICS: TOWARD A MODEL OF PLANNING-RELATED POLICY OUTPUTS IN AMERICAN LOCAL GOVERNMENT 3 (1968).

34. d'Arge, *Economic Policies, Environmental Problems and Land Use*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 157, 164 (D. McAllister ed. 1974).

35. *See* A. ALTSHULER, *supra* note 20, at 306-19.

36. *Id.* at 84-143.

37. *See* Lindblom, *The Science of "Muddling Through,"* in A READING IN PLANNING THEORY 151 (A. Faludi ed. 1973).

fying a vague criterion."[38] Incrementalism, on the other hand, limits the planner's role to tinkering with the framework of pluralism.[39]

A "due process-equilibrium" model is presumed to be appropriate for decision-making under incrementalism. Legitimacy is assumed if a decision attempts to canvass a wide range of information and opinion, thereby representing various interested groups, and has an internal logic. In short, the legitimacy of a decision stems from the process by which it is reached rather than from its substance. "Decisions reached as a result of . . . full consideration (of all available relevant information, including, in appropriate contexts, expert opinion) are more likely to meet the test of equilibrium theory—*i.e.* 'satisfaction,' acceptance, and the like—and do so most of the time."[40]

The due process-equilibrium model of planning, rather than dispensing with experts, simply reduces their contribution from a controlling factor to a relevant one, with their accumulated experience providing some insight into the consequences of alternative land use patterns. This approach has important consequences, for it shapes judicial review of land use decisions challenged on the ground of inconsistency with adopted plans. First, the model does not consider the plan controlling because planners have not clearly established their claim to legitimacy. This is because they offer neither a superior method of allocating land nor a set of values that commands wide consensus. Secondly, since the planner's conclusions are sometimes relevant, courts that view the subordination of planning to zoning law as reducing arbitrary decisions must make the difficult decision as to when the planner's contribution is relevant, as well as the weight to which it is entitled. Lastly, the recognition that a planner's contribution is only one component in the legitimization of a planning decision requires a court to peer behind the plan in order to validate a decision. The court must decide if the planning process was sufficiently open to command acceptance from those it affects.

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38. Schubert, *Is There a Public Interest Theory?*, in NOMOS V 165 (C. Friedrich ed. 1962).

39. *See* Altshuler, *Decision-Making and the Trend Toward Pluralistic Planning*, in URBAN PLANNING, *supra* note 18, at 183, 185.

40. Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 725 (1972), *quoting* Schubert, *supra* note 38, at 170-71.

II. Judicial Treatment of Plans

A. *Inconsistency with Adopted Plans*

Because zoning was originally conceived as a static theory, little attention was paid to the problem of the processes and standards under which changes in zoning districts were to occur. Under the original assumptions of zoning theory, the advance allocation of land development opportunities among like parcels of land was not thought to be a difficult problem. Although planners have long maintained that the purpose of zoning is not only to suppress nuisances but to promote the general welfare, most courts maintain a more limited conception of zoning. The basic premise is still that zoning is "more . . . an extension of individual property rights than . . . an instrument of public policy."[41] Zoning is justified as public imposition of a restrictive covenant scheme upon places where the transaction costs of private collective organization are too high. This justification for zoning accords with the classic police power rationale for limiting the use of property: protection of a common property resource (here, an area's amenities) to prevent "it from being taken by one of the common owners without regard to the enjoyment of the others."[42] Not surprisingly then, courts have tested the reasonableness of zoning changes by an equal protection standard that requires consistency with surrounding uses unless a demonstrable difference exists between the rezoned tract and the surrounding property.[43]

The basic reason advanced by courts for not requiring that zoning be consistent with an adopted plan[44] is that the plan has no legal

41. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. Pa. L. Rev. 47, 59 (1965).

42. Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900).

43. *See, e.g.*, Frankel v. City of Atlantic City, 124 N.J. Super. 420, 307 A.2d 615 (App. Div.), *rev'd on other grounds*, 63 N.J. 333, 307 A.2d 562 (1973) (per curiam). To revivify the development of its once chic ocean front, Atlantic City liberalized density requirements for ocean front property by establishing a high-rise apartment zone. The court invalidated the district on the grounds that all property in like circumstances must be treated alike and that no rational distinction existed between properties that are or are not appurtenant to the beach. *Id.* at 423, 307 A.2d at 616. Although the New Jersey supreme court reversed, the appellate division opinion is illustrative of the force of equal protection analysis. For an analysis of the equal protection basis of most standards for judicial review of map amendment decisions see Mandelker, *The Role of Law in the Planning Process*, 30 Law & Contemp. Prob. 26, 33-35 (1965).

44. The conclusion that zoning is not in accordance with a comprehensive plan is often applied to invalidate a change that is considered "spot zoning." After

effect and, thus, is advisory at best. States following SZEA have not required the preparation of a land use plan prior to exercise of the zoning power. The prevailing reasoning holds,

> It is inherent in the recommendatory nature of the comprehensive planning concept that it neither can nor does have any specific or litigable impact such as to provide any practical or realistic occasion for judicial intervention. The formulation and adoption of a comprehensive plan are but intermediate and inconclusive steps in the planning process, and in themselves are legally ineffective. No one's rights, pro or con, are affected thereby unless and until the recommendations thereof be implemented.[45]

While the advisory nature of an adopted plan logically flows from the theory of enabling legislation, it does not follow that the passage of an ordinance in conformity with the plan gives legal effect to the adopted plan. To hold otherwise would be to assert that the plan is the organic statute and zoning decisions implementing it are simply administrative in nature.[46] This should not be the basis for requiring consistency with adopted plans.

Adopted plans should, however, be given some weight in determining the reasonableness of legislative or administrative decisions. When the choice is between the proposed and existing uses, it would be reasonable for a court to presume that a selection made through the comprehensive planning process surveys a greater range of alternative

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determining whether the location and the development plans were consistent with the community's planning objectives, some courts have invalidated zoning as not "in accordance with a comprehensive plan" when the governmental unit was given discretion to locate floating zones on a case-by-case basis. "In other words, the development itself would become the plan which is manifestly the antithesis of zoning 'in accordance with a comprehensive plan.'" Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 217, 164 A.2d 7, 11 (1960). *Eves*, however, appears to have been overruled in Pennsylvania by Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 241 A.2d 81 (1968), and has not been followed in other states. *E.g.*, Lurie v. Planning & Zoning Comm'n, 160 Conn. 295, 278 A.2d 799 (1971).

45. Penny v. Board of Supervisors, 53 Pa. D. & C. 2d 329, 332 (C.P. Bucks County 1971); *accord*, Saenger v. Planning Comm'n, 9 Pa. Commw. 499, 308 A.2d 175 (1973); Morelli v. Borough of St. Marys, 1 Pa. Commw. 612, 275 A.2d 889 (1971). Alabama has adopted a similar analysis. *See* COME v. Chancy, 289 Ala. 555, 269 So. 2d 88 (1972). Under this analysis, the amendment of the ordinance is a *pro tanto* amendment of the plan unless procedures for amending the plan differ from procedures for amending the ordinance. *See* Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 241 A.2d 81 (1968).

46. *See* Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353, 355-56 (1955). *See also* Note, *Judicial Review of Land Bank Dispositions, supra* note 12, at 386-94.

uses for a tract of land than does a choice made through the usual ad hoc process.[47] Thus a party proposing a change that departs from the plan ought to carry some burden of showing that the planning choice was unreasonable. The burden, however, should not be so heavy that it becomes impossible to question the planning choice.[48]

Reasons for denying weight to planning choices lie deeper than the historic lack of planning and the absence of a statutory requirement of consistency with adopted plans. Courts may give some weight to plans, apart from the zoning ordinance, even without a clear statutory mandate to do so. In a planning decision the real issue is the legitimacy of value choices made by the governmental unit adopting the plan.[49] If courts subject administrative decisions to review using a consistency standard, they must question the goals that the plan seeks to achieve. Yet this judgment has traditionally rested with local government on the ground that these legislative bodies have been delegated the authority to make such choices subject only to broad ultra vires limits.[50]

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47. *See* Haar, *The Master Plan: An Inquiry in Dialogue Form*, in LAND-USE PLANNING 745 (2d ed. C. Haar ed. 1971).

