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# The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute

Stuart Meck<sup>\*</sup>

The desirability of a requirement that zoning and related land use controls, like subdivision regulations, must be consistent with an independently adopted local comprehensive plan is a question that has occupied state legislators, judges, professional planners, and attorneys since the 1920s. Not surprisingly, the subject of this symposium issue of the *Journal of Law and Policy*, Professor Daniel R. Mandelker, whose academic and professional work commands such widespread affection, influence, and high regard,<sup>1</sup> confronted this particular question in a 1976 article in the *Michigan Law Review*.<sup>2</sup> The article dealt with the enlarged role of the local comprehensive plan—a general policy document containing maps and text that is intended to guide public and private development—in the local land use control process.

This commentary revisits that article as well as some related

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1. For a discussion of the impact of Professor Mandelker's work on the direction of this author's career, see Stuart Meck, *The Prescience and Centrality of Land Use Law & Zoning Digest*, 51 LAND USE L. & ZONING DIG. 15, 15-16 (1999) (discussing the impact of reading Mandelker's article, *Control of Competition as a Proper Purpose of Zoning*, 14 ZONING DIG. 33 (1962), while a graduate student in city planning).

2. See Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976). This article had its origins in a paper prepared by Mandelker, who was a consultant to the Advisory Commission on Housing and Urban Growth of the American Bar Association. Portions of the article were incorporated into the Commission's report, which was funded by the U.S. Department of Housing and Urban Development. See HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW 325-410 (Richard P. Fishman ed., 1978).

articles and cases on the topic,<sup>3</sup> but concentrates on statutes. It critically reviews the history of the “in accordance with a comprehensive plan” language in the Standard State Zoning Enabling Act and its companion, the Standard City Planning Enabling Act, drafted by an advisory committee of the U.S. Department of Commerce in the 1920s. It then discusses contemporary consistency requirements in state planning and land use enabling statutes. Finally, it presents a model statute intended to clarify the relationship between the local comprehensive plan and various types of land use decisions and actions. The model statute that is presented is part of a larger effort by the American Planning Association, called Growing Smart<sup>SM</sup>, which is intended to draft the next generation of model planning and zoning enabling legislation for the U.S.

## I. THE CONSISTENCY DOCTRINE: THE ROLE OF THE STANDARD ACTS

Many planning and zoning statutes in the U.S. are either descended from or influenced by two model acts, which were drafted by an advisory committee of the U.S. Department of Commerce in

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3. See JOSEPH F. DIMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980); Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154 (1955); Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW AND CONTEMP. PROBS. 353 (1955); EDITH NETTER & JOHN VRANICAR, *LINKING PLANS AND REGULATIONS: LOCAL RESPONSES TO CONSISTENCY LAWS IN CALIFORNIA AND FLORIDA*, PLANNING ADVISORY SERVICE REPORT NO. 363 (1981); Charles L. Siemon, *The Paradox of “In Accordance with a Comprehensive Plan” and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987); Edward J. Sullivan & Lawrence Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975); Edward J. Sullivan & Thomas G. Pelham, *The Evolving Role of the Comprehensive Plan*, 29 URB. LAW. 363 (1997); Edward J. Sullivan, *The Role of the Comprehensive Plan*, 31 URB. LAW. 915 (1999); A. Dan Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69 (1975); and Robert Lincoln, *Implementing the Consistency Doctrine*, in *MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART<sup>SM</sup> WORKING PAPERS*, PLANNING ADVISORY SERVICE REPORT NO. 462/463 (1996). For a review of the case law on the consistency issue, see NORMAN WILLIAMS, 1 *AMERICAN LAND PLANNING LAW* 521-26 (1988 and 1999 Supp.) (highly recommended); DANIEL R. MANDELKER, *LAND USE LAW*, 4th ed. §§ 3.13 - 3.15 (1997 and 1999 Supp.); PATRICK J. ROHAN, 5 *ZONING AND LAND USE CONTROLS* § 32A.05[1] (Eric Damian Kelly ed., 1999). For a good appraisal of a Florida decision on consistency, see Thomas G. Pelham, *Quasi-Judicial Rezoning: A Commentary on the Snyder Decision and the Consistency Doctrine*, 9 J. LAND USE & ENVTL. L. 243 (1994) (analyzing *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993)).

the 1920s, appointed by Herbert Hoover, then Commerce Secretary and later President. Hoover was interested in ensuring that municipal governments in the U.S. had adequate tools to cope with the tremendous wave of urbanization then facing American cities, tools that would avoid the mistakes of the past. He also favored zoning as a way of protecting private investment in homes from commercial and industrial intrusions. He believed that one way of doing this was for the Commerce Department to promulgate model statutes that could be adopted by states.<sup>4</sup>

The results of Hoover's interest and initiative were the Standard State Zoning Enabling Act (SZE), which appeared in various drafts from 1922 to 1926,<sup>5</sup> and the Standard City Planning Enabling Act (SCPEA),<sup>6</sup> which was published in 1928. The SZE was intended to delegate the state's police power to municipalities in order to remove any question over their authority to enact zoning ordinances. The SZE contained procedures for establishing and amending zoning ordinances, and it authorized a temporary zoning commission in the municipality to recommend to the local legislative body the proposed zoning district boundaries and the proposed written text of the ordinance. The zoning commission was to go out of existence after the initial ordinance was enacted. A board of adjustment was to hear appeals in connection with the enforcement and interpretation of the zoning code. The board was an independent body given the authority to grant variances—minor departures from the terms of the zoning ordinance—and to allow special exceptions (also known as conditional uses) in a zone where certain criteria were satisfied.

The SCPEA covered six subjects: (1) the organization and power of the municipal planning commission, which was directed to prepare and adopt a "master plan"; (2) the content of the master plan for the physical development of the territory; (3) a provision for adoption of a master street plan by the governing body with control of private building in mapped, but unopened streets; (4) a provision for

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4. See Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3 (1996).

