Improving Development Control Through Planning: The Consistency Doctrine

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I. INTRODUCTION

A. *Reforms in Context*

> *It is a matter of common sense and reality that a comprehensive plan is not like the law of the Medes and the Persians; it must be subject to reasonable change from time to time as conditions . . . change.*[1]

1. Furniss v. Lower Merion Twp., 412 Pa. 404, 406, 194 A.2d 927, 927 (1963).

1. Recent actions in the area of consistency law

The last five years have seen a renewal of interest in the relationship between land use plans and regulations.[2] The term "consistency" has been used to describe this relationship.[3] Adherence

2. Classic works on the subject include Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) [hereinafter cited as Haar, *In Accordance With*]; Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955) [hereinafter cited as Haar, *An Impermanent Constitution*]. *See also* T.J. KENT, JR., THE URBAN GENERAL PLAN (1964) [hereinafter cited as KENT].

Professor Haar's position, the subject of some misuse in the last twenty years, is that the master plan should be a substantive document stating the goals of a locality and should serve as a guide for implementing legislation. It should not be excessively detailed; rather, "it is primarily . . . a philosophic guide to a way of life." Haar, *An Impermanent Constitution*, *supra* at 370.

The master plan is "[a] unique type of law . . . in that it purports to bind future legislatures when they enact implementary materials. . . . It thus has the cardinal characteristic of a constitution. But unlike that legal form it is subject to amendatory procedures not significantly different from the course followed in enacting ordinary legislation." *Id.* at 375.

Innovative approaches to growth control have been based on comprehensive and long-range planning, and these highly publicized programs have focused additional attention on the question of the proper function of plans in actual development controls. Examples are the growth control plans of Ramapo, New York and Petaluma, California. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

3. *See* Bross, *Circling the Squares of Euclidian Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97 (1975) [hereinafter cited as Bross]; Catalano & DiMento, *Mandating Consistency Between General Plans and Zoning Ordinances: The California Experience*, 8 NAT. RESOURCES L. 455 (1975) [hereinafter cited as Catalano & DiMento, *Mandating Consistency*]; DiMento, *Looking Back: Consistency in Interpretation of and Response to the Consistency Requirement, A.B. 1301*, 2 PEPPERDINE L. REV. S196 (1975) [hereinafter cited as DiMento, *Looking Back*]; HOUSING FOR ALL UNDER LAW (R. Fishman ed. 1978) [hereinafter cited as HOUSING FOR ALL]; Hagman & DiMento, *The Consistency Requirement in California*, 30 LAND USE L. & ZONING DIG. 5 (1978); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976) [hereinafter cited as Mandelker, *The Role*]; Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975) [hereinafter cited as Sullivan & Kressel]; Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69 (1975) [hereinafter cited as Tarlock, *The Case Against*]; N. WILLIAMS, AMERICAN PLANNING (1974); Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U.L. REV. 766 (1974); Note, *Urban Planning and Land Use Regulation: The Need for Consistency*, 14 WAKE FOREST L. REV. 81 (1978).

A number of states have judicially addressed the meaning of the phrase "in accordance with" as it is used to define the nexus of consistency between plans and regulatory devices in enactments based on model legislation. In Oregon, see Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975), holding that a comprehensive plan is the "controlling land use planning instrument for a city. Upon passage of a to the consistency doctrine requires a jurisdiction to engage in planning and to have its official land use controls carry out, implement or effectuate plans. The concern with consistency of one form or another has extended to both local[4] and inter-governmental relations.[5] Furthermore, since 1975 at least three states have joined the ranks of those which have by statute addressed the need for consistency between planning and land use regulations.[6]

comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. . . . [T]he zoning decisions of a city must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail." *Id.* at 514, 553 P.2d at 779. The court relied on interpretation of OR. REV. STAT. § 197 (1973) (which a dissenting justice concluded "on its face deals only with statewide planning goals and objectives and has its own mechanism of enforcement and redress of private wrongs," Baker v. City of Milwaukie, 271 Or. 500, 516, 533 P.2d 772, 779 (1975) (Leavy, J., pro tem., dissenting opinion)). *Accord*, O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965). *See also* Haar, *In Accordance with* and Haar, *An Impermanent Constitution*, note 2 *supra*. Oregon's statewide planning law is discussed at notes 45-48 *infra*.

In Maryland, see Kanfer v. Montgomery County Council, 35 Md. App. 715, 373 A.2d 5 (1977). That court followed the Maryland rule that a comprehensive plan is at best a guide for growth—it has no binding effect—and an amendatory ordinance from a single to a multiple family dwelling district will not fail solely because of nonconformity with the plan.

Another important state court decision is New York's Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968). The village in this case had adopted a "developmental policy" as an amendment to its zoning ordinance. *See* the discussion of Udell in HOUSING FOR ALL, *supra*, at 363-65, and in Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183, 187 (1972).

4. *See*, for example, HOUSING FOR ALL, *supra* note 3, at 5-1 ("Appendix to Chapter 5, *The State of the Art in Local Planning*"). Some examples are given at note 6 *infra*.

5. *See* section II-B *infra*.

6. These are California, Kentucky and Nebraska. Various provisions of the requirements of each of these states are analyzed throughout this article. So too is the Oregon scheme, initially enforced by the courts in Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). *See also* OR. REV. STAT. § 215.050 (1977). Other states have planning law requirements which approximate consistency requirements, but differ from the latter in one of several ways: planning may be permissive; the requirement of legislative findings of conformance may provide for extensive exceptions; or the language used may lack sufficient judicial interpretation to equate the law confidently with a consistency requirement. For examples see WASH. REV. CODE § 36.70.010-.940 (1964); VT. STAT. ANN. tit. 24 §§ 4301-4493 (1975); ARIZ. REV. STAT. ANN. § 9-462.01(E) (1977); ME. REV. STAT. tit. 30 § 4962(1)(A) (1964). Florida and New Jersey have legislated consistency requirements of varying strength, and Minnesota has adopted a requirement for the Minneapolis-St. Paul metropolitan area.

Florida's provisions go further than most other states'. They are found in the Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3161-3211 (Harrison 1978) and, as is elaborated below, apply in various forms to "all development undertaken by, and all action taken in regard to development orders by, gov-

Approaches to consistency undertaken in each of the states which have passed legislation on the subject differ considerably. Judicial interpretations of these statutes and of planning laws in other states which do not employ the term "consistent" but nevertheless have required a close relationship between the planning and regulatory enterprises, create a wide variety of frameworks for local governments to interpret. This article describes and analyzes the consistency requirement as it has been extended by these recent events. First, a review of the legal issues which arise over consistency implementation throughout the country will be made;[7] then a policy analysis of the consistency doctrine will be offered.[8]

ernment agencies" as well as to all land development regulations. *Id.* § 163.3194(1). The law extends Florida's previous statutory consistency requirement significantly, although judicial interpretation of the old statute provided for some type of consistent relationship. The previous statute was found in *Id* § 163.195. *See* Wald Corp. v. Metropolitan Dade County, 338 So.2d 863, 868 (Fla. Dist. Ct. App. 1976).

In 1975 New Jersey adopted the Municipal Land Use Law, N.J. STAT. ANN. § 40:55D-1-55D-92 (West Supp. 1977). For a discussion of the new statute, see Sussna, *New Municipal Land Use Law*, 99 N.J.L.J. 81 (1976). The consistency requirement of the land use law became law on August 1, 1976. N.J. STAT. ANN. § 40:55D-62 (West Supp. 1977). The requirement, which is that zoning ordinances and amendments "shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element", *Id.* § 40:55D-62(a), is waivable:

> the governing body may adopt a zoning ordinance or revision or amendment thereto which in whole or in part is inconsistent with or not designed to effectuate the land use 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 recorded in its minutes when adopting such a zoning ordinance.