48. A recent Connecticut decision may indicate movement in this direction. As in many states, Connecticut views the requirement that a zoning change be in accordance with a comprehensive plan as simply precluding spot zoning. *See, e.g.*, Sheridan v. Planning Bd., 159 Conn. 1, 266 A.2d 396 (1969); Luery v. Zoning Bd., 150 Conn. 136, 187 A.2d 247 (1962). In Lathrop v. Planning & Zoning Comm'n, 164 Conn. 215, 319 A.2d 376 (1973), a rezoning from residential to commercial was challenged, in part on the ground that the planning commission's development plan designated the area as an open-space green belt. *Id.* at ....., 319 A.2d at 381. The court found that the plan itself was inherently contradictory. *Id.* In addition to providing for green belt areas, the plan posited as one community objective the broadening of the tax base through controlled business development in appropriate locations. *Id.* The plan also seemed to indicate that commercial zoning on abutting highways would not detract from residential areas since green belt buffers would also be established. *Id.* The court concluded, therefore, that the "change would permit use of the land for a suitable and appropriate purpose and that such was in keeping with the orderly development of the comprehensive plan for zoning of the entire town." *Id.* Whether the court is merely concluding that the change is reasonable under traditional criteria or holding that the change is consistent with the adopted plan, the opinion does indicate that some duty exists to justify departures from the plan on the ground that they advance another objective of the plan.

49. *See* D. MANDELKER, supra note 1, at 58.

50. This is illustrated by Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), which sustained "phased growth" zoning. The court held that a city could control the rate and location of development by a point system matching the rate of new development

Beyond the reluctance of courts to review underlying value choices involved in planning, courts have been properly skeptical of consistency with adopted land use plans as a standard of review for other reasons. The discretion delegated to decision-making units to discriminate among potential uses, which is the essence of planning, conflicts with the equal protection basis of traditional zoning. Courts have sanctioned a great deal of discretion on the theory that flexibility is needed to cope with the dynamics of land development, but, on the whole, they have retained familiar standards of review based on equal protection. The primary inquiry remains focused upon the use's compatibility with surrounding property. This is a comfortable and manageable standard, enabling courts to fulfill their traditional function—preventing arbitrary decisions.

The standard of compatibility with surrounding uses, however, cannot be applied to all cases. For example, when the zoning authority attempts to reserve land by denying map amendments on the ground that the plan projects a different use, the problem is the conflicting efficiency claims of the developer and the community. The question is not one of preventing the imposition of external costs on third parties, for in any event such imposition will occur. Yet, the municipality's reservation is bound to strike the court as arbitrary, unless it can be justified by some general principle, since the recognition of individual initiative is not viewed as hurting anyone.

Originally planners were interested in deriving specific solutions from general principles. Despite their repeated assertions that planning is consistent with traditional notions of individual freedom, planners failed to appreciate that, in any given case, the resulting distribution of costs and benefits could be highly arbitrary. In recent years, however, planners have called for plans that are "legitimate" in that the distribution of land development opportunities will not be arbitrary.[51]

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to the availability of public services. This is a textbook example of rational planning, with clearly stated goals and regulations subordinated to them.

While *Golden* does establish that phased growth is permissible under appropriate enabling authority, the case does not preclude questioning its wisdom. Opposing such a choice are the substantial potential costs imposed on other areas, especially if many other communities do likewise.

This argument does not mean to suggest that phased zoning is unconstitutional. The case for the constitutionality of the *Golden* ordinance is well made in Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

51. *See* Perin, *A Noiseless Seccession from the Comprehensive Plan*, 33 J. AM. INST. PLANNERS 336 (1967).

B. *Attempts to Reconcile Planning with Fairness*

The leading attempt to reconcile planning with fairness to those affected is that of Professor Haar,[52] who argues that the difference between the plan and the zoning map is a matter of ripeness. In addition, he asserts that the reservation of undeveloped land, until it can be determined if projected developments do in fact occur, is fair for two reasons. First, cluttering the tract with interim marginal improvements might lose more than is gained and risks blighting surrounding areas.[53] Secondly, given the legitimacy of this planning decision, the planning process is, in the long run, fair to all members of the community. This is true because the plan, having isolated and identified the forces shaping the development of the community and having appraised their impact and probability, is "a conscious master strategy to optimize the future of the community. It orients public policy in a predictable way [and] endeavors to liquidate the caprice of circumstances."[54] All members of the community are provided a means of rationally pursuing their interests, "protected to some extent from the attrition of the expected . . . ."[55]

Professor Haar's argument, however, makes two unwarranted assumptions. First, he assumes that the planning process will generate consensus over time as people accept the allocation of land development opportunities and adjust their behavior accordingly. It is equally likely that advance assignment will exacerbate, rather than lessen, tensions. In many cases the plan will merely accelerate the time when conflicts must be resolved. If, as has been argued, the plan is entitled to some weight because it creates expectations about what development will or will not be allowed, then property owners and lawyers will perceive planning as a dual-level process of obtaining permission to develop. If they lose at the first stage (when the plan is considered and adopted) they may then request a rezoning that, in effect, is an appeal of the original planning decision. Secondly, Professor Haar assumes that the plan can embody reasoned choices that command wide acceptance. Many of the conflicts that the plan seeks to resolve or minimize are disputes over fundamental values. Procedures that rest on expertise and attempt to gain acceptance for general principles

52. Haar, *supra* note 47, at 756.
53. *Id.*
54. *Id.* at 753.
55. *Id.*

by maximizing citizen input through quasi-adjudicatory hearings will do little to resolve fundamental value conflicts.[56]

Courts are not receptive to Professor Haar's arguments. The leading case is *Biske v. City of Troy*[57] in which a "new" and "burgeoning community" designated the area around a busy intersection for its future community center. To reserve the land a map amendment for a service station was denied on the grounds that the change would be inconsistent with the comprehensive plan. The intermediate appellate court held that although projections of the master plan were speculative, they were nonetheless reasonable because a contrary holding "would have the effect of nullifying all city planning."[58] The Michigan supreme court, however, refused to give the same weight to the master plan in determining the reasonableness of the rezoning denial. Stressing that the plan had not been formally adopted, the court stated that in weighing projections of the city against the infringement of vested rights, "admirable as the purpose may be . . . the effect of the 'master plan' is ephemeral and minimal. Overriding the ideal are the present, existing circumstances."[59]

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56. *See* Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 66-67 (1973). It is worth observing that perhaps the greatest potential for effective planning today lies with the Environmental Protection Agency, which subordinates all conflicts to the statutory goal of maintaining a quality environment.

57. 381 Mich. 611, 166 N.W.2d 453 (1969).

58. 6 Mich. App. 546, 552, 149 N.W.2d 899, 902 (1967).

59. 381 Mich. at 623, 166 N.W.2d at 460. In criticizing *Biske*, Professor Mandelker has made the classic planner's argument—efficiency calculations made through the planning process are superior to those made through the market. D. MANDELKER, *supra* note 1, at 53-54. The fundamental defect in the argument is that it permits communities to appropriate the benefits of property ownership (in effect, acquiring an option over the property) without its responsibilities. A high risk exists that the community's efficiency judgment will be wrong, *see* Demsetz, *Some Aspects of Property Rights*, 9 J. LAW & ECON. 61 (1966); Tarlock, *Toward a Revised Theory of Zoning*, 1972 LAND USE CONTROLS ANN. 141, since planning projections are made under conditions of uncertainty and rest on a surprisingly thin information base. This is not to say that *Biske* is correctly decided, for a court could conclude, by analogy to interim-zoning cases, that reservation of land for a reasonable future period is not an invalid infringement of property rights. If, however, the plan's claim to reasonableness rests upon Professor Mandelker's suggested reason, then *Biske* was correct in refusing to give the plan evidentiary value.

III. According Weight to Adopted Plans

An increasing number of cases accord some weight to adopted plans, which are recognized as separate from the zoning ordinance, in passing upon the reasonableness of a zoning change or denial. These fragmentary cases fall roughly into three categories: the first equates the absence of a plan with arbitrary action because the stability of property values is undermined; the second places some duty on communities to justify departure from the plan; and the third represents tentative approaches to the imposition of the rational planning model on communities.