5. A STANDARD STATE ZONING ENABLING ACT (SZE) (U.S. Dept. of Commerce 1926 rev'd ed.).

6. A STANDARD CITY PLANNING ENABLING ACT (SCPEA) (U.S. Dept. of Commerce 1928).

approval of all public improvements by the planning commission; (5) control of private subdivision of land; and (6) a provision for the establishment of a regional planning commission and a regional plan.

Section 3 of the SZEА contained what Professor Mandelker has characterized as “enigmatic language.”<sup>7</sup> It stated that “[s]uch [zoning] regulations shall be made in accordance with a comprehensive plan.” The term “comprehensive plan” was not defined. Instead, a footnote to Section 3 attempted to clarify the term: “This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.”<sup>8</sup> Beyond that the SZEА did not provide any substantive guidance on the nature of the “comprehensive study,” who was to prepare it, or what role such a study had in the continuing administration of the zoning ordinance.

As noted, the companion model, the SCPEА, authorized the adoption of a master plan in Section 6 and included a “zoning plan” as an element (the SZEА used the same term), along with other components of the plan (various types of capital improvements, streets, and parks). However, none of these elements were mandatory, including the preparation of the master plan.

Professor Mandelker has observed that the “in accordance with a comprehensive plan” language, at first blush, “might have banned zoning in the absence of a comprehensive plan.” The clarifying notes to Section 3 of the SZEА suggest that “zoning was to be undertaken on the basis of a comprehensive review of local conditions, not that the preparation of an independent comprehensive plan was intended as a condition to the exercise of the zoning power.”<sup>9</sup> He also observed that, because the SZEА was drafted before the planning act, there was no statutory planning process, at the time of the SZEА’s publication, to which zoning could be related. In addition, when the SCPEА was finally published, it made local planning optional and advisory, rather than mandatory and binding.<sup>10</sup> As a consequence,

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7. Mandelker, *supra* note 2, at 902.

8. SZEА n.22.

9. Mandelker, *supra* note 2, at 902.

10. The exception in the SCPEА is the requirement that before a municipal planning commission could review and approve subdivision plats, a “major street plan” had to be adopted and it is clear that such a plan was an element of the master plan. SCPEА, Sec. 13. See Mandelker, *supra* note 2, at 903.

Mandelker concluded, “the planning and zoning acts fail to define the zoning plan and leave its relationship to the zoning process unclear.”<sup>11</sup>

Mandelker is correct in terms of the impact of the acts. However, there is another possible explanation that suggests that the requirement of an independently prepared comprehensive study, as a backdrop to the preparation of the zoning regulations, was in fact in the minds, if not the pens, of the drafters. This determination was reached by this author in a review of unpublished materials of the advisory committee that drafted the two acts as well as materials on planning and land use controls from the 1920s. This explanation implies that court decisions that held that such a requirement was not contemplated by the act but instead could be found in the text or maps of the zoning ordinance were mistaken.

The SZEA’s principal drafter was Edward M. Bassett, a New York City attorney who was chair of the committee that prepared the original proposal for a zoning ordinance in 1916 and later general counsel for the city’s zoning committee.<sup>12</sup> Bassett drew on his New York City experience in drafting the SZEA, and it was he who was in control of much of the process by virtue of his strong personality.

The SZEA went through a number of drafts, with Bassett doing the work and responding to other members of the advisory committee. In a third draft prepared in 1922, “important language appeared for the first time. That was that ‘such [zoning] regulations shall be made in accordance with a well-considered plan.’”<sup>13</sup> The phrase “well-considered plan” was taken from a section of the New York City charter that authorized the enactment of zoning by the city’s legislative body. The “well-considered plan” language was the requirement for a separate comprehensive study that New York City’s Commission on Building Districts and Restrictions eventually prepared to provide a rationale for the zoning code, the first in the

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11. Mandelker, *supra* note 2, at 904.

12. This account of the involvement of Edward Bassett and Harland Bartholomew in the drafting of the “in accordance with a comprehensive plan” language appears in somewhat different form in STUART MECK & KENNETH PEARLMAN, *OHIO PLANNING AND ZONING LAW* § 4.37.1 (1999).

13. Knack et al., *supra* note 4, at 5.

nation.<sup>14</sup> That study was intended to create the record for zoning in New York, should it be challenged. Containing maps and photographs the study documented the conditions that formally justified the need for zoning: streets that were congested by cars, trucks, and horse-drawn vehicles; buildings that were clustered too close together and positioned so that sunlight could not reach into them; widespread conflicts between uses, including problems associated with noise, odor, dust, access by delivery vehicles, and the general invasion of nonresidential uses (such as factories and junk shops) into residential areas; lost open spaces; and apartments encroaching into sections of the city dominated by detached, single-family housing.

The U.S. Department of Commerce staff circulated the SZEA's third draft to a number of outside reviewers to assist the advisory committee. Sometime in 1922 the staff assembled the comments in a memorandum to the committee. One outside reviewer was Harland Bartholomew, a nationally-famed St. Louis planning consultant. In his comments, Bartholomew recommended to the advisory committee "that the phrase 'well-considered plan' be changed to 'comprehensive city plan.'" Bassett responded by scratching out [on a draft] the more innocuous term and penciling in "'comprehensive'—leaving out 'city.'"<sup>15</sup> The result was the phrase "in accordance with a comprehensive plan."<sup>16</sup>

It should be emphasized that planning and land use controls were in their formative years in the 1920s. Moreover, the preparation of the SZEA was a hasty and relatively low-budget effort by a small group, whose members were mainly concentrated on the east coast of the U.S. Bassett was dogmatic in his belief that enabling legislation

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14. The New York City charter language stated: "The board [of estimate and apportionment] shall give reasonable consideration, among other things to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development *in accord with a well-considered plan*" (emphasis added). Section 242b, reprinted in COMMISSION ON BUILDING DISTRICTS & RESTRICTIONS, FINAL REPORT, at 46 (1916).

15. Knack et al., *supra* note 4, at 5. Bartholomew's comments appear in the U.S. Department of Commerce memorandum, circa 1922, titled "Comments by Zoners," which is on file with the author (as is the marked-up third draft of the SZEA). See Figure 1.