Id.

In 1976 Minnesota adopted a requirement for its Twin Cities whereby local implementation actions of the comprehensive plan and those of "metropolitan systems plans" must be consistent. MINN. STAT. ANN. § 473.865 (West 1977). The statute also takes a step toward requiring consistency between capital improvement programs (CIPs) and plans: school district CIPs will be reviewed for compatability with the local government comprehensive plans and by the Metropolitan Council. *Id.* § 473.863.

7. *See* sections II-A to II-H *infra*.

8. *See* sections III-A to III-D *infra;* note 263 *infra*. Both legal and policy analyses are important in this area of law. Professor Mandelker's description of the zoning amendment process in one of the communities he has studied as "a hybrid administrative and legislative process" applies as well to much of planning law. D. MANDELKER, THE ZONING DILEMMA (1970).

The present analysis relies on the literature of the planning field and several studies of the response to local government consistency requirements. The studies utilized are two surveys performed by the author and Professor R. Catalano of the University of California, Irvine, of county response to the California consistency requirement, and data supplied to the author by the State of California, Office of Planning and Research from the Local Government Planning Survey 1977 (Feb. 1977).

2. Background for the movement toward increased regulatory importance of the plan

Efforts to increase the importance of planning have taken place within a context of considerable local government confusion about the proper function of the plan. The history of the events which have added to this planning law confusion has been told thoroughly and well by others.[9] However, to set the stage for what follows, several points from that history should be briefly highlighted. These points make the variability in the importance placed by local governments on the planning enterprise more understandable.

First, the Standard Acts[10] which have been offered as models to

The surveys by Professors Catalano and DiMento [hereinafter cited as Surveys] were conducted in June 1974 and August 1976: response rates were 89% and 98% six months and two and one half years, respectively, after the consistency doctrine was to take effect in California. The number of respondents in the two surveys was 48 (1974) and 53 (1976). Respondents were representatives of county planning agencies. The difficulties of utilizing survey data to assess responses to a legal mandate are well appreciated by the author, and results are reported herein only when those difficulties are insignificant and with proper indication that the results are suggestive, not definitive.

The present work is also the result of a series of interviews by the author on the consistency requirement undertaken at various times since passage of the consistency reform in California. Among these are an interview with Mr. William Boyd, Staff Counsel, California Coastal Commission, in San Francisco, Calif. (June 13, 1978) and those previously reported in DeMento, *Looking Back*, note 3 *supra*.

9. This history is found in materials which over the years have dominated local government planning law. *See* KENT, *supra* note 2, at 27 (ch. 2, *Fifty Years of Experience with the General Plan*); HOUSING FOR ALL, *supra* note 3, at 325 (ch. 5, *The Role of the Local Comprehensive Plan in Land-Use Regulation*); *see also* the sources cited in notes 2 and 3 *supra*.

At the time Professor Haar wrote his two articles, note 2 *supra*, on the relationship between zoning and planning, courts had interpreted the language of the STANDARD STATE ZONING ENABLING ACT, U.S. DEPT. OF COMMERCE, 1922 (Rev. ed. 1924), in ways which differ dramatically from the recently adopted understandings of consistency reviewed in the present work. Professor Haar wrote:

> [the] general plan, or comprehensive plan, with which the amendment must conform, is many things to many courts. It may be the basic zoning ordinance itself, or the generalized "policy" of the local legislative or planning authorities in respect to their city's development—or it may be nothing more than a general feeling of fairness and rationality. Its identity is not fixed with any precision, and no one can point with confidence to any particular set of factors or any document, and say that there is the general plan to which the zoning enabling act demands fidelity.

Haar, *In Accordance With*, *supra* note 2, at 1167.

10. The Standard Acts are: the STANDARD STATE ZONING ENABLING ACT, U.S. DEPARTMENT OF COMMERCE, 1922 (Rev. ed. 1924) and the STANDARD CITY PLANNING ENABLING ACT (Rev. ed. 1928). The statutes were products of the Advisory Committee on City Planning and Zoning to then Secretary of Commerce Herbert Hoover.

the states for legislating the functions of planning and zoning have lacked precision in the articulation of the planning-land use control relationship. Second, widespread disagreement exists within and across professions about both the feasibility and advisability of a strong planning function. No matter what the subject of planning in the United States—traditional land use, economic, social, corporate, environmental—questions involved are so important, so value-laden, and at the same time so general, as to make the search for a strong consensus naive. Differences in views on consistency reflect the additive effects of disagreements, sometimes major, on each of the assumptions upon which planning responsibility is based.[11] Third, regardless of the extent of clarity in the minds of those legislators, judges, and commentators who have been involved in setting the directions of the planning-land use control relationship, their language, either by design or default, has added to the ambiguity in directives to those who must act at the local level.

When planners and local government officials choose to control land use they have at their disposal a grab bag of authority and interpretation on how much their regulations are predestined by their plans—or the plans assembled by those who preceded them. Thus it comes as no surprise that in the last fifty years there has been no standard response to the "standard" act language. Typologies of response created by commentators indicate the truly remarkable divergence in interpretation of the language.[12] On one end of a continuum the consistency doctrine is seen as "mere surplusage," that is, it is a restatement of law which must apply in any event to land development and control decisions. One the other extreme is the interpretation of greatest interest to the present study. This interpretation requires "not only that zoning action must be consistent with basic policy, but also that normally

11. These assumptions are addressed in sections III-B-III-D, *infra*.

12. *See* those offered in Haar, *In Accordance With*, *supra* note 2, at 1166-67; Sullivan & Kressel, *supra* note 3, at 41; 1 N. WILLIAMS, AMERICAN PLANNING LAW 421-24 (1974).

13. 1 N. WILLIAMS, AMERICAN PLANNING LAW 424 (1974). Professor Williams sets forth a table which indicates that the case law of several states has moved toward the latter extreme view: that of a full master plan. *Id.* at 426. In this category Professor Williams includes, in chronological order by year of utilizing the interpretation: Michigan, Maryland, Pennsylvania, Connecticut, New Jersey, Virginia, Iowa, Kentucky, New York, Hawaii, Ohio, Oregon, North Carolina, and Washington. He admits that the categorization involves "many close questions." *Id.* at 425 n. 2. Events reported in the present work would require a slightly different classification.

(perhaps with some exceptions) the areas allocated to each land use must be indicated on the master plan map—that is, there must be land use designations made in advance."[13]

Within categories on the continuum further division takes place as a result of differing responses to several questions. A 1961 debate over the role of comprehensive planning lists some of these determining queries:

1. What is the effect of requiring accordance with the plan upon existing zoning ordinances—especially those where no comprehensive plan is presently in existence?
2. What is the effect of subsequent amendments, either of the master plan or of the zoning ordinance?
3. Is there an idealized set of elements for the plan—in terms of details and specificity for its long-range, generalized effects; and for type-sizes and type-populations of communities?
4. How would these fit into a regional pattern of controls?
5. What is the effect of the master plan on marketability of titles?
6. Given this prominent role, what should be the procedures for promulgation, popularization, and adoption of the master plan?[14]

B. *A Guide to the Reader*

This paper's objective is to investigate a variety of issues in both planning and planning law which are raised by consideration of the relationship between plans and regulations. Reforms in planning, such as consistency laws, attempt to increase both the fairness of planning decisions and regulations and the ability of those who are affected by development decisions to predict the outcome of governmental action. The present work addresses both predictability and fairness in two sections. These sections relate to the legal and policy issues which arise out of consistency reforms.