A. *Absence of Plan Equated with Arbitrary Action*

The concept of zoning as a stabilizing device explains cases in which the absence of a comprehensive plan has been equated with arbitrary action. *Raabe v. City of Walker*[60] is an excellent example. An undeveloped area surrounding a stable residential neighborhood was rezoned to permit heavy industrial development after the chamber of commerce proposed a plan for an industrial park. The city planning commission made no recommendation for the site because there had not been time for a comprehensive study of the entire area and because petitioners had no specific plan for development. The trial court ruled that "[t]he regulation must be made in accordance with a plan. In this case there was no general plan, and the rezoning was not part of any such general plan."[61] In affirming, the Supreme Court of Michigan found the rezoning inconsistent with the "manifestly desirable stability of zoning, once it has been ordained and relied upon for any fair period of repose by home builders and homeowners as well as those concerned for industrial, commercial, or other reasons

60. 383 Mich. 165, 174 N.W.2d 789 (1970). *See also* Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969), which held that denial of an apartment rezoning to prevent pollution of the Hudson River, because the town's treatment facility could not accommodate future development, was arbitrary. The court found the rezoning was not in accordance with a comprehensive plan. *Westwood Estates* is a classic example of a decision that is arbitrary because the cost imposed on the landowner was unrelated to any benefits to society, since there was no showing that pollution of the Hudson River would be ameliorated. A similar approach was taken in Petlin Associates, Inc. v. Township of Dover, 64 N.J. 327, 316 A.2d 1 (1974), which invalidated a rezoning for a hospital-medical zone because no real consideration had been given to how the property would fit into an integrated and comprehensive plan.

61. 383 Mich. at 170, 174 N.W.2d at 792.

. . . "[62] The court stated that the absence of a community land use plan, or at least a recent area study, weakened the presumption of validity attending any "regular-on-its-face municipal zoning ordinance or amendment thereof."[63]

B. *Duty to Justify Departure from the Plan*

Kentucky is the jurisdiction most explicitly imposing some burden on the community to justify a rezoning that departs from the plan.[64] The state has unique enabling legislation requiring not only the preparation of a land use plan but also a planning commission or local legislative finding that rezoning is consistent with the plan.[65]

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62. *Id.* at 177, 174 N.W.2d at 795. Protection of surrounding landowners conflicts with the classic zoning theory that the classification should reflect the highest and best use of the property. Increasingly the conflict is resolved in favor of surrounding owners. *See, e.g.*, Hukle v. Kansas City, 212 Kan. 627, 512 P.2d 457 (1973). In holding that the city need not rezone an area for apartment uses because of street and sewer problems the court noted "[t]he most appropriate use of land throughout an entire city is not to be discouraged; however, the highest and best use of a particular tract is not necessarily a controlling factor." *Id.* at ....., 512 P.2d at 465.

63. 383 Mich. at 178, 174 N.W.2d at 796. *Accord*, Forestview Homeowners Ass'n Inc. v. County of Cook, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974), holding that "the failure . . . to plan comprehensively for the use and development of land . . . and [the] failure to relate . . . rezoning decisions to data files and plans of other . . . county agencies" weakened the presumption of validity that would otherwise attach. *Id.* at 243, 309 N.E.2d at 773.

64. Connecticut cases adopting this approach have already been discussed. *See* note 48 *supra.*

65. KY. REV. STAT. ANN. § 100.213 (Baldwin 1969).

CAL. GOV'T CODE §§ 65860(a)-(b) (West Supp. 1974) require that various land uses authorized in the ordinance be "compatible with the objectives, policies, general land uses and programs specified in the [comprehensive] plan." The impact of this requirement on judicial review is not clear; the statute seems to contemplate that inconsistencies will be removed by amending the plan. *Id.* § 65860(c).

The prior California legislation was construed in Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). Plaintiff owned land located in both the city of San Buenaventura and Ventura County. It submitted proposals for an apartment complex to be located on property designated by the circulation element of the city-county land use plan for a street extension. Plaintiff brought an action for declaratory relief against both the city and the county alleging that the plan constituted a taking. The court first held the action against the county premature because neither the city nor county had attempted to implement the plan. It described the plan in the following terms: "The plan is by its very nature merely tentative and subject to change . . . . The adoption of a general plan is a legislative act. Since the wisdom of the plan is within the legislative and not the judicial sphere, a landowner may

This provides a statutory basis for finding that rezonings departing from the plan without justification are arbitrary, regardless of how the case would be decided under traditional reasonableness standards.

The impact of the Kentucky legislation is illustrated by *City of Louisville v. Kavanaugh*.[66] The City's comprehensive plan designated a tract (which was zoned single-family) for multi-family development. The City denied petitioner's application for a rezoning to construct multi-family housing, thereby refusing to conform zoning to the plan. The Kentucky court of appeals noted that "a comprehensive land use plan is a guide rather than a strait jacket,"[67] but reasoned, "Nevertheless, such a plan, if it has any reason for existence, must be regarded as a basic scheme generally outlining planning and zoning objectives in an extensive area."[68] The court went on to hold that the record made before the planning commission and the legislative

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not maintain an action to probe the merits of the plan absent allegation of a defect in the proceedings leading to its enactment." *Id.* at ....., 514 P.2d at 115-16, 109 Cal. Rptr. at ..... Plaintiff had a stronger case against the city because its denial of a building permit could be characterized as an improper implementation of the general plan. The court held that an action for declaratory relief was an inappropriate method for judicial review of administrative decisions and that the adoption of a general plan did not constitute a taking. The court's characterization of the plan as non-binding will surely have to be reevaluated in light of CAL. GOV'T CODE § 65860(a) (West Supp. 1974). The opinion is critically analyzed in *The Supreme Court of California 1972-1973, Property*, 62 CALIF. L. REV. 408, 624-38 (1974).

Other enabling legislation requires preparation of a plan and specifies that it shall be implemented by a zoning ordinance "for the purpose of carrying out the policies and goals of the land use plan" but does not expressly require that subsequent amendments be consistent with that plan. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 4961-2 (1973); MINN. STAT. ANN. § 462.357 (1974).

66. 495 S.W.2d 502 (Ky. 1973). Surprisingly the court made no mention of the enabling legislation although it cited cases construing the statute. *See, e.g.*, Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970) (rezoning of site for regional shopping center not in conformity with land use plan held arbitrary). The controversy is discussed in Tarlock, *Not in Accordance with a Comprehensive Plan: A Case Study of Regional Shopping Center Location Conflicts in Lexington, Kentucky*, 1970 URBAN L. ANN. 133. *See also* Wells v. Fiscal Court, 457 S.W.2d 498 (Ky. 1970).

67. 495 S.W.2d at 505, *citing* Ward v. Knippenberg, 416 S.W.2d 746, 748 (Ky. 1967). *Ward* was decided prior to the effective date of KY. REV. STAT. ANN. § 100.213 (Baldwin 1969).

68. 495 S.W.2d at 505; *cf.* Sonneland v. City of Spokane, 4 Wash. App. 865, 484 P.2d 421 (1971). In upholding the reasonableness of a rezoning, the *Sonneland* court stressed that the planning commission had not disregarded the plan and that the commission "gave it serious consideration during its deliberations upon the proposed change." *Id.* at 870, 484 P.2d at 424.

body clearly established that the present single-family zoning was "no longer appropriate."[69] The trial court's assignment of a multi-family classification to the property was upheld upon the ground that such a designation conformed to both the planning commission's recommendation and the comprehensive land use plan's classification of the area.[70] In the absence of evidence that some other category of use might be more appropriate and that the plan should be amended, the plan must be followed to avoid a finding of arbitrary action by the local legislative body.[71]

C. *Imposition of a Planning Process Rather Than Comprehensive Planning*

As long as map amendment decisions are considered legislative and minimal standards of rationality are met, municipalities have the discretion to make classification decisions in undeveloped or developing areas on whatever grounds they choose. In recent years, however, the classification of map amendment decisions as a legislative function has come under attack; the argument is being made that such decisions are, in reality, administrative and that the municipality must bear a higher burden of justification. This is one means by which courts have attempted to impose rational planning on communities by exercising greater control over the decision-making process at the time of a zoning change.