16. *Id.*

should simply enable and not be terribly directive.<sup>17</sup> Consequently, the SZEA lacks definitions and is devoid of substantive direction in the preparation of the zoning plan. Bassett believed, in this author's opinion, that the courts, in interpreting the model act, would provide that guidance on a case-by-case basis.

Absent a definition, of what was a "comprehensive plan" sufficient to support a zoning ordinance to consist? Active in the preparation of plans and zoning ordinances throughout the country, consultant Harland Bartholomew subsequently explained the type of supporting study or plan that he had in mind in a paper he delivered in 1928 at the National Conference on City Planning in New York City. Referring to the "in accordance with a comprehensive plan" and related language in the SZEA, he cataloged a series of considerations and issues that could well be a scope of work or a description for a land use element of a modern-day comprehensive plan, even though Bartholomew was referring to the analytical backdrop for a zoning plan. He listed the following "Studies to be Made in Advance of the Preparation of a Zoning Ordinance": existing use of land and buildings, new buildings erected by five-year periods, building heights, lot widths, front yards, population density, population distribution, topography, and computation of areas for different land uses. Bartholomew added:

In addition to these studies there should be available a major street plan, a transit plan, a rail and water transportation plan and a park and recreation plan; in other words, a comprehensive city plan. Without such a comprehensive city plan, the framers of the zoning plan must make numerous assumptions regarding the future of the city in respect to all of these matters without the benefit of detailed information and study. Zoning is but one element of a comprehensive plan. It

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17. Knack et al., *supra* note 4, at 4.



Figure 1—Excerpt from Draft of Standard State Zoning Enabling Act, circa 1922, showing Edward M. Bassett's handwritten Changes to "in accordance" language

Source: Papers of Edward M. Bassett, Rare and Manuscript Collections, Carl A. Kroch Library, Cornell University Library, Ithaca, New York.

can neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan

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Bartholomew clearly was thinking of a study that looked not only at existing conditions but also at potential future ones as well. “Two fundamental considerations,” he observed, would need evaluation in the formulation of the zoning plan: “1. How much area is needed for each broad type of use and how shall it be arranged or balanced in any given community? 2. What regulations are needed in the several use districts to afford good relations between individual structures.”<sup>19</sup> Thus, Bartholomew’s paper supports the notion that the zoning plan was to be grounded in separate technical reports that documented its rationale with quantitative and qualitative analyses of community growth and current and future land use relationships, preferably taking into account the impact of proposals for future public improvements. In short, he was talking about a separate document that was a plan.

A 1931 pamphlet, *The Preparation of Zoning Ordinances*, also by the advisory committee that drafted the SZEA and SCPEA and published by the Commerce Department, confirms Bartholomew’s views. The pamphlet was intended to advise municipalities on formulating zoning ordinances, especially for the first time. In its discussion of the role of the zoning commission, the temporary body whose job it was to develop the zoning plan, the advisory committee noted that the commission was to conduct a “thorough study” that “will cover the physical characteristics of the various sections of the city, the probably future of each section, as shown by the present trend of development, and the development likely to result from the

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18. Harland Bartholomew, *What is Comprehensive Zoning?*, in *PLANNING PROBLEMS OF TOWN, CITY AND REGION: PAPERS AND DISCUSSIONS AT THE TWENTIETH NATIONAL CONFERENCE ON CITY PLANNING* 47, 50 (1928). The SZEA, in a footnote, reflected this philosophy and suggested that the city planning commission, rather than a temporary zoning commission, be charged with developing the zoning plan: “It is highly desirable that all zoning schemes be worked out as an integral part of the city plan. For this reason, the city plan commission, preferably, should be intrusted with the making of the zoning plan.” SZEA n.41.

19. Bartholomew, *supra* note 18, at 51. See also THEODORA KIMBALL HUBBARD & HENRY VINCENT HUBBARD, *OUR CITIES TO-DAY AND TO-MORROW: A SURVEY OF PLANNING AND ZONING PROGRESS IN THE UNITED STATES* 109-110 (1929) (discussion of elements of a comprehensive plan, including a “zoning plan” similar to that described by Bartholomew).

contemplated control, as well as the present and probable future needs of each section and of the city as a whole.”<sup>20</sup>

This historical backdrop suggests that the preparation of a independent plan or study should be a condition precedent to the adoption of a zoning ordinance. Nonetheless, the “in accordance” language continued to cause problems in land use litigation. Many ordinances were developed without the formulation of any plan or study, much less one that was comprehensive, and courts continued to uphold them.<sup>21</sup> Despite the ambiguity, the “in accordance” language is still found in the enabling legislation of many states.<sup>22</sup>

Attorneys Edward Sullivan and Thomas Pelham acknowledge this in a journal article:

[M]ost localities either did not have a plan, or would give that plan no credence in the adoption of amendment of their zoning

20. THE PREPARATION OF ZONING ORDINANCES: A GUIDE FOR MUNICIPAL OFFICIALS AND OTHERS IN THE ARRANGEMENT OF PROVISIONS IN ZONING REGULATIONS, BH16, 4 (U.S. Dept. of Commerce, Bureau of Standards 1931).

21. This was first documented by Professor Charles Haar in a famous and often cited article, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154 (1955).