Increased certainty in the development control area will depend on the extent to which a series of issues are resolved in the legislatures or later in the courts. Unanswered questions include: 1) to what relationships does the consistency requirement apply?[15] 2) how are the relationships required by consistency to be im-

14. Haar & Mytalka, *Planning and Zoning*, 13 ZONING DIG. 33, 35-36 (1961). The piece was a response to McBride & Babcock, *The "Master Plan"—A Statutory Prerequisite to a Zoning Ordinance?*, 12 ZONING DIG. 353 (1960). *See* note 235 *infra*.

15. *See* section II-A *infra*.

plemented?[16] 3) what remedies are available upon a failure to achieve consistency?[17] 4) who may initiate such remedies?[18] 5) what is the state role in enforcement?[19] 6) to whom are consistency mandates directed?[20] 7) what are the implications for property rights raised by increasing the regulatory impact of the comprehensive plan?[21] Without clarification of these and other questions summarized earlier[22] legal uncertainty will remain even after general consistency requirements are adopted, and charges of unfairness will abound. Section II presents these issues and discusses them with the assistance of case law, statutory language and expert commentary. That section is addressed both to the litigator working with recently introduced consistency reforms and to the legislator seeking to adopt consistency reforms.

Section III is addressed to the same audiences. Here, arguments for and against increasing the importance of the plan are made. This entails explication of assumptions about: 1) the nature of the planning process, both as it exists in the United States and as it has been envisioned by scholars and reformers; 2) the impact of consistency reforms on present planning practice; and 3) the availability of alternatives which meet the objectives of consistency.[23] As in Section II, analyses can be clustered under considerations of fairness and of predictability.

II. Legal Issues Arising Out of Consistency Reforms

A. *The Scope of the Consistency Requirement in Local Government*

Consistency between the general plan and the local zoning ordinance[24] has been legislatively or judicially mandated in several

16. *See* section II-C *infra*.
17. *See* section II-D *infra*.
18. *See* section II-D *infra*.
19. *See* section II-D *infra*.
20. *See* section II-E *infra*.
21. *See* section II-F *infra*.
22. *See* text accompanying note 14 *supra*.
23. *See* section III-D *infra*.
24. The local plan of a city or county is referred to by various names throughout the states cited in this article. For example, in California it is called the general plan. In Pennsylvania, Oregon, Florida, Kentucky and Wyoming, it is called the comprehensive plan. In Nebraska it is known as a comprehensive development plan and in New Jersey, the master plan.

states—albeit with somewhat different meanings. In these states the judicial or statutory trends are that a local government should develop a general, master, or comprehensive plan and that regulatory actions by the local government should reflect or implement the plan. A discussion of how this relationship has been implemented is presented below.

At the local government level some sort of consistent relationship is required in several jurisdictions well beyond a mere requirement that zoning be in accordance with the plan. For example, some areas require consistency between plans and subdivision maps or ordinances.[25] There has been consideration of and commentary on consistency between: zoning ordinances and conditional use permits;[26] subdivision maps and specific plans;[27] public works projects

25. The requirement of specific plan and general plan consistency in subdivision regulations is found in California law at CAL. GOV'T CODE §§ 66473, 66473.5, 66474 (West Cum. Supp. 1966-1977). In Nebraska the statutory consistency requirement applies only to zoning regulations. NEB. REV. STAT. § 23-375 (1977). However, there is authority that subdivision regulations will be treated the same as zoning ordinances. *Id.* § 23-377. *See also* the case law in California, note 65 *infra*.

26. In Hawkins v. County of Marin, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976), the California Court of Appeal, First District, Division 4, held that conditional use permits themselves need not be reviewed for consistency with the general plan. The court reasoned: "Since use permits issued pursuant to [the] Marin County Code . . . must necessarily conform to its requirements, it follows that if that code section is kept consistent with the general plan, use permits issued thereunder will also be consistent therewith," *Id.* at 594, 126 Cal. Rptr. at 760. Division 1 of the same court, however, did review the conditional use permit for consistency with the open space elements of the defendant's general plan: "From our consideration of the Open Space Element, and the evidence, we are of the opinion that the Board reasonably could, and did, conclude that the conditional use permit at issue was closely attuned to the stated policy and goals of the county's Open Space Element." Sierra Club v. County of Alameda, 140 Cal. Rptr. 864, 872 (1977). Recently a bill which would have required consistency of conditional use permits with the stated policies and objectives of local government was defeated in committee in the California Legislature. Conversation with Ms. Vivian Kahn, California Office of Planning and Research (June 12, 1978).

In Oregon, the Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) criteria for a regulation change were limited in the case of a conditional use permit. A zone change, as in *Fasano*, requires consistency with the projections of the plan, a showing of need for the change, and a showing that the need will be best served by a change in the classification of the particular property under consideration as compared with other available property. Although consistency was held to apply to issuance of special or conditional use permits, both the public need and the other available property criteria were held inapplicable in this instance. Kristensen v. City of Eugene Planning Comm'n, 24 Or. App. 131, 135-36, 544 P.2d 591, 593-94 (1976).

27. CAL. GOV'T CODE §§ 66473.5-66474 (West Supp. 1966-1977); 59 OPS. CAL. ATTY. GEN. 129 (1976); Marsh & Merritt, *The Specific Plan in California: A De-*

(traditionally and ironically beyond the reach of local government planning) and zoning requirements;[28] plans and development orders;[29] acquisitions and disposal actions related to open space and open space plans.[30] Consistency between developments of regional

veloping Concept for the Resolution of Conflicts in Land Use, 3 PEPPERDINE L. REV. S26,S49-51 (1976).

28. One of the great anomalies of American planning law is the failure to require consistency between public works or capital improvement projects and the general plan. In California recent legislation requires that capital improvement projects of a district or local agency be reviewed for consistency with applicable general plans and prohibits such agency from carrying out its project if the planning agency finds it is not consistent. Nevertheless "[a] district or local agency may overrule the finding and carry out its capital improvement program." 1978 Cal. Legis. Serv. 3639. California law also requires planning agency review of all but minor public works projects for conformity with general plans. Failure of the planning agency to report within forty days is deemed a finding of the proposed action's conformity with the applicable plan. CAL. GOV'T CODE § 65402(c) (West 1966-1977). *See* Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316 (1961).

29. In the Florida scheme, "development" is "the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land and the dividing of land into three or more parcels." Florida Environmental Land and Management Act of 1972, FLA. STAT. ANN. § 380.04(1) (Harrison 1975). "Land development regulations" include local government zoning, subdivision, building or construction, or other regulations controlling the development of land. FLA. STAT. ANN. § 163.3194(2)(b) (Harrison 1978).

30. In California open space is defined by statute:

§ 65560.

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams,

impact and local land development regulations has been mandated by statute.[31] In addition, requirements of consistency between planning and fiscal activities have been enacted in at least one state.[32]

In certain jurisdictions where attempts to enhance the importance of planning have been strongest, requirements of internal consistency have begun to appear. An example is found in California law where consistency among both the mandatory and optional elements of the general plan is required. According to a statute adopted in that state, "The Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency."[33]

B. *Consistency: Linchpin for a Cooperative Intergovernmental Planning Approach?*

Although the consistency doctrine is primarily directed at consistency at the local level, the touchstones of the consistency relationship can be found at and between other levels of government. Concern with consistency has been manifest in certain state efforts to emphasize state and regional considerations in the planning process.

In California, for example, cities and counties in rapid growth areas have been directed to make their local plans consistent with state and federal air quality standards.[34] Another example of a

trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

CAL. GOV'T CODE § 65560 (West Supp. 1966-1977).