The basis for the argument that the municipality must justify its decision as being consistent with a comprehensive plan, or that the decision-making process must be rational, can be found in federal and state cases interpreting the National Environmental Policy Act of 1969[72] and its state progeny[73] to require that actions with a significant environmental impact be justified by the agency undertaking the action. "Rational," as interpreted by these courts, requires that the decision-maker (1) display the costs of an action, unless that information is not available at reasonable cost; (2) study a reasonable range of alternatives that might minimize costs; and (3) come to a

69. 495 S.W.2d at 505.

70. *Id.*

71. *Id.*

72. 42 U.S.C. §§ 4321-47 (1970).

73. For a discussion of state legislation modeled after NEPA see Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URBAN L. ANN. 3 (1974).

well-considered decision that balances the costs and benefits of the action.[74]

Courts applying the developing law of impact analysis seem to equate a decision-making process satisfying this model with one that promotes advance planning, or that is at least an adequate substitute for the advance allocation of land development opportunities. The theory justifying this approach to promote planning is that a decision cannot be justified as rational unless it was made pursuant to a plan, since the judicially required process is the classic rational model. The zoning authority must either demonstrate consistency with a plan or be prepared to do considerable planning in the course of passing on a specific zoning change request.

1. Rationale for More Intensive Review

Justice Levin of the Michigan supreme court has articulated the rationale for a more intensive review of the zoning change process. Concurring in *Kropf v. City of Sterling Heights*,[75] which refused to accept the preferred use doctrine developed by intermediate appellate courts[76] and reaffirmed the normal presumption of validity, he argued that zoning changes are adjudicatory rather than legislative acts: "Nothing is more specific, less general, than the zoning ordinance of most developed communities. While passed in the form of a law, the typical zoning ordinance represents particularized applications of administrative power, reflecting choices made over an extended period of time between particular properties and proposed developments *ad hoc, ad hominem*."[77]

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74. The leading case is Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). A leading judicial activist has described the environmental impact review cases as requiring that an "official or agency take a 'hard look' at all relevant factors. And when the matter is not brought to court on a direct review procedure, as to a court of appeals after some kind of inquiry on a more or less formal record, the court, in this case the district court, is entitled to probe the matter." Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974). Reliance on impact analysis, coupled with some planning, is strongly endorsed in TASK FORCE ON LAND USE & URBAN GROWTH, *supra* note 9, at 195-208.

75. 391 Mich. 139, 215 N.W.2d 179 (1974).

76. For a discussion of the preferred use doctrine and how *Kropf* fits into the case development see 8 URBAN L. ANN. 207 (1974).

77. 391 Mich. at 167, 215 N.W.2d at 191. Justice Levin cited recent cases in Oregon and Washington, *e.g.*, Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973), and Durocher v. King County, 80 Wash. 2d 139, 492 P.2d 547 (1972), that have classified map amendments as adjudicatory because

Proceedings based on individual grounds are quasi-judicial.[78] The standard of review, therefore, becomes substantial evidence on the whole record.

The relationship between adjudicatory classification of zoning amendment decisions and planning is not obvious. Rather than clarifying this point, Justice Levin's approach is more concerned with stripping away the presumption of validity in order to focus on the policy objectives of zoning—perhaps with a view toward confining zoning to more specified objectives. The potential link, however, is suggested by *Citizens Association of Georgetown, Inc. v. Zoning Commission.*[79] Plaintiffs challenged the refusal of the District of Columbia to enact an interim ordinance preventing the establishment of a high-rise commercial center in an area recommended for low-density residential and parkland by the National Capital Planning Commission. The argument that departures from a planning recommendation had to be justified by a "compelling public interest" was rejected on traditional grounds. The court held, however, that the refusal to enact the interim ordinance was invalid for failing to state reasons and remanded for such a statement. Following recent District of Columbia circuit decisions, the court closely supervised the agency action and expressed hope that "the articulation of reasons by an agency—for itself and for the public—does afford a safeguard against arbitrary and careless action and is apt to result in greater consistency in an agency's decision-making."[80]

In justifying a statement of reasons for what has traditionally been classified as a legislative act, the court tried to steer a middle course between reclassification of the decision as adjudicative on the one hand, and a standard of review more intense than mere rationality but less strict than substantial evidence on the whole record on the other:

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the costs and benefits of the decision are often focused on a limited class of residents rather than on the public generally. For an insightful analysis of the ambiguity between the legislative and administrative nature of map amendments see Krasnowiecki, *The Basic System of Land Use Control: Legislative Pre-Regulation v. Administrative Discretion*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES 3, 6-10 (N. Marcus & M. Grove eds. 1970).

78. 391 Mich. at 169-70, 215 N.W.2d at 193-94.

79. 477 F.2d 402 (D.C. Cir. 1973).

80. *Id.* at 408.

> It is true that the Zoning Commission is a quasi-legislative body and is not required to support its legislative-type judgments with findings of fact. But, as the District of Columbia Court of Appeals has noted, there are important elements of a non-legislative nature to the Commission's decisions. And there are important distinctions between our review of the Zoning Commission and our review of the acts of a legislature. Thus, while the legislative character of the Commission's decision may take it outside the strict application of *Chenery*, the Commission may still be required to state reasons for its decisions. Reasons differ from findings in that reasons relate to law, policy, and discretion rather than to facts and even where findings are not required, a disclosure of an agency's reasons is often desirable.[81]

The impact of *Citizens Association* and Justice Levin's concurring opinion in *Kropf* cannot be appraised without examining the tension underlying the current "activist" approach to judicial review of zoning changes.

2. Tension in More Intensive Review

Courts attempting to take an active role in reviewing zoning changes are starting from two inconsistent premises and attempting to achieve two potentially different objectives. First, having been told by planners that cities should map out the location of urban growth before it occurs, the courts are trying to impose a process that will force communities to undertake the comprehensive advance allocation of land development opportunities. Yet while the courts are trying to achieve this idealistic vision of planning, they know that the zoning process is a shambles. Changes often result from bribes, or more benignly, from the naive belief that all development is progress, rather than from a conscious attempt to examine critically and anticipate the impact of change on the immediate area, let alone the community in general. Secondly, to protect applicants and interested third parties from this increasingly arbitrary process, courts seek to impose an adjudicatory model on zoning changes and to narrow the limits of local discretion. The apparent rationale is that if local legislative bodies are forced to articulate reasons, consistent

81. *Id.* at 408-09 (footnotes omitted). SEC v. Chenery Corp., 318 U.S. 80 (1943) invalidated an SEC order on the ground that the Commission, if acting in a judicial capacity, had to demonstrate that the transactions it sought to prohibit would be harmful. The Court suggested that harm could be presumed if the Commission was acting under its delegated rule-making powers.

patterns of decisions will emerge, factors will ripen into standards, and the risk of arbitrariness will be reduced.[82]

This tension is nowhere better illustrated than in *Fasano v. Board of County Commissioners*,[83] which began by seeking to coordinate master planning and zoning but ended by giving priority to reform of the zoning process. The county commissioners granted a zoning change for a planned-unit trailer park, following the favorable recommendation of the county planning commission. The supreme court reversed, holding that a zoning change must be proved consistent with a comprehensive plan:

> 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.[84]

After apparently adopting the Haar theory that zoning should be subordinate to planning,[85] however, the court quickly abandoned it

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82. Imposition of an adjudicatory model on these bodies may promote planning as a secondary by-product of the reform of the zoning process, but it will not be the comprehensive advance allocation of land development opportunities envisioned in master plans. Instead, decision-makers and planners will be forced to take a limited look into the future, since, before current proposals can be properly evaluated, changes in adopting land use patterns and other foreseeable impacts must be surveyed and accounted for in the decision.

83. 264 Ore. 574, 507 P.2d 23 (1973).

84. *Id.* at 582, 507 P.2d at 27; *see* ORE. REV. STAT. §§ 215.050, 215.110(1) (1972). Evolution of the Oregon supreme court's standards of judicial review of zoning decisions is traced in Sullivan, *From* Kroner *to* Fasano: *An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L.J. 358 (1974).