22. A sampling of statutes where the phrase “in accordance with a comprehensive plan” appears in connection with the authorization of zoning for certain local governments includes the following: ALA. CODE § 11-52-72 (1994) (counties and municipalities); COLO. REV. STAT. ANN. § 31-23-303 (West Supp. 1999) (cities and towns); CONN. GEN. STAT. ANN. § 8-2 (West Supp. 1999) (cities, towns, and boroughs); DEL. CODE ANN. tit. 22, § 303 (1997) (cities); IOWA CODE ANN. § 335.5 (West 1999) (counties), § 414.3 (West 1999) (cities); LA. REV. STAT. ANN. § 33:4723 (West 1988) (cities); MISS. CODE ANN. § 17-1-9 (1995) (cities); MO. ANN. STAT. § 89.040 (West 1989) (cities, towns, villages); N.C. GEN. STAT. § 153A-341 (LEXIS 1999) (counties); N.D. CENT. CODE § 11-33-03 (Lexis Supp. 1999) (counties); N.M. STAT. ANN. § 3-21-5 (Michie 1978) (cities and counties); OHIO REV. CODE ANN. § 303.02 (West 1994) (counties), § 519.02 (West 1994) (townships). Alaska’s statute includes the “in accordance” language but refers to a comprehensive plan, defined in a separate section, clarifying that the plan is to be a separate document consisting of a number of required elements. ALASKA STAT. § 29.40.040 (Lexis 1998) (citing to § 29.40.0303 (municipalities) (1999)). New York’s zoning enabling legislation for towns does the same thing. MCKINNEY’S TOWN LAW § 263 (West 1987) (zoning), § 272-a (West Supp. 1999) (town comprehensive plan). The statute describing the “town comprehensive plan” requires that “[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.” *Id.* at § 272-a-11(a). *See also* MONT. CODE ANN. § 76-2-203(1) (counties) and 76-2-304(1) (cities) (1999) (providing that “[z]oning regulations must be made in accordance with the [or “a”] growth policy . . .”). A “growth policy” means and is synonymous with a comprehensive development plan, master plan, or comprehensive plan that meets statutory requirements. *Id.* § 76-1-103(4). The Montana zoning statutes were amended in 1999 to replace the term “comprehensive development plan” with “growth policy.” Ch. 582, MONT. L. 1999.

regulations. When faced with the prospect of enforcing this section [the “in accordance” language] or finding zoning ordinances invalid, courts “fudged” and found the comprehensive plan in the overview of the local zoning maps. This “saved” the zoning ordinance in the particular case but provided no standard for future cases, as the amended zoning maps would always be in accordance with themselves.<sup>23</sup>

The majority view in the U.S. is that the adoption of a comprehensive plan is not a statutory prerequisite to the adoption or administration of zoning ordinances.<sup>24</sup> As Sullivan and Pelham note, these cases often hold that the “comprehensive plan” is found implicitly embedded within the zoning ordinance text and map. A minority of states have taken the opposite position—that adoption of a comprehensive plan is a condition precedent and zoning must be consistent with the plan.<sup>25</sup> Had the SZEA been clearer in its

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23. Edward J. Sullivan & Thomas G. Pelham, *The Evolving Role of the Comprehensive Plan*, 29 URB. LAW. 363, 364 (1997).

24. See *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 8 (N.J. 1957); *Theobald v. Board of County Comm’rs, Summit County*, 644 P.2d 942, 949 (Colo. 1982) (*but cf.* *Condiotti v. Board of County Comm’rs of the County of La Plata*, 983 P.2d 184 (Colo. 1999)); *Furtney v. Simsbury Zoning Comm’n*, 271 A.2d 319, 325 (Conn. 1970); *Dawson Enter., Inc. v. Blaine County*, 567 P.2d 1257, 1262 (Idaho 1977), *superseded by statute as stated in State ex rel.; Chiavola v. Village of Oakwood*, 886 S.W. 2d 74, 80 (Mo. Ct. App. 1994); *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993); *Nottingham Village, Inc. v. Baltimore County*, 292 A.2d 680, 688 (Md. 1972); *Udell v. Haas*, 235 N.E.2d 897 (1968); *Cleaver v. Board of Adjustment of Tredyffrin Twp.*, 200 A.2d 408, 413 (Pa. 1964); *Hadley v. Harold Realty Co.*, 198 A.2d 149, 152 (R.I. 1964); *West Hill Citizens for Controlled Development Density v. King County Council*, 627 P.2d 1002, 1005 (Wash. 1981); and *Bell v. City of Elkhorn*, 364 N.W.2d 144, 148 (Wis. 1985). See also 364 N.W. 2d at 147 (quoting Daniel R. Mandelker, *LAND USE LAW*, § 3.14 at 57 (1982)). Decisions from New Jersey, Rhode Island, Washington, and Wisconsin may have been superseded by subsequent statutory changes requiring consistency with a separate plan, in the author’s opinion.

25. *Fasano v. Board of County Comm’rs of Washington County*, 507 P.2d 23, 28 (Or. 1973), *superseded by statute as stated in Menges v. Board of County Comm’rs of Jackson County*, 606 P.2d. 681 (Or. 1980); *Green v. County Council of Sussex County*, 508 A.2d 882 (Del. Ch. 1986) (citing Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976)); *Machado v. Musgrove*, 519 So. 2d 629, 633 (Fla. Dist. Ct. App. 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988); *Baker v. City of Milkwauckie*, 533 P.2d 772, 777 (1975); *Village of McGrew v. Steidley*, 305 N.W.2d 627, 632-33 (1981); *Love v. Board of County Comm’rs of Bingham County*, 671 P.2d 471, 472 (Idaho 1983) (construing IDAHO CODE, § 67-6511, which provides that “the zoning districts shall be in accordance with [the policies set forth in] the adopted [comprehensive] plan”). See also IDAHO CODE § 67-6508 (1989), which provides: “It shall be the duty of the planning or planning and

formulation of the "in accordance" language, describing the components of the plan in Bartholomew's words, the result might have been different.

## II. CONTEMPORARY LEGISLATIVE REQUIREMENTS FOR CONSISTENCY

As states have revised their planning and zoning legislation, the modern tendency has been to make the preparation of a comprehensive plan mandatory (or mandatory for certain classes of governments, such as for urbanized or rapidly growing counties, and the cities within them, in Washington state), requiring that zoning ordinances be based on a separately prepared and adopted plan and, in some cases, providing a statutory test to gauge consistency. This section reviews a sampling of statutes in twelve states. These laws attempt, in varying degrees, to overcome the ambiguity created by the SZEAs' "in accordance with a comprehensive plan" language.