For legislation in California on consistency with local open space plans for projects requiring a building permit, subdivision map approval or open space zoning, see *id.* § 65567. *See also id.* § 65566, discussed in note 113 *infra*.

31. FLA. STAT. ANN. § 380.06(11) (b) (Harrison 1975). Under this section the local government is also directed to consider whether the development is consistent with a report and recommendations to be prepared under the act by the appropriate regional planning agency. *Id.* § 380.06(11) (c).

32. *See* MINN. STAT. ANN. § 473.865(2) (West 1977).

33. CAL. GOV'T CODE § 65300.5 (West Supp. 1966-1977).

34. For an example of how this requirement is monitored see Memorandum from State Air Resources Board of the State of California to L. Frank Goodson, Projects Coordinator, Resources Agency of the City of Irvine (Feb. 16, 1977) (on file with the author). The state's review of the draft environmental impact statement for an amendment to the City of Irvine's General Plan states that:

California consistency requirement that transcends the local level of government concerns that state's coastal region. Under the California Coastal Act of 1976[35] regional commissions are to develop coastal land use plans and then make zoning conform with or carry out[36] the plans. Commissions must designate *the* principal use of a coastal area—as opposed to *a* principal use—and developments that are not designated as the principal use under the zoning ordinance may be appealed.[37] A third and controversial[38] instance of California's intergovernmental approach to planning can be found in its approach to the promotion of low and moderate income housing. In late 1977, the California Department of Housing and Community Development promulgated the State Housing Element Guidelines (hereinafter cited as Guidelines).[39] The state aim expressed in the Guidelines is to provide a decent home in a satisfactory environment for all.[40] The Guidelines address consistency in two ways. First, they provide generally that local goals shall be consistent with state goals.[41] Second, the Guidelines require internal consistency and stress action which should be taken if inconsistency results.[42]

> Consistency with the AQMP [Air Quality Maintenance Plan] planning effort may require a reassessment of the growth rate in the Irvine area and recognition of a possible shift of growth to other areas. This may identify a need to develop and consider additional land use options in the Irvine area in subsequent amendments to the general plan. . . . The Irvine General Plan needs to incorporate the measures needed to offset adverse air quality effects, so that the plan can be considered compatible with the State Policy to "[t]ake all action necessary to provide the people of this state with clean air. . . . Section 21001, Public Resource Code.

Id. at 2.

35. CAL. PUB. RES. CODE §§ 30000-30900 (West 1977).

36. Interpretations of the meaning of these terms contrast with the term "consistent"; the latter is seen as less strict, more general in its implementation. *See* Memorandum from William Boyd, Staff Counsel, California Coastal Commission, to Regional Executive Directors and Regional Commission LCP Staffs (Jan. 13, 1978) (on file with the author).

37. *Id.* at 2.

38. *See* Comment, *A Regional Perspective of the "General Welfare"*, 14 SAN DIEGO L. REV. 1227 (1977); Freilich, *Land Use Controls and Growth Management: The Need for a Comprehensive View*, 9 URB. L. V (Summer 1977); Silverman, *Subsidizing Tolerance for Open Communities*, 1977 WIS. L. REV. 375.

39. Title 25 CAL. AD. CODE §§ 6400-6478 (Dec. 10, 1977).

40. *Id.* § 6404.

41. "Local housing goals, policies, and priorities must be related to the state housing goal . . . and consistent with the three policy objectives . . . [l]ocal housing goals, policies, and priorities should be well integrated so as to present a sound set of guiding principles for the housing program." *Id.* § 6450.

42. *Id.* § 6464.

Some states explicitly make the consistency relationship dependent on recognition of goals, policies and programs formulated on the state level. North Carolina, for example, has a limited regional consistency requirement which applies to the coastal zone. Under the requirement, local land-use plans within the coastal area are required to be consistent with state guidelines promulgated by the Coastal Resources Commission.[43] In Wyoming the language of the 1975 State Land Use Planning Act requires that local land use plans "be consistent with established State guidelines and be subject to review and approval by the Commission."[44] In Oregon, state agency, city, county, and special district comprehensive plans and land use controls are to be evaluated for consistency with state goals—although no state guidelines are employed.[45] Under the original statute the Land Conservation and Development Commission was authorized to prescribe and change and amend those plans which did not comply with the state planning goals[46] and to enjoin development which did not conform with the plan. Under a recent amendment the state may issue orders requiring conformity.[47] These orders may include imposition of moratoria on future development if the addressed governmental unit does not meet the planning mandate of the law.[48]

Consistency with state goals and guidelines in the area of housing has implicitly been required in the innovative and fairly drastic positions taken in Massachusetts and New York. In New York the Urban Development Corporation was granted power to override local land use controls in order to involve the state more directly in

43. N.C. GEN. STAT. § 113A-108 (1978) (repeal voted in 1977, effective date of repeal July 1, 1981 (Session Laws 1977 c. 712 s.3)). For one author's description of the leisurely approach taken to consistency in North Carolina, in the absence of great developmental pressure, see Comment, *Urban Planning and Land Use Regulation: The Need for Consistency*, 14 WAKE FOREST L. REV. 81 (1978).

Other limited consistency requirements include the permit system established by the Washington State Shoreline Management Act of 1971, WASH. REV. CODE § 90.58.010-.930 (1976).

44. WYO. STAT. § 9-19-301(a) (1977).

45. OR. REV. STAT. § 197.175(2) (1977). In South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 569 P.2d 1063 (1977), the Oregon Supreme Court held that an amendment to a comprehensive plan must be consistent with the goals and policies of unamended portions of the plan and not violate state planning goals. Thus local government internal consistency and inter-governmental consistency are required.

46. OR. REV. STAT. § 197.325(1) (1975) (repealed by 1977 c. 664 § 42).

47. OR. REV. STAT. § 197.320 (1977).

48. *Id.*

the provision of low income housing in the suburbs.[49] A Massachusetts zoning statute[50] allows the state to set standards which local government must follow; these standards would permit developers to build low or moderate income housing. A State Housing Appeals Committee decides whether local denial decisions are consistent with local needs and has the power to reverse local decisions which are inconsistent.[51]

In the future, consistency requirements in some form are more likely to be offered in cooperative planning efforts between states and local communities. Presently, in most planning frameworks the state proposes planning objectives and requires development mechanisms at the local level for achieving these objectives.[52] A

49. N.Y. UNCONSOL. LAWS §§ 6251-6285, 6301-6325, 6341-6360 (McKinney Supp. 1978). The New York courts have recently found a local government zoning ordinance unconstitutional for failure to provide for lower income housing. On remand from New York's highest court, the trial court determined the number of units the locality was to provide within the next decade. Berenson v. Town of New Castle, 30 LAND USE L. & ZONING DIG. 61 (1978) (Sup. Ct. N.Y., Westchester County (trial court), decided Dec. 9, 1977).

50. MASS. GEN. LAWS. ANN. ch. 40 A, §§ 20-23 (1973). For a negative conclusion on the impact of the Massachusetts scheme, see Siegan, *Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulations*, 5 ENVT'L L. 385, 394 (1975). A more neutral report is given in Breagy, *Housing Appeals Statute Provides Massachusetts with Statewide Powers Over Local Housing Ordinances*, 33 J. HOUSING 548 (1976). At the time of that report the Massachusetts Housing Appeals Committee had overturned local decisions against housing in 31 of 333 cases (involving 4,222 units).

51. *See* Silverman, *Subsidizing Tolerance for Open Communities*, 1977 WIS. L. REV. 375, 390-91 (1977). Both of these approaches are criticized as ways for achieving local compliance with state goals.

The above legislation mirrors California case law requiring that both local government planning and land use regulation need to consider regional effects. *See* Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 713, 135 Cal. Rptr. 41 (1976).