85. The Hawaiian supreme court has accepted the argument that zoning should be subordinated to planning in two important cases construing procedures set out in the Honolulu city-county Charter for amending the general land use plan. The Charter provides that "[n]o . . . zoning ordinance shall be initiated or adopted unless it conforms to and implements the general plan. . . ." Dalton v. City & County of Honolulu, 51 Hawaii 400, 413, 462 P.2d 199, 207 (1969). *Dalton* invalidated a three-step procedure to increase the residential densities on a 47-acre tract. The city and county first used the general procedure for amending an ordinance to amend the general plan, then to make the same change on the general plan's detailed land use map and finally to change the zoning classification from Rural Protective to Apartment District. The court held that the purpose of the

by stripping away the presumption of validity for local legislative actions. By holding map amendments to be quasi-judicial acts, the court rejected the arbitrary and capricious standard applicable to review of legislative acts. The basis of the court's reasoning was the assertion, grounded in experience but flatly at variance with generations of constitutional commentary, that "[l]ocal and small decision groups are simply not the equivalent in all respects of state and national legislatures."[86]

After adopting a procedure for future applicants,[87] the court found the staff report supporting the proposed change insufficient to meet

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Charter was to put "teeth into the requirement that the general plan be 'long-range' by providing a test for courts to use in reviewing zoning ordinances, *i.e.*, if a zoning ordinance does not 'conform to and implement' the general plan, then the city did not have the power to adopt it." *Id.* at 413, 462 P.2d at 207. Specifically the court suggested that the city had to present studies showing that the original assumptions of the plan had been re-evaluated and that the new studies were comprehensive. Thus the same procedures characterized as "safeguards" applicable to adoption of the general plan have to be followed in amending the plan. *Id.* at 416, 462 P.2d at 209.

Hall v. City & County of Honolulu, ... Hawaii ....., 530 P.2d 737 (1975), applied *Dalton* to invalidate a procedure used to shrink densities in the Waikiki-Diamond Head area of Honolulu. In 1964 the general plan designated the area primarily residential with a small portion devoted to apartment use. In 1967 the city and county plan commission began hearings on the detailed land use map and development plan for the area. Two years later the Mayor's Advisory Committee on Diamond Head recommended that 29.29 acres be acquired as a park to block a condominium. The Planning Director ultimately recommended that the general plan for the area be changed to parks and recreation, and the City Planning Commission and the City Council passed the necessary amendments. The Planning Commission approved the recommendation without a public hearing. The court held that the plan was amended in violation of the Charter provisions construed in *Dalton*. The only public hearings dealt with the detailed land use map; the court held that the map is different from the general plan because the former "*merely* provides in more detail the specific boundaries of *the various land use activities shown on the General Plan.*" *Id.* at ....., 530 P.2d at 741. The Commission must therefore hold a hearing specifically to amend the general plan and must demonstrate that the amendments are based on "[a]n updated comprehensive and long-range study of the General Plan and of any amendments thereto; . . ." *Id.*

86. 264 Ore. at 580, 507 P.2d at 26.

87. With future cases in mind, it is appropriate to add some brief remarks on questions of procedure. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.

Id. at 588, 507 P.2d at 30; *see* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130-43 (1972).

the required burden of proof.[88] The court refused to accept what it considered a generalized and conclusory argument—that the proposed use conformed to the plan—partly because the county's comprehensive plan was not in the record, thereby prohibiting adequate judicial determination of the issues.[89]

The most questionable aspect of *Fasano* is its shift of the burden of proof to the applicant seeking a change in the status quo:

> The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase. If other areas have previously been designated for the particular type of development, it must be shown why it is necessary to introduce it into an area not previously contemplated and why the property owners there should bear the burden of the departure.[90]

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88. When we apply the standards we have adopted to the present case, we find that the burden was not sustained before the commission. The record now before us is insufficient to ascertain whether there was a justifiable basis for the decision. The only evidence in the record, that of the staff report of the Washington County Planning Department, is too conclusory and superficial to support the zoning change. It merely states:

> The staff finds that the requested use does conform to the residential designation of the Plan of Development. It further finds that the proposed use reflects the urbanization of the County and the necessity to provide increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning. . . .

264 Ore. at 588-89, 507 P.2d at 30.

89. Such generalizations and conclusions, without any statement of the facts on which they are based, are insufficient to justify a change of use. Moreover, no portions of the comprehensive plan of Washington County are before us, and we feel it would be improper for us to take judicial notice of the plan without at least some reference to its specifics by counsel.

As there has not been an adequate showing that the change was in accord with the plan, or that the factors listed in ORS 215.055 were given proper consideration, the judgment is affirmed.

Id. at 589, 507 P.2d at 30; *see* ORE. REV. STAT. § 215.055 (1972).

90. 264 Ore. at 586, 507 P.2d at 29. The court acknowledged inevitable criticism from scholars who advocate flexibility and discretion for planning authorities, but in weighing the effect of making change more burdensome against the danger that zoning changes would result from private economic pressures on local governments, the court chose to protect the planning system from the latter evil:

> By treating the exercise of authority by the commission in this case as the exercise of judicial rather than of legislative authority and thus enlarging the scope of review on appeal, and by placing the burden . . . of proof upon the

This was done because the court had previously adopted the Maryland change or mistake rule.[91] *Fasano* formally abandoned the rule in favor of a standard requiring consistency with the comprehensive plan. The shift of the burden of proof, however, robs the comprehensive plan of its intended impact—shaping the community's future. An applicant for a change that conforms with the plan cannot now be assured that the change will be valid as long as the reasonableness of the plan can be defended. The applicant must, it appears, also show that the newly authorized use can only be located where the legislative body has designated in the rezoning, because no other feasible alternative site exists in the community for such a use.[92] This is the logical consequence of eliminating the presumption of validity in favor of theories demanding more intense judicial review of legislative actions. The latter are based on the constitutional theory that actions interfering with constitutional rights (here, apparently, expectations of stability) are justifiable only on the grounds that they represent the least restrictive alternative.[93]

On the other hand, under the Haar theory (that zoning should be subordinate to planning) the burden of proof logically would be on the party, whether municipality or landowner, urging a result that is at variance with the plan. *Fasano*, however, wisely rejects the Haar thesis in favor of "judicialized" proceedings that require the decision-maker to justify his decision by showing that all relevant

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one seeking change, we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions. However, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.

Id. at 587-88, 507 P.2d at 29-30.

91. Under the change or mistake rule, amendments to the existing zoning may be granted only when the applicant produces evidence of "substantial change in the character of the neighborhood where the property is located or . . . a mistake in the existing zoning classification." MD. ANN. CODE art. 66b, § 4.05(a) (1970). *See generally* 1 R. ANDERSON, THE AMERICAN LAW OF ZONING § 4.29 (1968); 1 A. & C. RATHKOPF, THE LAW OF ZONING AND PLANNING 27-13 to -23 (3d ed. 1974).

Regarding Oregon's adoption of the rule see Cunningham v. City of Brookings, 11 Ore. App. 579, 504 P.2d 760 (1972); Smith v. County of Washington, 241 Ore. 380, 406 P.2d 545 (1965); Page v. City of Portland, 178 Ore. 632, 165 P.2d 280 (1946).

92. This standard, as applied in *Fasano*, will make it unnecessarily difficult to locate planned unit development districts.

93. *See* Comment, *The Limits of Permissible Exclusion in Fiscal Zoning*, 53 B.U.L. REV. 453, 475-79 (1973).

interests have been considered and by explicitly discussing the trade-offs involved in the decision.[94] Technically, the burden of producing such a record is on the applicant. To support a favorable decision, however, he or she must demonstrate that this process has occurred. This process is likely to be fairer to all relevant interests, while simultaneously inducing modest but needed improvements in the management of change through planning.