### A. Arizona

Arizona requires that "[a]ll zoning and rezoning ordinances or regulations adopted . . . shall be consistent with and conform to the adopted general plan of the municipality, if any" that is adopted pursuant to state statute.<sup>26</sup> In the event of uncertainty, such zoning or rezoning ordinances "shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and

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zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan." In Montana, adoption of a comprehensive development plan is a condition precedent to the adoption of permanent zoning regulations and a zoning ordinance must "at least substantially comply" with the plan. *Little v. Board of County Comm'rs of Flathead County*, 631 P.2d 1282, 1291, 1293 (1981). Piecemeal amendment via a "local vicinity plan" that is inconsistent with the master plan is disfavored. *Ash Grove Cement Company v. Jefferson County*, 943 P.2d 84 (1997). The *Ash Grove* decision and a concurring opinion quote and/or cite Professor Mandelker, 943 P.2d at 499 (citing and quoting Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 946 (1976)), and 943 P.2d at 501 (citing same article) (Leapheart, and Nelson, JJ., specially concurring). See also discussion of changes to Montana zoning statutes *supra* note 22.

26. AZ. REV. STAT. ANN. § 9-462.01(F) (West 1999).

applicable elements of the general plan.”<sup>27</sup> A zoning or rezoning ordinance conforms with the land use element of the general plan “if it proposes land uses, densities or intensities within the range of identified uses, densities and intensities of the land use element of the general plan.”<sup>28</sup> Thus, the Arizona statutes not only provide for consistency and conformity for zoning and rezoning ordinances, but they also describe how consistency and conformity are to be ascertained by the general public and, presumably, by a reviewing court.

### *B. California*

California, which requires cities and counties to adopt general plans, requires the zoning ordinances of those local governments to be consistent with the general plan.<sup>29</sup> A zoning ordinance is consistent only if it meets the following two conditions: (1) the city or county has officially adopted such a plan and (2) the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.<sup>30</sup>

In the event the zoning ordinance becomes inconsistent with a general plan because of an amendment to the plan or a plan element, the statute requires that the zoning ordinance must be amended within a reasonable time so that it is consistent with the general plan as amended.<sup>31</sup> The statute also authorizes residents or property owners to initiate a suit that challenges a new zoning ordinance or amendment that it not consistent with the plan, provided such suit is brought within ninety days of the enactment of the ordinance or amendment.<sup>32</sup>

### *C. Delaware*

In its “Quality of Life Act of 1988,” that applies only to New

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27. *Id.*

28. *Id.*

29. CAL. GOV'T CODE ANN. § 65350 (West 1997).

30. *Id.* § 65860(a).

31. *Id.* § 65860(c).

32. *Id.* at § 65860(b).

Castle County,<sup>33</sup> Delaware requires the preparation of a comprehensive plan, which includes a future land use plan element and a map or map series that depicts future land uses.<sup>34</sup> Once the plan, element, or portion thereof has been adopted by the county council, then “[t]he land use map or map series forming part of the comprehensive plan . . . shall have the force of law, and no development . . . shall be permitted except in conformity with the land use map or map series and with county land development regulations enacted to implement the other elements of the adopted comprehensive plan.”<sup>35</sup>

The Delaware statute contains a form of vested rights that applies to the comprehensive plan and land development regulations: “Any application for a development permit filed or submitted prior to adoption or amendment . . . of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application.”<sup>36</sup> This language would appear to bar the local government from delaying consideration of the development permit application on the basis of a pending comprehensive plan or amendment.

#### *D. Florida*

Florida has extensive requirements for consistency. In Florida, counties, municipalities, and special districts must prepare and adopt comprehensive plans meeting state requirements.<sup>37</sup> The consistency provisions apply to development undertaken by governmental agencies and to land development regulations. Once a comprehensive plan element or portion thereof has been adopted, “all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or

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33. DEL. CODE ANN. tit. ix, § 2653(b), § 2656 (West 1999). The land use element must include a map or map series that shows the future location, distribution, and extent of various categories of future land use, describing land uses by density or intensity. *Id.* § 2656(g)(1).

34. *Id.* § 2651(a), § 2659(a).

35. *Id.* § 2651(b).

36. *Id.* § 2659(c).

37. FLA. STAT. ANN. § 163.3167(2), (4) (West 1990).

element shall be consistent with such plan or element. . . .”<sup>38</sup> Florida statutes require that “[a]ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof, and any land development regulations existing at the time of adoption which are not consistent with the adopted comprehensive plan, or element or portion thereof, shall be amended so as to be consistent.”<sup>39</sup>

Florida includes in its statutes tests for determining consistency for development orders,<sup>40</sup> land development regulations, and development:

(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.<sup>41</sup>

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.<sup>42</sup>

Florida’s laws also provide guidance to the courts with regard to how the legislature intended the consistency requirement to be interpreted. In reviewing local governmental action or development regulations under the statute:

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38. *Id.* § 163.3194(1)(a).

39. *Id.* § 163.3194(1)(b).

40. A “development order” is defined as “any order granting, denying, or granting with conditions an application for a development permit.” FLA. STAT. ANN. § 163.3164(6) (West 1990).

41. *Id.* § 163.3194(3)(a).

42. *Id.* § 163.3194(3)(b).



[A court] may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.<sup>43</sup>

#### *E. Kentucky*

Kentucky describes a comprehensive plan in its statutes,<sup>44</sup> but allows a city or county to adopt an interim zoning ordinance after the planning commission and appropriate legislative bodies have adopted a statement of goals and objectives that is to be part of the plan and after the planning commission has adopted at least the land use element of the plan.<sup>45</sup> Interim regulations can have force for no longer than twelve months.<sup>46</sup> During this period the planning commission is to adopt the remainder of the elements of the comprehensive plan, and when all of the elements of the plan have been properly adopted, permanent zoning regulations can then be implemented.<sup>47</sup>

The Kentucky consistency requirement specifically applies to zoning map amendments and requires the planning commission or city or county legislative body to make findings to support these conclusions.<sup>48</sup>

Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find

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43. *Id.* § 163.3194(4)(a).

44. KY. REV. STAT. ANN. § 100.187 (Michie 1993).

45. *Id.* § 100.201(1).

46. *Id.*

47. *Id.* § 100.201.

48. *City of Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971).

that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that one (1) or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court:

(a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate;

(b) That there have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.<sup>49</sup>

#### *F. Maine*

Maine's statutes require that a zoning ordinance, which must include a zoning map, "must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body."<sup>50</sup> The Maine statutes contain a detailed description of the comprehensive plan and its elements.<sup>51</sup>

#### *G. Nebraska*

Nebraska's consistency requirement applies only to counties. It states that "[z]oning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations."<sup>52</sup> The statute continues, requiring that the zoning regulations "shall be consistent with the

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49. KY. REV. STAT. ANN. § 100.213(1) (Michie 1993).