A suggested planning reform that builds on this trend would be exemption from state or federal environmental review of local development decisions if a local unit of government has adopted a comprehensive plan that is in conformance with a regional comprehensive plan. *See, e.g.*, Mazanec, *Let's Put the Plan Back Into ___ing*, 36 URB. LAND 12 (1977). *See also* Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisited*, 7 ECOLOGY L.Q. 51 (1978).

52. While not universally couched in consistency language per se the potential impact of these decisions may be similar to that of consistency legislation. Some states call for regional coordination of local planning efforts as well. *See, e.g.*, PA. STAT. ANN. tit. 53, § 10306 (Purdon 1972); VT. STAT. ANN. tit. 24, § 4382(a)(8) (Supp. 1978) (suggested provisions for a comprehensive plan include a statement indicating how the plan relates to development trends and plans for adjacent municipalities and areas and the comprehensive plan).

In Hawaii and Vermont local government actions must correspond to plans de-partnership between state and local government with the substantive impact articulated at the state level should be considered. Under an improved model incorporating the consistency doctrine, local planning would encompass state standards in specified areas; home rule would allow local specification in the remainder. A consistent relationship between resulting plans and local regulations could increase the probability of successfully implementing the local-state plan. Among the offered benefits would be notice to all interested parties as to eventual use patterns of their communities. Private planning and investment might be expedited.

C. *Implementing the Consistency Relationship*

1. Generally

Consistency is not a self-activating doctrine; nor are details of its implementation obvious from its statutory and judicial articulation. When operational questions[53] have been resolved by the state, a system of enforcement must be selected or sufficient incentives for local government to comply with the partnership must be offered.[54] Various options exist for local compliance with state plan-

veloped at the state level. HAW. REV. STAT. § 205-16 (1976). For the Vermont Environmental Control Act, see VT. STAT. ANN. tit. 10, § 6001-6091 (1973 & Supp. 1978). For some indications of its efficacy, see R.G. HEALY, LAND USE AND THE STATES, (1976). Short treatments of the Vermont approach and that employed in Hawaii are given in NATURAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN THE UNITED STATES (E. Moss ed. 1977).

See the discussion of the Oregon and Wyoming schemes in text accompanying notes 44-48 *supra*. Legislation requiring closer coordination of planning activities of state and regional agencies has been proposed in California (Cal. A.B. 3543, introduced by Knox, Mar. 30, 1978).

53. Some examples of such questions are: How is consistency to be defined? What needs to be consistent with what? To whom are consistency mandates directed? *See* sections II-C to II-G *infra*.

54. Even in California, a state with advanced planning law and a now mature consistency provision, enforcement is spotty and based on either attorney general or private attorney general actions.

Attorney general enforcement of state planning law can be based on several sources of authority. In California the power is articulated as constitutional, CAL. CONST. art. 5, § 21; is found in common law, *e.g.*, People v. New Penn Mines, Inc., 212 Cal. App. 2d 667, 28 Cal. Rptr. 337 (1963); and is codified in statutory law, CAL. GOV'T CODE § 12511 (West 1963).

Under proposed legislation the attorney general would be required to file a petition for a writ of mandamus if a legislative body failed to comply with requirements of legislation mandating, *inter alia*, adoption of an agricultural element of local general plans. Cal. S.B. 193 (introduced by Zenovich, Jan. 25, 1977). Many aspects of the enforcement of environmental and land use law rely on the citizen suit. Much of the ning requirements. One alternative is to tie funding of projects which are attractive to local government to compliance with state planning requirements.[55] A second would have certain state benefits cut off if planning mandates are ignored. A third envisions a state-local agreement that state planning will only preempt certain specified physical and social domains; local decisions will be "guaranteed" elsewhere—at least for a set period of time. Other ideas are presented and discussed later in this article.[56]

2. How is Consistency Defined?

Variation in receptivity by local governments to the consistency doctrine can be partially attributed to the fact that there are several unresolved questions about the actual workings of the requirement.

case law, for example, which interprets environmental impact assessment requirements under federal and state environmental quality legislation has been brought by private citizens. At the point of this writing a dozen consistency suits had reached the appellate courts in California. *See* note 65 *infra*. A review of files at the State Attorney General's office—required to keep records of trial court filings of environmental and land use litigation—indicates little additional action at the trial court level. Eighty percent (80%) of these suits have been brought by private litigants, but in less than one-half the cases was there a remedy received at the highest (court of appeal) level which the suit reached.

55. The California Governor's Office of Planning and Research carries out the legislative directive of "developing state land use policies, coordinating planning of all state agencies and assisting and monitoring local and regional planning." CAL. GOV'T CODE § 65035 (West Supp. 1966-1977). It has no regulatory power. It sees itself as establishing state land use policy. *See* State of California, Office of Planning and Research, Goals for Local Government Planning: A Response to House Resolution 41, (April 1978) [hereinafter cited as Goals], but direct enforcement of state planning law is undertaken, if at all, by judicial review of local government action initiated by occasional attorney general litigation and random citizen suits.

The monitoring of compliance is a difficult state task, not only because of resource and methodological challenges: agreement upon the very definition of compliance is difficult to achieve. Lack of consensus is in part a function of the adversarial nature of the implementation of value-filled environmental and land use legislation.

Some states encourage their localities to plan and then do the planning for them should they fail to do so. In Florida, if a municipality within a county or a special district or local governmental entity has not adopted a plan as of July 1, 1979, the plan of the county in which the municipality or local government entity is situated shall govern. FLA. STAT. ANN. § 163.3167 (4) (Harrison 1978). If a county has not by then prepared a plan, the State Land Planning Agency shall prepare a comprehensive plan for the local entity.

56. *See* the discussion of alternatives to the consistency requirement and recommendations for implementing the requirements in sections III-D and IV *infra*. Proposed California legislation would create a Local Government Planning fund in the state treasury to reimburse local agencies for costs incurred pursuant to specified proposed planning legislation (A.B. 3544, introduced by Knox, Mar. 30, 1978). California law already requires that the state reimburse local government for costs incurred in carrying out certain state mandated programs.

Perhaps most fundamental is the considerable ambiguity in definition of the term "consistency." Even in those states where a legislative change has been made to effect consistency, there is no generally accepted understanding of the term. While this is certainly common in statutory interpretation, differences in use should be addressed.

In California, for example, several attempts have been made to clarify the cryptic language in the consistency statutes. One provision simply notes:

> A zoning ordinance shall be consistent with a city or county general plan only if:
> (i) The city or county has officially adopted such a plan, and
> (ii) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses and programs specified in such a plan.[57]

In its General Plan Guidelines[58] the California Council on Intergovernmental Relations sought to clarify the meaning of consistency but added little illuminating language. The Council, a forerunner to the present California Governor's Office of Planning and Research, concluded that the consistency link would be made "when the allowable uses and standards contained in the text of the zoning ordinance tend to further the policies in the general plan and do not inhibit or obstruct the attainment of those articulated policies."[59] This approach was generally endorsed by the California Attorney General in an opinion in early 1975.[60] After referring to language used in a 1946 North Dakota case[61] and a 1923 California case[62] he gratuitously added two dictionary definitions to his opinion to conclude that "[i]t is quite apparent that the 'consistency' or 'conformity' need not require an exact identity between the zoning ordinance and the general plan."[63] Concluding that "[i]t is not al-

57. CAL. GOV'T CODE § 65860(a) (West Supp. 1966-1977).

58. General Plan Guidelines, September, 1973, State of California Council on Intergovernmental Relations (Sept. 20, 1973) [hereinafter cited as General Plan Guidelines]. The Office of Planning and Research has recently responded to a legislative request with a document which briefly states that "zoning and subdivision consistency legislation ought to insure that plans be put into effect." *See* Goals, *supra* note 55, at 4. This document indicates the considerable lack of consensus in California as to the goals and objectives of the state planning law.