An important question left unanswered by *Kropf, Citizens Association* and *Fasano* is whether this increased judicial scrutiny will apply to review of land use plans.[95] These cases assume that piecemeal

94. Professor Krasnowiecki has advanced a similar proposal for Maryland. He correctly argues that the "emphasis on the adoption of the plan" tends to limit the experience gained by the community in its preparation "to a particular period in the community's history and . . . tends to overemphasize the value of long range commitment to the exclusion of repeated stocktaking and reevaluation in light of changing circumstances." Krasnowiecki, Model Land Use Development Code, in Maryland Planning and Zoning Law Study Comm'n: Final Report 53, 109 (1969). He recommends that all regulatory actions be submitted to the planning staff for comment and recommendations, that plans be annually reviewed, and that "amendments which are inconsistent with the ongoing plan cannot be validly adopted until the plan is modified at its next annual review." *Id.* at 110. This limits planning to the functions of information assembly and display, pulse-taking, and feedback review, leaving policy formulation to the local legislative body or unit to whom the power has been delegated. *See* Meyerson, *Building the Middle-Range Planning Bridge for Comprehensive Planning*, 33 J. AM. INST. PLANNERS 58 (1956). *See also* Robinson, *Beyond the Middle-Range Planning Bridge*, in A READER IN PLANNING THEORY 171 (A. Faludi ed. 1973).

95. A further question, left open by *Fasano*, is whether a developer can first amend the comprehensive plan and then seek a map amendment for a use that is now consistent with the plan. A recent Oregon circuit court decision held *Fasano* equally applicable to piecemeal amendments of the comprehensive plan. Tierney v. Duris, No. 33-384, 33-943, (Wash. City Cir. Ct., March 19, 1974), reprinted in ALI-ABA, LAND USE LITIGATION: CRITICAL ISSUES FOR ATTORNEYS, DEVELOPERS, AND PUBLIC OFFICIALS 57 (1974). The developer of a small shopping center in the middle of the city's arterial highway "strip" secured an amendment to the city's comprehenisve plan in order to pave the way for a subsequent map amendment. The trial judge held that an amendment to a plan must (1) conform to the basic purpose and spirit of the plan, (2) contribute to the general welfare, and (3) be based on adequate study of the full implications of the change. He found that the change was inconsistent with ORE. REV. STAT. § 227.240 (1973), which requires that zoning regulations be "in accord with a well considered plan" and that *Fasano* requires greater justification for an amendment to the plan than the city had provided. Specifically, the trial judge held that the decision was deficient because no findings of fact had been made to support the change and, more interestingly, that the change did not conform to the basic purpose and spirit of the plan because the entire plan had been adopted only fifteen months prior to the change.

In a case decided after *Tierney* an intermediate appellate court held that ORE.

zoning changes are in fact adjudicatory actions and reviewable as such. By implication these courts assume that there is a distinction between such changes and a comprehensive zoning ordinance or land use plan, and that comprehensive zoning ordinances and land use plans would still be entitled to the presumption of validity on the grounds that they remain "true" legislative processes. The courts assume that a piecemeal change involves the particularized application of a standard, and hence is adjudicatory, but that a comprehensive ordinance or plan involves the formulation of general standards and thus is entitled to the presumption of validity. This does not follow, however, because the methodological differences between a piecemeal change and a comprehensive ordinance and plan are often insignificant. Additionally, a land use plan specific enough to guide future development by constraining the range of choices open to the implementing body is invariably the sum of numerous small-scale adjudications. The difference between planning and the map amendment process is that in the former adjudication is made unilaterally by planners with sporadic public input (although sophisticated landowners are now paying much more attention to plans); in the latter affected parties are given notice of the proposed action, even if the proceedings are not cast in an adjudicatory mold, and can contest it before some formally constituted body. Review of decisions taken in a comprehensive plan may present timing problems. Principles de-

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REV. STAT. § 227.240 (1973) was sufficiently different from *Fasano* so that the requirements were not applicable to cities. Baker v. City of Milwaukee, 17 Ore. App. 389, 520 P.2d 479 (1974). *Fasano* may rest on due process rather than statutory grounds, however, and thus be applicable to all units of government and to all piecemeal zoning adjustments. See West v. City of Astoria, ... Ore. App. ....., 524 P.2d 1216, 1223 (1974) (Schwab, C.J., concurring specially).

The Kentucky court of appeals has held that "if the legislative body makes a zoning change despite the planning commission's recommendation against it, the legislative body must make a finding of adjudicative facts from the record of a trial-type hearing held either by the planning commission or by the legislative body." Hays v. City of Winchester, 495 S.W.2d 768, 769 (Ky. 1973). *See also* City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971).

The response adopted by the Pennsylvania court to the problem of change versus stability seems more satisfactory. Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 241 A.2d 81 (1968), rejected an argument that a community could not adopt a planned unit development ordinance for a tract designated low-density residential in the plan, holding that "plans may be changed by the passage of new zoning ordinances, provided the local legislature passes the new ordinance with some demonstration of sensitivity to the community as a whole, and the impact that the new ordinance will have on this community." *Id.* at 632, 241 A.2d at 84.

veloped in the previously discussed cases apply equally to review of planning choices contained in a comprehensive land use plan as well as to piecemeal zoning or planning choices.

IV. Proper Judicial Regard for Land Use Plans

No persuasive reason exists to require that zoning changes be consistent with adopted comprehensive plans. First, the legitimacy of planning choices has not been established. Secondly, the lack of a consistent rationale for advance allocation of land development opportunities creates a substantial risk that these allocations will be both arbitrary and inefficient. The courts have, therefore, correctly viewed map amendments as *pro tanto* amendments to the land use plan. Courts also have properly reviewed zoning changes on reasonableness grounds, focusing primarily upon the foreseeable community benefits flowing from the legislative decision and on the friction between the proposed use and surrounding tracts. Further, cases such as *Fasano,* which have undertaken a reform of the zoning process, properly concentrate on confining the discretion of local legislative bodies. This is accomplished by requiring greater justification for grants or denials of rezoning rather than by broadening the discretion to plan and to impose planning choices through zoning.

I do not, however, mean to argue that planning has no utility or even that a plan's existence has no bearing on the reasonableness of a legislative choice. Obviously, planning is one useful method for identifying community objectives and adapting to future developments.[96] When planning is undertaken through an acceptable process, courts should in some instances validate choices based upon such planning. Traditional comprehensive planning, however, will play a decreasing role in the adjustment of land use conflicts; it has little to contribute to the solution of the major land use conflicts of the foreseeable future and, consequently, should not be enshrined in either enabling acts or judicial decisions. Furthermore, planning undertaken in the future will be more focused than that done in the past. Relevant criteria will be increasingly spelled out in state enabling legislation, federal land use planning assistance legislation, and local ordinances. As a result "[e]ffective plans and policies will need to

96. *See* Black, *The Comprehensive Plan,* in Principles and Practice of Urban Planning 358 (4th ed. W. Goodman & F. Freund eds. 1968).

deal less often with the results of development and far more often with the objective and constraints that shape it."[97] Planning remains relevant to two of the basic land use problems now confronting the United States—recognition of land development's environmental impact and rationalization of a free-wheeling, ad hoc, and often corrupt, decision-making process.[98]

The solution to environmental problems requires a combination of impact analysis and the withdrawal of land from development.[99] Difficult political choices must ultimately be made about how much land is to be withdrawn to enhance environmental quality. Planners have undertaken impact analysis for years but have been unsuccessful in withdrawing land from development, partly because of restrictions on use of the police power to preserve open space and partly because plans have more often projected where development should go rather than where it should not.

The thrust of recent innovations in state land use controls has been to establish and implement land withdrawal plans analogous to those

97. TASK FORCE ON LAND USE & URBAN GROWTH, *supra* note 9, at 211.

98. Two other current land use problems exist: the appropriate balance between providing adequate housing opportunities coupled with maintenance of high-amenity communities and urban neighborhoods, and the balance between growth and fiscal base. Planning is irrelevant to solving these problems because conflicts between communities claiming a right of self-determination and those claiming a right of access are fundamental value conflicts. Such clashes will have to be resolved by political decisions addressed to the questions whether decision-making power should be reallocated to new and higher units of government or whether communities can set their own quotas, and whether more precise legislative definitions of the limitations on using the police power to maintain fiscal stability are needed. *See generally* R. BABCOCK, THE ZONING GAME (1966). Only after these decisions have been made does planning become meaningful.