50. ME. REV. STAT. ANN. tit. 30-A, § 4352.2 (West 1996).

51. *Id.* tit. 30-A, § 4326.

52. NEB. REV. STAT. § 23-114.03 (1997). The requirements for a comprehensive development plan are described in § 23-174.05. The county planning director is responsible for preparing the plan, which is reviewed by the planning commission and the county board of commissioners that shall adopt or reject such a plan in whole or in part with or without modifications. *Id.* § 23-174.06.

comprehensive development plan and designed for the purpose of promoting the health, safety . . . and welfare of the . . . inhabitants of Nebraska, including . . . specific [zoning] purposes.<sup>53</sup>

#### *H. New Jersey*

New Jersey describes its comprehensive plan as a “master plan” and provides that a governing body may adopt or amend a zoning ordinance

after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements. . . .<sup>54</sup>

However, the governing body may adopt “a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance.”<sup>55</sup>

#### *I. Rhode Island*

Rhode Island requires all of its thirty-nine cities and towns to adopt comprehensive plans with a number of required elements.<sup>56</sup> To eliminate any ambiguity over the relationships between the plan and zoning, the zoning enabling legislation defines a comprehensive plan as a document “to which any zoning adopted pursuant to this chapter [R.I. Gen. Laws, tit. 45, Ch. 24] shall be in compliance.”<sup>57</sup> Further,

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53. *Id.* § 23-114.03. The statute lists fourteen zoning purposes.

54. N.J. STAT. ANN. § 40:55D-62(a) (West 1999).

55. *Id.*

56. R.I. GEN. LAWS § 45-22.2-2 (Lexis 1999).

57. *Id.* § 45-24-31(16).

the statute requires that “[a] zoning ordinance adopted or amended pursuant to this chapter shall include a statement that the zoning ordinance is consistent with the comprehensive plan. . . .”<sup>58</sup> This would suggest that any map or text amendment would require such a determination, rather than simply a boiler-plate finding in connection with the adoption of the original zoning ordinance.

### *J. Oregon*

Oregon’s consistency requirements are part of a state-administered land use planning system that requires that cities and counties adopt comprehensive plans. A state land conservation and development commission (with the assistance of the state development of land conservation and development) reviews these plans to determine whether they properly implement a series of nineteen state goals and comply with other state requirements, which are set forth in administrative rules.<sup>59</sup> Once the state determines that the plans pass muster, it certifies or “acknowledges” them.

The state’s consistency requirements require that the adopted comprehensive plan “be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans.”<sup>60</sup> Such plans “[s]hall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through [them].”<sup>61</sup>

### *K. Washington*

Under the state Growth Management Act, Washington requires counties (as well as the cities within them) of a certain population size or that have experienced certain percentages of population increases over the previous decade to prepare comprehensive plans.<sup>62</sup>

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58. *Id.* § 45-24-34.

59. The Oregon planning statutes appear in OR. REV. STAT. ch. 197 (1997); the administrative rules appear in ORE. ADMIN. R. ch. 660 (1999). The nineteen state planning goals appear in OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, OREGON’S STATEWIDE PLANNING GOALS (1995).

60. OR. REV. STAT. § 197.010(1)(c) (1997).

61. *Id.* § 197.010 (1)(d).

62. WASH. REV. CODE ANN. § 36.70A.040(1) (West 1999).

The development regulations must be “consistent with and implement the comprehensive plan.”<sup>63</sup> A similar requirement applies to counties and cities that are not required to plan under the Growth Management Act.<sup>64</sup>

### *L. Wisconsin*

A revision to Wisconsin’s planning statutes in 1999 revamped the description of a comprehensive plan, adding a series of mandatory elements and imposing a consistency requirement, not only for zoning actions but also for a variety of related governmental decisions.<sup>65</sup> The comprehensive plan should include the following elements: issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; intergovernmental cooperation; land use; and implementation.<sup>66</sup> The land use element, for example, is to be “a compilation of objectives, policies, goals, maps, and programs to guide the future development and redevelopment of public and private property. . . . [It] shall also include a series of maps that shows . . . the general location of future land uses by net density or other classifications.”<sup>67</sup> This element must contain land use projections of future residential, agricultural, commercial, and industrial land uses, including “the assumptions of net densities or other spatial assumptions upon which the projections are based.”<sup>68</sup>

Beginning on January 1, 2010, by which time all local governments in the state must have completed and adopted comprehensive plans, “any program or action of a local governmental unit that affects land use shall be consistent with that local government’s comprehensive plan.”<sup>69</sup> The extensive list of actions for

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63. *Id.* § 36.70A.040(3).

64. *Id.* § 35.63.125 (West 1999).

65. 1999 WIS. LAWS 9.

66. WIS. STAT. § 66.0295(2) (1999) (setting forth the contents of a comprehensive plan). The description of the comprehensive plan is an adaptation of the description contained in the American Planning Association’s Growing Smart<sup>SM</sup> LEGISLATIVE GUIDEBOOK, *infra* note 72, §§ 7-201 *et. seq.*

67. WIS. STAT. § 66.0295(2)(h).

68. *Id.*

69. *Id.* § 66.0295(3).

which consistency is required includes: municipal incorporation, annexation, certain boundary agreements, consolidation and detachment of territory, official mapping, local subdivision, extraterritorial plat review by a city or village, city, county, village, or town zoning ordinances, improvement of transportation facilities, agricultural preservation plans, impact fee ordinances, land acquisition for recreational lands and parks, shoreland and wetland zoning, construction site erosion control and stormwater management zoning, and any other ordinance, plan, or regulation of a local government that relates to land uses.<sup>70</sup>

### III. A MODEL ACT TO GAUGE CONSISTENCY OF LAND DEVELOPMENT REGULATIONS AND LAND USE ACTIONS WITH AN INDEPENDENTLY ADOPTED LOCAL COMPREHENSIVE PLAN

In October 1994 the American Planning Association (APA) launched Growing Smart<sup>SM</sup>, a multiyear effort to draft the next generation of model planning and zoning legislation that will replace the SZEA and the SCPEA.<sup>71</sup> The model statutes appear in a *Legislative Guidebook*,<sup>72</sup> the final version of which is expected to be published in early 2001. In contrast to the one-size-fits-all approach of the Standard Acts of the 1920s, the Growing Smart<sup>SM</sup> model statutes are written in a modular format that enables the user to select from among a variety of options and to assemble a system that will

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70. *Id.* at § 66.0295(3)(a) to (s).