59. General Plan Guidelines, *supra* note 58, at II-13.

60. 58 OPS. CAL. ATTY. GEN. 21 (1975).

61. Mielcarek v. Riske, 21 N.W.2d 218, 221 (N.D. 1946).

62. Shay v. Roth, 64 Cal. App. 314, 318 (1923).

63. 58 OPS. CAL. ATTY. GEN. 21 (1975). The Attorney General also cited Annot.,

ways an easy matter to say that a particular use is or is not consistent with a general plan," the Attorney General did answer an easy question by stating that a hypothetical case of a residential multiple zoning and a general plan calling for single family residential "would not be considered consistent."[64]

California cases attempting to implement consistency have been meager, although at least twelve California Court of Appeal decisions have involved the consistency requirement at the time of this writing.[65] The California Supreme Court has heard two of these cases and has agreed to hear another.[66] Of these cases the court of

40 A.L.R.3d 372 (1971); and, Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

64. 58 OPS. CAL. ATTY. GEN. 21, 25 (1975).

65. Woodland Hills Residents' Ass'n v. City Council, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975); Hawkins v. County of Marin, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976); McMillan v. American Gen. Fin. Corp., 60 Cal. App. 3d 175, 131 Cal. Rptr. 462 (1976); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Youngblood v. Board of Supervisors, 71 Cal. App. 3d 655, 139 Cal. Rptr. 741(1977), *vacated as moot*, 150 Cal. Rptr. 242, 586 P.2d 556 (1978); Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977); Friends of "B" Street v. City of Hayward, 142 Cal. Rptr. 50 (1977); Sierra Club v. County of Alameda, 140 Cal. Rptr. 864 (1977) (accepted for hearing by Supreme Court of California but later retransferred to the Court of Appeal with directions to refile its opinion, 73 Cal. App. 3d 572 (1977)); San Diego Gas & Electric v. City of San Diego, 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978). An unpublished Court of Appeal opinion also addresses the consistency issue. Allan v. City of Glendale, 2 Civ. No. 52161 (City of Glendale, May 17, 1978) (Super. Ct. No. C-177607) addressed the scope of review a court should employ in reviewing a local government's determination of consistency. *See* the discussion of this case at note 226 *infra*. An extensive trial court opinion on the implementation of consistency was offered in Coalition for Los Angeles County Planning v. Board of Supervisors, [1975] 8 ENVIR. REP. (BNA) 1249. The court found medium to high density zoning inconsistent with the open space element goals of restoring and preserving natural resources and residential development inconsistent with the state policy of preservation of significant ecological areas. The court made other detailed factual findings of inconsistency. *Id.* at 1254. There have been a small number of other trial court cases which have come to the attention of the author. Where these have addressed issues of importance to the development of consistency law, they are noted *infra*.

66. Sierra Club v. County of Alameda, 73 Cal. App. 3d 572 (1977) was accepted for hearing by the Supreme Court of California but later was retransferred to the Court of Appeal with directions to refile its opinion. Youngblood v. Board of Supervisors, 586 P.2d 556, 150 Cal. Rptr. 242 (1978) was decided on Nov. 20, 1978. The Supreme Court of California affirmed the decision of the trial court holding that the defendant board of supervisors did not act unlawfully in approving the tentative map and that once the developer complied with the conditions attached to that approval and submitted a final map corresponding to the tentative map, the board performed a ministerial duty in approving the final map. The principal issue on appeal was mooted as the board of supervisors, while the appeal was pending, amended the

appeal decision in *Sierra Club v. County of Alameda*[67] comes closest to defining consistency. In that case a consistency challenge was made to a grant of a conditional use permit. The area in question was zoned agricultural and the permit was granted for a fairly extensive outdoor recreational complex. The court employed a "closely attuned" test for consistency. It first looked to the local open space element as a guide and reviewed the element's policies and goals. It concluded "[f]rom our consideration of the Open Space Element, and the evidence, we are of the opinion that the Board reasonably could, and did, conclude that the conditional use permit at issue was closely attuned to the stated policy and goals of the county's Open Space Element."[68]

Oregon has also experienced problems in implementing consistency due to definitional uncertainties.[69] Observers have noted that in Oregon "[n]otwithstanding advances made in the area of planning requirements, the proper relationship between the plan and regulatory measures remains unsettled."[70] Although absolute identity is not required between the plan's projection and the zoning designation[71] and although the leading Oregon case[72] did establish

zoning for the property in dispute to conform to the general plan. As of this writing no hearing date had been set in the third case, Friends of "B" Street v. City of Hayward, 142 Cal. Rptr. 50 (1977).

67. 140 Cal. Rptr. 864 (1977).

68. *Id.* at 872 (emphasis added).

69. In Oregon, however, the mandate of close conformance between plans and local regulations was reached through a set of events different from those in California.

See note 6 *supra*; Comment, *Green v. Hayward: Crystalizing Oregon's Solution to Zone Change Conflicts*, 13 WILLAMETTE L.J. 173 (1976); Mandelker, *The Role*, note 3 *supra*; Tarlock, *The Case Against*, note 3 *supra*; Triplett & Fasano, *Zone Changes in Oregon: Fasano in Practice*, 6 ENVT'L L. 177 (1975).

70. Sullivan & Kressel, *supra* note 3, at 52.

71. Bissell v. Washington County, 12 Or. App. 174, 506 P.2d 499 (1973).

72. Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). *See also* note 26 *supra*. In Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975), the court held that a zoning ordinance which allowed a more intensive use than that prescribed in the plan must fail. *Id.* at 514, 533 P.2d at 779. Baker changed the obligation to effect consistency to an affirmative duty. *See* Bross, *supra* note 3, at 98 n.6. In Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976), the Oregon Supreme Court admitted that the Fasano criteria were "rather general procedural admonitions" which were not readily ascertained and applied. *Id.* at 705, 552 P.2d at 822. The court also addressed the standard of judicial review in consistency cases:

> The appropriate place for both an initial interpretation of a comprehensive plan and a determination whether a proposed change complies with the specifics of the plan as properly interpreted is at the local level where the governing body is

standards for measuring conformity with the plan, interpretation of the relationship remains unclear.

Other states seem to be having similar difficulties with the development of a clear meaning of consistency. Two Florida acts[73] use the term "consistency" but official interpretations are lacking. In Kentucky, case law has been extensive but inconclusive on the importance of the comprehensive plan. A 1974 Kentucky decision noted that the purpose of the consistency section[74] was "to require zoning to conform to the *basic scheme* of prior planning [citation omitted], and to *prohibit indiscriminate ad hoc* zoning changes *which do not conform* to the original comprehensive plan."[75] A 1977 case, however, recalls the language of a ten year old decision that "a comprehensive plan is a 'guide rather than a strait-jacket.' "[76] An opinion of the Attorney General of Kentucky provides that the local zoning ordinance must be in "basic harmony" with the plan

> familiar with the plan and its implementation, and has heard the evidence at first hand. The chances of misunderstanding and of inconsistent land-use decisions are greatly enhanced when the courts are forced, because of inadequacies in the record, to undertake a search for evidence to support findings which were not made and reasons which were not given. Judicial review in these cases should be limited to a consideration of whether a properly documented decision finds support in the record.

Id. at 706, 552 P.2d at 822. *See also* Greb v. Board of Comm'rs, 32 Or. App. 39, 573 P.2d 733 (1978) in which the Oregon Court of Appeals dismissed a property owner's contention that zoning must be changed to conform with the less restrictive plan. The court concluded that plans only establish maximum intensities of land use.