99. Impact analysis is not inconsistent with a comprehensive planning process since, in theory, environmental impacts would be considered in the process of preparing a plan, and the final plan would strike the necessary balance between environmental and other relevant considerations. Existence of a plan would limit impact analysis review to consideration of local effects that are not contained in the plan. *Cf.* Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Service, 487 F.2d 1029 (D.C. Cir. 1973). For a perceptive discussion of the relationship between environmental impact analysis, planning, and the efforts of the guidelines implementing the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-151 (West Supp. 1972), *amending* CAL. PUB. RES. CODE §§ 21000-151 (West 1970), to coordinate the two processes see Hagman, *supra* note 73, at 48-56. As Professor Hagman notes, coordination is necessary to maintain formalized impact assessment procedures based on the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-27 (1970), from becoming too costly and too trivial.

developed by the federal government. States have, to date, focused their innovations in land use controls on highly vulnerable resources such as wetlands. But land use plans will soon be required that classify land on the basis of its ecological carrying capacity and that specify areas to which development should be channeled.[100] This is planning, of course, but it is not the same as traditional comprehensive planning[101] because it involves the allocation of land to prevent imposition of relatively definite external costs. Resolution of these problems will provide the framework within which courts and, to a lesser extent, legislatures must struggle with the problem of deciding the appropriate weight to give previously adopted plans when reviewing specific zoning changes.

The immediate problem facing the courts, as *Fasano* indicates, is integration of prior planning choices into the rationalizaton of the decision-making process—the second of our basic land use problems. Examination of the reasons for increased judicial intervention into the decision-making process provides guidelines for courts in deciding what weight to give an adopted plan.

The case for increased judicial review of zoning ordinances is based on the widely accepted need to rationalize existing decision-making processes. As communities attempt to use zoning to attain more objectives,[102] they are departing from the limited purposes approved by the Supreme Court.[103] The resulting use of zoning to advance

100. For useful discussions of a proposal to finance withdrawals and growth containment programs by transfer of development rights see Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 124-27 (1973) (discussing problems of coordinating development rights transfer with traditional comprehensive planning); Note, *Development Rights Transfer and Landmark Preservation—Providing a Sense of Orientation*, 9 URBAN L. ANN. 131, 142-58 (1975).

A sophisticated land use plan that rates an area's capacity for development according to a number of environmental factors, such as the carrying capacity of the soil, has been prepared for the community of Medford, in southern New Jersey. CENTER FOR ECOLOGICAL RESEARCH IN PLANNING AND DESIGN, DEP'T OF LANDSCAPE ARCHITECTURE AND REGIONAL PLANNING, UNIVERSITY OF PENNSYLVANIA, MEDFORD: PERFORMANCE REQUIREMENTS FOR THE MAINTENANCE OF SOCIAL VALUES REPRESENTED BY THE NATURAL ENVIRONMENT OF MEDFORD TOWNSHIP N.J. (1974).

101. Traditional land use planning has always incorporated concepts of withdrawal such as flood-plain protection.

102. Such objectives include stabilization of the property tax base, design control, and the reservation of land for senior citizens' retirement colonies.

103. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Although the rationale of *Euclid* remains unclear, Justice Sutherland's opinion seems

the general welfare,[104] rather than to minimize friction between land uses, increases the risk that regulations will be adopted that impose costs on third parties—costs that the prohibited development would not incur. No accepted basis for imposition of such costs may exist other than as they relate to promotion of the general welfare. Conversely, ability to invoke the presumption of validity means that a community's substantial costs may be placed upon landowners, without offsetting community gains, as a result of a zoning change. Both of these situations are potentially arbitrary; judicial intervention is proper, at the least, to require that communities more consciously consider the impacts of their decisions and to limit regulations to those resting on a generally accepted basis.[105]

The theoretical basis for this judicial intervention is twofold. First, local legislative bodies are exercising delegated powers and thus are not the equivalent of state and national legislatures. Secondly,

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to limit the validity of zoning ordinances to the prevention and suppression of nuisances, with the local legislative body allowed a margin of safety in making its classifications. *See* Brief for Alfred Bettman as Amicus Curiae, reprinted in Bettman, *supra* note 25, at 157. The latest Supreme Court opinion seems to rest the zoning power on enhancement of the general welfare as much as on the suppression and prevention of nuisances. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), held constitutional a zoning ordinance that restricted occupancy in a single-family residential area to one or two unrelated individuals or any number of persons related by blood. The narrowness of the *Belle Terre* facts suggests that the issue of the limits of the zoning power is still very much open.

104. For an extraordinarily expansive reading of the general welfare as a basis for exercise of the zoning power see Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), upholding a six acre minimum lot ordinance when sanitary considerations supported, at most, a three acre minimum.

105. *Cf.* National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965):

> While recognizing this presumption [of validity], we must also appreciate the fact that zoning involves governmental restrictions upon a landowner's constitutionally guaranteed right to use his property, unfettered, except in very specific instances, by governmental restrictions. The time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial responsibility to protect the constitutional rights of individual citizens. Thus, the burden of proof imposed upon one who challenges the validity of a zoning regulation must never be made so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against the infringement of constitutionally protected rights.

The long-standing Pennsylvania policy of grounding the presumption of validity on adherence to individual initiative, *e.g.*, Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951), takes an overly narrow view of a community's police powers. *National Land*, however, arguably posits the broader principle that a community owes an individual some duty to explain the reasons for imposing a restriction on development.

since the concept of zoning contains limitations on a city's choices, a court can articulate standards to structure local discretion. In attempting to rationalize the process, courts might use adopted plans in four situations.

First, a court may wish to recognize the goal of neighborhood stability, especially in residential areas. A plan creates expectations that are entitled to some recognition, though doctrines such as the Maryland change or mistake rule and the *Fasano* approach are too rigid. Although a property owner's interest in stability can never rise to the dignity of an estoppel, a court could properly shift the burden of justifying departures from the plan that would alter the anticipated pattern in developed areas where expectations are stronger.[106] On the other hand, if the area is undeveloped it would be proper for a court to conclude that the interests of surrounding landowners are adequately protected by a site review of the project.[107]

Secondly, if a city has made a survey, attempted to allocate land among competing uses based on projected demands, and enacted the ordinance on the basis of that allocation, the underlying plan ought to be evidence of the zoning ordinance's reasonableness.[108] "The adoption of a master plan and the adherence to such a plan is not in and of itself an abuse of discretion."[109] Land reservation, however,

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106. *See* Udell v. Haas, 21 N.Y.2d 463, 470, 235 N.E.2d 897, 901, 288 N.Y.S.2d 888, 894-95 (1968). In allowing an adjoining landowner to challenge a rezoning to permit a studio for the television program "Hawaii Five-O" the Supreme Court of Hawaii stated that "an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change." East Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Hawaii 518, 521-22, 479 P.2d 796, 798 (1971).

107. Pennsylvania courts have taken this approach. *See* Doran Invs. v. Muhlenberg Township, 10 Pa. Commw. 143, 309 A.2d 450 (1973) (community cannot rely on comprehensive plan designation of area for low density to deny planned unit development application that meets all standards of the ordinance).

108. In affirming denial of a rezoning for a mobile home park in an area designated for industrial development, the Supreme Court of Kansas wrote,

> It is not confiscatory to adopt a plan for land use development and to maintain that plan for development in an area where such development is possible. To abandon such plan for a single project in light of all the circumstances presented by the evidence herein is not required. Here abandonment of the plan would create a situation where homes and children would be placed in an industrial area next to a chemical plant which emitted odors and discharged chemicals into a stagnant lagoon.

Creten v. Board of County Comm'rs, 204 Kan. 782, 788, 466 P.2d 263, 269 (1970).