71. The project is supported by: Henry M. Jackson Foundation, Seattle, Wash.; U.S. Department of Housing and Urban Development (lead federal agency); Federal Highway Administration, U.S. Department of Transportation (DOT); U.S. Environmental Protection Agency; Federal Emergency Management Agency; Federal Transit Administration, DOT; Rural Economic and Community Development Administration, U.S. Department of Agriculture; Annie E. Casey Foundation, Baltimore, Md.; Siemens Corporation, Washington, D.C.; and the APA itself. For an overview of the project, see Stuart Meck, *Growing Smart<sup>SM</sup>: A Report on a Work-in-Progress—Drafting the Next Generation of Model Planning and Zoning Statutes for the United States*, in THE TWENTY-NINTH ANNUAL INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 9-1 (1999). Professor Mandelker has served as a principal consultant to the Growing Smart<sup>SM</sup> project, drafting model statutes on integrating state environmental policy acts into local planning, on transportation corridor mapping, on nonconforming uses, and on administrative and judicial review of land use decisions.

72. GROWING SMART<sup>SM</sup> LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, PHASES I AND II INTERIM EDITION (Stuart Meck ed., 1998).

address the particularized issues facing a given state.

The *Guidebook*, in Chapter 7, proposes model legislation for a local comprehensive plan. If a state decides to mandate planning for local governments, the *Guidebook* calls for a series of required and optional elements for the local comprehensive plan. The required elements include two “bookends”: (1) an issues and opportunities element that is intended to set the stage for the preparation of other elements and (2) a program of implementation that proposes measures and assigns responsibilities for carrying out the plan. The other required elements are for land use, transportation, community facilities (which includes utilities), and housing as well as economic development, critical and sensitive areas, and natural hazards (the local government may opt out of preparing these elements if circumstances do not justify them). In addition, the model statutes include a variety of optional elements that address agriculture and forest preservation, human services, community design, historic preservation, and a variety of subplans, such as those for neighborhoods and transit-oriented development.<sup>73</sup>

The *Guidebook* describes these elements and the nature of their relationships in substantive detail to avoid ambiguity with regard to the purposes and preparation of the elements. Should a state decide to mandate planning, the model statutes describe a system in which the local comprehensive plan provides the policy framework for the administration of land use controls and public capital investment—a consistency doctrine that merges intentions and actions. In the *Guidebook* the local comprehensive plan is not simply a rhetorical expression of a community’s desires. Instead, it describes the public policies that a local government actually intends to carry out. If it were otherwise, why bother to complete and adopt one?

In his 1976 article Professor Mandelker contended that a consistency statute should have a number of characteristics. According to Mandelker it should apply not only to map amendments but also to variances, conditional use permits, and other types of administrative zoning procedures. Zoning action, he contended, “should comply with the spatial policies contained in the plan,

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73. LEGISLATIVE GUIDEBOOK, *supra* note 72, §§ 7-201 *et. seq.*

whether they are specified on a map or by textual statement.”<sup>74</sup> This suggests that a consistency determination must look both at the map and the plan text—usually a statement of goals, policies, and guidelines. Finally, Mandelker recommended that the statute should take into account timing policies when they are present in the plan.<sup>75</sup>

Based in part on the Florida statute described above,<sup>76</sup> the model statute below embodies the idea that the local comprehensive plan should be implemented through the local regulatory framework—the zoning ordinance, the subdivision ordinance, and related land development regulations—and through individual development decisions that are either legislative or administrative in nature. It also incorporates Mandelker’s proposals in terms of: (a) applying to the entire zoning and land use control process and (b) requiring an analysis of the various mapped and written policies in the plan, whether spatial (the location, character, and type of land use) or timing (policies dealing with the phasing of public facilities and gradual phasing of land use categories to more intensive uses at the times specified in the plan).

The model calls for the local planning agency to conduct a written analysis whenever there are land development regulations,<sup>77</sup> amendments (including zoning map amendments), or discretionary “land use actions” proposed. The agency applies a three-prong test to evaluate consistency. Such evaluations provide positive coordination and ensure that, when proposals involving land development regulations and individual development decisions arise, there is a careful assessment of their relationships with the local comprehensive plan and that assessment is part of the public record concerning the

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74. Mandelker, *supra* note 2, at 965.

75. *Id.*

76. FLA. STAT. ANN. § 163.3194 (West 1990). An earlier version of the APA’s model statute, drafted by the author with the assistance of John Bredin, Esq., a research fellow on the Growing Smart<sup>SM</sup> project, was introduced in the Pennsylvania House of Representatives in 1999 as H.B. 1866. The version that appears in this article is based on an unpublished draft dated October 27, 1999. Mr. Bredin also assisted in the drafting of this version.

77. The LEGISLATIVE GUIDEBOOK describes land development regulations as “any zoning, subdivision, impact fee, site plan, corridor map, floodplain or stormwater regulations, or other governmental controls that affect the use and intensity of land.” GUIDEBOOK, *supra* note 72, at § 3-301 (definitions). A land development regulation would include a zoning map amendment.



legislative or administrative decision.

The written report must state whether or not, in the opinion of the local planning agency, the regulations, amendment, or action is consistent with the local comprehensive plan. The written report must contain recommendations as to whether or not to approve, deny, substantially change, or revise the regulations, amendment, or action. If the agency finds an inconsistent relationship between the local comprehensive plan and the proposal, it may also recommend ways of modifying the plan to eliminate it. The written report is advisory to the legislative or administrative body (such as a board of zoning appeals, the planning commission, or a hearing examiner) that receives it. The legislative or administrative body may: (a) adopt the report, (b) reject the report, or (c) adopt the report in part and reject it in part. If the body rejects the report or part of it, it must conduct the same analysis that the local planning agency undertook concerning consistency and make its own findings before taking action.