73. The Forida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3161-.3211 (Harrison 1978), is discussed note 6 *supra*. The statute, noting that it is the intent of the Act that local land development regulations implement the comprehensive plan, authorizes judicial review of the relationships between plans and regulations.

Under § 380.06 of the Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. § 380.012-.11 (Harrison 1975 & Supp. 1978), a local government must consider, *inter alia*, when passing on applications for developments within state designated areas of critical concern, whether the development is consistent with local land use regulations and with the report of the applicable regional planning agency. Sections of this Act have recently been declared unconstitutional. *See* Cross Key Waterways v. Askew, 351 So. 2d 1062 (Fla. Dist. Ct. App. 1977), declaring that certain standards incorporated in § 380.05 and § 380.06 represent an unconstitutional delegation of legislative authority to the State Administration Commission to designate areas of critical concern. The case has been appealed.

74. Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492 (Ky. 1974) (reversing the circuit court).

75. *Id.* at 494 (emphasis added).

76. Bryan v. Salmon Corp., 554 S.W.2d 912, 917 (Ky. 1977) (quoting Ward v. Knippenberg, 416 S.W.2d 746 (Ky. 1967)).

and need not be absolutely consistent even in the absence of exceptions to the operation of the requirement.[77] Overall ambiguity resulting from inconsistent judicial interpretation and imprecise statutory language[78] weakens the Kentucky scheme.

Although Nebraska has a potentially far-reaching statutory consistency requirement,[79] consistency has been interpreted to be of almost no force there. In fact, the zoning ordinance has been explicitly interpreted to be the controlling entity, while the plan "is a guide to community development rather than an instrument of land-use control."[80]

The New Jersey Code uses the term "substantially consistent" but does not define it, and as of this writing no case has attempted to construe the phrase. However, reference to another section of the Code[81] may provide some indication of how a court will interpret the language. That section provides that the "zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land."[82]

a. The California example

Ambiguity in the interpretation of consistency explains in part the conclusion by some commentators that the change in the law effected by passage of consistency requirements is not great at

77. OPS. KY. ATTY. GEN. 68-558 (1968) interprets KY. REV. STAT. ANN. § 100.213 (Baldwin 1969) as requiring that a body make a finding of agreement between the plan and a map amendment or that a written finding be made that there was a mistake in the original zoning classification or that there have been major changes in the area. The requirement is modest and has been compared to Maryland's change-mistake rule. *See* Mandelker, *The Role*, *supra* note 3, at 963.

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

79. NEB. REV. STAT. § 23-114.03 (1977): "Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations. Such zoning regulations shall be consistent with the comprehensive development plan. . . ."

80. Stone v. Plattsmouth Airport Auth., 193 Neb. 552, 554, 228 N.W.2d 129, 131 (1975). This interpretation, in fact, sees NEB. REV. STAT. § 23-114.03 (1977) (passed in 1967) as effecting virtually no change in Nebraska law. *See also* Crane v. Board of County Comm'rs, 175 Neb. 568, 122 N.W.2d 520 (1963); City of Milford v. Schmidt, 175 Neb. 12, 120 N.W.2d 262 (1963); Weber v. City of Grand Island, 165 Neb. 827, 87 N.W.2d 575 (1958).

81. N.J. STAT. ANN. § 40:55D-62(a) (West Supp. 1978).

82. *Id.*

all.[83] But in California observers might reach a different conclusion. Among the leading cases in California addressing the issues of the function of the comprehensive plan are *O'Loane v. O'Rourke*[84] and *Selby Realty Co. v. City of Buenaventura.*[85] In *O'Loane*, the Court of Appeal stated that "It is apparent that the plan is, in short, a constitution for all future development within the city . . . [a]ny zoning ordinance adopted in the future would surely be interpreted in part by its fidelity to the general plan as well as by the standards of due process."[86] In *Selby* the court noted that "[t]he 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 not maintain an action in declaratory relief to probe the merits of the plan absent allegation of a defect in the proceedings leading to its enactment."[87]

The wording of early versions of California planning law underscores the extent to which AB 1301 (a common name for the consistency requirement) represents a significant change in the law. Prior to 1971 section 65860 of the California Government Code read: "No county or city shall be required to adopt a general plan prior to the adoption of a zoning ordinance."[88] The Attorney Gen-

83. For example, Professor Mandelker notes that in California the General Plan Guidelines, note 58 *supra*, "appear to state a 'rule of reason' for relating the zoning ordinance to the comprehensive plan that is similar to the position that several courts have taken on the same issue without the benefit of a statutory pronouncement." Mandelker, *The Role*, *supra* note 3, at 959 (footnote omitted). Professor Tarlock in a 1975 article seems to minimize the impact of the California legislation by referring to it in a footnote. He indicates that "Kentucky is the jurisdiction most explicitly imposing some burden on the community to justify a rezoning that departs from the plan. 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." Tarlock, *The Case Against*, *supra* note 3, at 89. He states that in California "the statute seems to contemplate that inconsistencies will be removed by amending the plan." *Id.* at n.65. *But see* note 87 *infra*.

84. 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).

85. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

86. O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965).

87. 10 Cal. 3d 110, 118, 514 P.2d 111, 115-16, 109 Cal. Rptr. 799, 803-04 (1973) (citations omitted). Regarding this case Professor Tarlock does admit that "the court's characterization of the plan as non-binding will surely have to be re-evaluated in light of" the consistency requirement. Tarlock, *The Case Against*, *supra* note 3, at 90 n.65.

88. CAL. GOV'T CODE § 65860 (West 1965). In California, presently mandated elements of the general plan are: a land use element, a circulation element, a hous-

eral has interpreted this as "almost an opposite connotation" to the present consistency requirement.[89] Other factors, including the legislative history of AB 1301,[90] the choice of the term "consistent" as opposed to the less stringent and more readily adopted phrase "in accordance with"[91] and knowledge of some of the more strongly held positions in planning,[92] lead to the conclusion that the change in California law contemplated by AB 1301 was considerable.

3. How should consistency be defined?

a. The views of the commentators and some general considerations

Commentators have been dissatisfied with official definitions of consistency. Professor Hagman has criticized the State of California

ing element, a conservation element, an open space element, a seismic safety element, a noise element, a scenic highway element, and a safety element. CAL. GOV'T CODE § 65302 (West Supp. 1966-1977). Proposed legislation would add an agricultural element as a separate element or consolidated with the open space element or land-use element required by this section (S.B. 193, introduced by Zenovich & Garamendi, Jan. 25, 1977).

89. 58 OPS. CAL. ATTY. GEN. 21, 23 (1975). On the history of planning requirements in California law, see Pach, Hookano & Fischer, *Adoption of the General Plan in California: Prelude to a Permanent Constitution*, 3 PEPPERDINE L. REV. S63, S66-69 (1976). On the subject of the extent of change, see Case v. City of Los Angeles, 218 Cal. App. 2d 36, 32 Cal. Rptr. 271 (1963), where neighbors challenging a conditional use permit which allowed development of a "deluxe apartment complex" in an R1 zone were told that the use permit provisions were not unconstitutional as alleged, simply because they provided for rezoning without an ordinance amending the master plan: "The acts of the administrative agencies in approving the location of a conditional use is not a rezoning of the property." *Id.* at 40, 32 Cal. Rptr. at 273.