109. Fontaine v. Board of County Comm'rs, 493 P.2d 670, 671 (Colo. Ct. App. 1971).

is potentially arbitrary and inefficient and must be closely watched. Beyond challenges on constitutional grounds,[110] courts should allow a landowner to assert that a reservation is too inflexible. The community must be able to respond to more pressing needs, such as the demand for apartments. In some cases courts must require the municipality to justify the projections upon which the land reservation was made.[111]

Thirdly, the converse situation, in which the applicant proposes a use consistent with the plan and is denied a zoning change, is more difficult. Because the proposed use is consistent with the plan it could be argued either that a denial is arbitrary or that the community has the burden of justifying the denial. The former is undesirable on two grounds: it is not good planning theory because it may lock a community into an undesirable earlier decision,[112] and it is poor legal theory because the community must always be capable of using the police power to adapt to changing conditions. Shifting the burden could be justified on the ground that adoption of a plan creates legitimate expectations and that both the applicant and surrounding landowners have adjusted their behavior, to the greatest extent pos-

110. *E.g.*, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), in which a zoning amendment changing property from unrestricted use to a residential district was held invalid as a substantial taking of land in violation of the fourteenth amendment when applied to property that could not be used for residential purposes in the immediate future. *Id.* at 232-33, 15 N.E.2d at 592.

111. *See* United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974). In 1972 the City adopted a master plan that designated a site sought to be used by plaintiff for a low-income housing project as a park. Plaintiff was denied the necessary zoning permission. The plan, however, was not followed in two multi-family rezonings for white developers. On the basis of this and other evidence of discrimination, the court found that the "city failed to meet its burden of proving that its refusal was necessary to promote a compelling governmental interest, and thus that the city officials have deprived the farm workers of equal protection of the law under the fourteenth amendment." 493 F.2d at 811. *Cf.* Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971).

112. "To the extent that the plan . . . is a detailed map of the land indicating specific uses, it differs hardly at all from the zoning map itself. Under these circumstances . . . the plan becomes rigid and of little use in dealing with dynamic community growth." Plager, *The Planning Land-Use Control Relationship: A Look at Some Alternatives*, 3 LAND USE CONTROLS Q. 26, 29 (1969). "It is a matter of common sense and reality that a comprehensive plan is not like the law of Medes and Persians; it must be subject to reasonable change from time to time as conditions in the area or township or a large neighborhood change." Furniss v. Lower Merion Township, 412 Pa. 404, 406, 194 A.2d 926, 927 (1963).

sible, on the assumption that the plan will be implemented as adopted.

The situation is different when the plan has been implemented in a two-stage process—adoption of the plan followed by adoption of a zoning classification consistent therewith. Since the community has not applied the plan to any specific tract, expectations are weaker. A possible solution is to shift the burden of justification and also adopt a liberal rule on what reasons are relevant in reviewing the legislative decision. The community should be able to show, not that conditions have changed or that the plan rests on a mistake, but simply that it wants to implement a different set of values.[113]

113. *Cf.* Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969). Pro-planned growth forces ousted a pro-uncontrolled development county council in an election. The lame-duck council granted a number of zoning changes that frustrated the county's policies of confining growth to wedges and corridors and surrounding satellite communities with green belts. The higher densities allowed by the lame-duck council were inconsistent with the previously-adopted master plan. The new council repealed the changes when it took office. In affirming the repeals, the court noted that the applicants "did not overcome the strong presumption that the plan was valid legislative action, a presumption buttressed in this case by reason of the fact that the plan implemented the General Plan and the Master Plan." *Id.* at 67, 245 A.2d at 706. *Accord,* Shapiro v. Montgomery County Council, 269 Md. 380, 306 A.2d 253 (1973). The result should be the same if a community with a high density non-channeled growth master plan wished to adopt a channeled growth policy and to implement it through zoning ordinances.

The Washington supreme court is moving in the opposite direction. The court has combined a rigorous standard of due process with a radical extension of the prohibition against spot zoning to enforce fidelity to land use plans designed to preserve high amenity, low density residential areas. In Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832 (1969), a small island completed, after extensive discussion and planning effort, a comprehensive zoning ordinance designed to keep its 5,500 acres for residential and recreational uses. Shortly thereafter an aluminum company successfully petitioned the planning commission and the board of county commissioners for a 470 acre industrial use rezoning. The court invalidated the rezoning on the ground that apparent fairness was lacking, in part, because the proceedings were hasty compared to the extensive consideration given to the initial ordinance. Additionally, the court found on the merits that the rezoning was spot zoning.

In Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971), an oil company was more sophisticated but equally unsuccessful. The company was smart enough to secure its map amendment in a two-stage process; first the comprehensive plan, which contained a rural-residential projection, was amended and then the map amendment was granted. The proceedings, however, were held to lack the appearance of fairness because several members of the planning commission were treated to a trip to Los Angeles to inspect the environmental controls at one of the company's existing refineries. Additionally, spot zoning was again found. *See generally* Comment, *Zoning Amendments and the Doctrine of Apparent Fairness,* 10 WILLAMETTE L.J. 336 (1974).

The Washington supreme court has, in effect, adopted the Maryland change or

Interests of the applicant and surrounding landowners in stability and predictability should not, however, be accorded decisive weight. Rather the court should recognize that these interests are adequately considered in the process of reevaluation of community objectives.

Lastly, in some instances a court might decide that the need for a plan exists and invalidate decisions as ad hoc and arbitrary if sufficient planning has not been done.[114] The essence of zoning is the resolution of competing demands for the use of space within a particular jurisdiction. Resolution of the competition requires that the decision-maker consider a reasonable number of claimants, other than the applicant, for the zoning change and project the impact of alternative uses on the surrounding area as well as the community as a whole. If the court is not satisfied that this process was undertaken, it should hold the change inconsistent with the comprehensive plan and re-

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mistake rule and extended it to situations that are arguably not traditional small-scale piecemeal rezonings but legitimate efforts by communities to respond to changed conditions. The court is formulating rigid a priori principles to decide which revisions of a comprehensive plan are and are not in the public interest. As *Chrobuck* explained:

> [W]e start with the premise that comprehensive planning and zoning proposes and imposes limitations upon free and unhampered use of private as well as public property, and when such regulations are once enacted, the indiscriminate amendment, modification or alteration thereof tends to disturb that degree of stability and continuity in the usage of land to which affected landowners are entitled to look in the orderly occupation, enjoyment and development of their properties.

Chrobuck v. Snohomish County, 78 Wash. 2d at 867-68, 480 P.2d at 495. *See also* Board of Supervisors of Fairfax County v. Snell Constr. Corp., ... Va. ....., 202 S.E.2d 889 (1974).

The Washington doctrine of apparent fairness is an example of a judicially developed moritoria procedure. The standard of care and ultimately of justification of the decision which the court has imposed on local planning commissions and legislative bodies can be justified as a means of restoring public confidence in local decision-making. "In too many localities . . . neither the procedures for determining land use nor the individuals making the decisions have the public's confidence. . . . The decision-making process must be fair not only in fact; it must also be perceived as fair by the builders, property owners, and others whom it affects." TASK FORCE ON LAND USE & URBAN GROWTH, *supra* note 9, at 215-14.

114. This is reasonable since, as Professor Hagman has argued, the crucial factor is not the existence of a comprehensive plan but a useful information base for making short-range projections to aid decision-makers. Hagman, *supra* note 73, at 50.

In environmental litigation it has been argued that when environmental impacts have been inadequately considered, the decision should be to read the enabling legislation narrowly and to remand the decision to the legislature for a more democratic input. Similar theories, developed to justify remands to the agency involved, seem applicable to judicial review of zoning changes.

quire the community to justify the need for departure from a previously adopted plan.

CONCLUSION

In *Golden v. Planning Board*[115] Judge Scileppi wrote,

> The evolution of more sophisticated efforts to contend with the increasing complexities of urban and suburban growth has been met by a corresponding reluctance upon the part of the judiciary to substitute its judgment as to the plan's over-all effectiveness for the considered deliberations of its progenitors. . . . Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning, and thus well within the legislative prerogative, not lightly to be impeded . . . .[116]

Such reasoning is incorrect. The planning process does not make a land use decision legitimate. Allocation of land among competing uses involves difficult value choices that cannot be resolved by rational processes. Additionally, the impact of planning choices often falls unevenly on different community groups. Courts must, therefore, continue to play their traditional role of adjusting the claims of diverse parties by scrutinizing the reasonableness of local decision-making. The fact that decisions were made pursuant to a prior planning process is some evidence of their reasonableness but the weight to attach to planning is a decision a court must make in light of all the circumstances.

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115. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

116. *Id.* at 376-77, 285 N.E.2d at 301, 334 N.Y.S.2d at 150-51.