Where a local comprehensive plan is mandatory but has not been adopted, the local government's land development regulations will be void, because they cannot be consistent with the plan, although the model permits the continuing validity of the regulations for a six month grace period. A similar grace period applies when adoption of a new plan or amendment to an existing plan results in inconsistent land development regulations, and the local government needs time to make the regulations conform.

Thus, the model below tries to avoid the major difficulties presented by the "in accordance with a comprehensive plan" language of the SZEА, which failed to provide a mechanism for relating proposed ordinance text and zoning map changes to a separate plan or similar document. In contrast to the SZEА, this model defines a plan and its elements. It also asks the state to make a decision as to whether planning is to be optional and advisory, or mandatory and directive. If it is the latter, or if a local government decides to adopt the local comprehensive plan, then the consistency provisions apply. Finally, the model below does not simply suggest a desirable relationship—zoning supported by some type of externally prepared study—intended to provide a justification for the exercise of the police power. Rather, it describes a process and specific standards for relating the goals, policies, mapped land uses, proposed public

facilities, and other implementing actions to a decision about the content of land development regulations or a specific type of land use action. The process below results in findings about the nature of that relationship, so that what the plan says and how it is actually implemented are constantly before the local government's legislative and administrative bodies.

#### IV. CONSISTENCY OF LAND DEVELOPMENT REGULATIONS AND LAND USE ACTIONS WITH A LOCAL COMPREHENSIVE PLAN: A MODEL ACT

(1) Land development regulations and amendments thereto, including amendments to the zoning map, and any land use actions shall be consistent with the local comprehensive plan that has been adopted by the legislative body of a local government, provided that in the event the land development regulations, as amended, become inconsistent with the local comprehensive plan by reason of amendment to the plan or adoption of a new plan, the regulations shall be amended within [6] months of the date of amendment or adoption so they are consistent with the local comprehensive plan, as amended.

(a) Except as provided in paragraph (1) above, any land development regulations and amendments thereto and any land use actions that are not consistent with the local comprehensive plan shall be voidable.

(b) Any land development regulations and amendments thereto shall be void [6] months from the date on which a local comprehensive plan is required to be adopted, if a comprehensive plan must be adopted pursuant to [*cite to section in statute*] but no comprehensive plan has been adopted.<sup>78</sup>

(c) As used in this Section, "land use action" means: preliminary or final approval of a subdivision plat; approval of a planned unit development [or similar site-specific development plan]; approval of

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78. Under subparagraph (b) if a local government is required to adopt a local comprehensive plan by the enabling legislation, but it has not, then its land development regulations will be void, because they are not consistent with a plan. In the absence of a plan that is required by the state before a date certain, the local government loses its ability to enforce its land development regulations.

a conditional use; granting of a variance; or a decision by the local government to construct a capital improvement and/or acquire land for community facilities, including transportation facilities.<sup>79</sup>

(2) A local government shall determine, in the manner prescribed in this Section, whether such land development regulations, amendments thereto, and land use actions are consistent with the local comprehensive plan. Before the legislative body of a local government may enact or amend land development regulations and before the legislative body, the local planning commission, the hearing examiner, the Land Use Board of Review,<sup>80</sup> or any other body with administrative authority may take any land use action, the local planning agency shall prepare a written report to the legislative or administrative body regarding the consistency with the local comprehensive plan of: the proposed land development regulations; a proposed amendment to existing land development regulations; or a proposed land use action. The written report shall be advisory to the legislative or administrative body. Pursuant to paragraph (3) below, the written report shall state whether or not, in the opinion of the local planning agency, the regulations, amendment, or action is consistent with the local comprehensive plan. The written report shall also contain recommendations pursuant to paragraph (4) below as to whether or not to approve, deny, substantially change, or revise the regulations, amendment, or action. The local planning agency shall make the written report available to the public at least [7] days prior to any public hearing or meeting on the regulations, amendment, or action that is the subject of the report.

(3) The local planning agency shall find that proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land use action is consistent

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79. The assumption here is that community facilities will either be approved as-of-right or by a discretionary conditional use permit or some other action by the local government, such as a decision by the legislative body to acquire land, that may be part of the preparation of the capital budget and long-range capital improvement program.

80. In the Growing Smart<sup>SM</sup> model statutes, the Land Use Board of Review is a body that is intended to replace the function of the board of zoning appeals. The statutes also provide for a hearing examiner who can assume any function delegated to it by the legislative body, including specific decision-making responsibilities for variances, conditional uses, and subdivision review and approval.

with the local comprehensive plan when the regulations, amendment, or action:

(a) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan;

(b) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan; and

(c) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other specific public actions, or actions proposed by nonprofit and for-profit organizations that are contained in the local comprehensive plan.

In determining whether the regulations, amendment, or action satisfies the requirements of subparagraph (a) above, the local planning agency may take into account any relevant guidelines contained in the local comprehensive plan.

(4) If the local planning agency determines that the regulations, amendment, or action is not consistent with the local comprehensive plan, it:

(a) shall state in the written report what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and

(b) may state in the written report what amendments to the local comprehensive plan are necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.

(5) The legislative or administrative body shall, upon receipt of the written report of the local planning agency, review it and, giving the report due regard, shall in the written minutes of its deliberations:

(a) adopt the report;

(b) reject the report; or

(c) adopt the report in part and reject it in part.

(6) If the legislative or administrative body rejects the report in part or in whole, in the written minutes of its deliberations:

(a) it shall state whether the proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land use action is consistent with the local comprehensive plan pursuant to paragraph (3) above; and/or

(b) if the legislative or administrative body determines that the regulations, amendment, or action is not consistent with the local comprehensive plan:

1. it shall state what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and/or

2. it may state what amendments to the local comprehensive plan may be necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.