90. As to the meaning of consistency in the open space provisions, one commentator reports that a legislative committee considering changes in the open space law had concluded: "Ideally, there should be unity between . . . " general plans and the "de facto plan drawn by the local body as it administers zoning and other land use programs." Hall, "*The Right of Control Over the City Plan: Local Planner Versus the State Legislature and the Court*," 3 PEPPERDINE L. REV. S106, S112 (1976) (quoting CALIFORNIA STATE SENATE AND ASSEMBLY JOINT COMMITTEE ON OPEN SPACE LANDS, FINAL REPORT (1970)). *See also*, DiMento, *Looking Back*, note 3 *supra*; Catalano & DiMento, *Mandating Consistency*, note 3 *supra*.

91. By 1968, 44 states had adopted zoning enabling acts which contained some variation of the requirement that zoning regulations be "in accordance with" a comprehensive plan. Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U.L. REV. 766, 768 n.6 (1974). Professor Haar's analysis of judicial interpretation of the phrase was that the comprehensive plan's "identity is not fixed with any precision, and no one can point with confidence to any particular set of factors, or any document, and say that there is the general plan to which the zoning enabling act demands fidelity." Haar, *In Accordance With*, *supra* note 2, at 1167.

92. *See* sections III-B and III-C *infra*.

Council on Intergovernmental Relations' definition[93] as ambiguous.[94] Professor Mandelker has noted that the definition of consistency remains a problem in California and Florida and concluded that any good definition should contain a "spacing and timing dimension."[95] He also concluded that the California Council's approach[96] which "suggests phasing zoning amendments to shift land use categories to more intensive uses as the times specified in the plan for the development of selected areas approach . . . deserves legislative consideration."[97]

Variability in commentators' understandings of how the term should be defined[98] becomes understandable when one appreciates the number of assumptions which guide a conclusion as to the proper relationship between plans and regulations.[99] These assumptions are treated in a section on policy analysis later in this article.[100] There it will be noted that one's opinions about an acceptable definition of consistency are related both to one's evaluation of how much consistency affects the planning process and to the individual characteristics of a particular comprehensive plan.[101]

93. *See* text accompanying note 59 *supra*.

94. D. HAGMAN, PUBLIC CONTROL OF CALIFORNIA LAND DEVELOPMENT § 2.29 (Supp. 1975) (supplement to D. HAGMAN, CALIFORNIA ZONING PRACTICE (1969)).

95. Mandelker, *The Role*, *supra* note 3, at 965. The ABA Advisory Commission would have spatial and timing dimensions in its definition of consistency. HOUSING FOR ALL, *supra* note 3, at 397.

96. General Plan Guidelines, note 58 *supra*.

97. Mandelker, *The Role*, *supra* note 3, at 965 (footnote omitted).

98. Professor Tarlock would oppose implementation of a strict consistency requirement for reasons summarized in the policy analysis. *See* section III-B *infra*. He feels that at most "[a]dopted plans should . . . be given some weight in determining the reasonableness of legislative or administrative decisions." Tarlock, *The Case Against*, *supra* note 3, at 83-84. For Professor Mandelker's position *see* text accompanying note 95. Professor Haar's position is given note 2 *supra*.

99. The capacity of the adversary system to complicate what some consider to be fairly obvious meanings in planning law may be most manifest where the consistency doctrine is concerned. *See* Catalano & DiMento, *Mandating Consistency*, note 3 *supra*, describing the response of the California legislative staff to the confusion caused by consistency language: "We meant 'compatible.' Immediately after [it was] enacted there were some who felt it meant 'exact conformity' . . . [but] they realized this was not the intent. My feeling is that all people who complained were simply engaging in dilatory, delaying tactics. They wanted to discredit 1301 and this was a gesture of defiance." *Id.* at 459.

100. *See* Section III-B *infra*.

101. For example, there is considerable movement away from detailed master plans with mapped areas designating permissible uses. One innovation (others are discussed at sections III-B and III-D *infra*) is toward "policy plans" which articulate a set of policies to guide developmental decisions regardless of their situs. Consis-

One view of consistency is that there should be a direct relationship between plans and regulations. An opposite approach is that the plan deserves at most to be consulted, and should remain one of several factors considered in deciding on a zoning amendment or other zoning or regulatory action.

b. Phasing—its implications for defining consistency

An important consideration in developing a definition of consistency is the treatment of phasing regulations to bring about the future scenario which the plan describes.[102] For example, consider a situation where the plans of a local government call for intensive (industrial) use of a plot of land and the present zoning is for a considerably less intensive (agricultural) use. When the demand for intensive use of the land is great and there are no environmental constraints on a zone change, this situation poses no great conflict. A problem of timing may, however, arise under a consistency requirement when there is no present strong demand for industrial or intensive use. When this happens, the local general plan typically precludes development for industrial uses until a time contemplated by the plan. A landowner—or in some jurisdictions even a non-landowner resident[103]—with developmental interests who prefers this site to another already zoned for industrial purposes may challenge that regulation.

Local government response will vary with the approach taken to timing in mandating consistency between local plans and local regulations. One view reflects the traditional understanding that low intensity zoning is a holding exercise for non-intensive purposes until a real demand is shown. Early California planning guidelines suggested that consistency implementation could reflect this ap-

tency requirements in jurisdictions with policy plans are not unimaginable (indeed proposed law in California would have amendments to the general plan consistent with certain policies of the proposed "Urban Strategy" (A.B. 3501, introduced by Gage, Mar. 30, 1977)). Means of implementing such requirements, however, will be considerably different than in cases where general plans are specific as to locations of various uses.

102. Traditionally, local planning has relegated lands not subject to immediate or short range development pressures to low density zones, although the long range plan may be for highly intensive use. This allows a local government some flexibility in phasing its growth.

103. In California law, standing to enforce the consistency requirement is provided for "[a]ny resident or property owner within a city or county . . . ." CAL. GOV'T CODE § 65860(b) (West Supp. 1966-1977).

proach.[104] Zoning amendments would occur as the designated time for a use noted in the general plan came about.[105] Presently there is some argument that such a waiting period could result in a challenge of a taking.[106]

A second approach is to require that all revisions of the zoning ordinance be made at the time of adoption of the plan. Consistency conflicts would thus be avoided although problems would arise for those cities wishing to phase their growth.

A third approach is to resolve consistency challenges on a case-by-case basis. The volume of litigation would be limited by a provision similar to that in California law which allows citizens to institute legal challenges for a limited period.[107] This approach may be criticized for unduly limiting the effectiveness of a consistency requirement. Therefore, a "two-tier" consistency doctrine may be desirable. One standard of consistency would apply to designated areas, perhaps land experiencing no strong development pressure. Here the concern with the community's need to plan for the long-range future would be maintained and no immediate requirement of consistency would be imposed. Another standard would require more immediate revisions to reflect recognition of the necessity for a strong relationship between the community's plans and regu-

104. General Plan Guidelines, *supra* note 58, at II-12.

105. *Id.* This would require a change in California law. The present approach is reflected in CAL. GOV'T CODE § 65860(c) (West Supp. 1966-1977):

> In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such a plan, or to any element of such a plan, such zoning ordinance shall be amended *within a reasonable time* so that it is consistent with the general plan as amended. (emphasis added).

An interesting example of some of the problems which evolve because of the uncertainty of the phasing issues is found in Bissell v. Washington County, 12 Or. App. 174, 506 P.2d 499 (1973). There, the Oregon Court of Appeals found that both the changes which had occurred and the failure of previously anticipated changes to occur justified the County Board of Commissioners' refusal to allow a zone change demanded by plaintiff, although the change would be in conformance with an adopted plan. Plaintiff's expectations would seem to be justified and controversies of this sort argue for the second alternative to phasing, pages 60-61 *infra*.

106. *See* the discussion of the taking issue in section II-F *infra*. In the instant hypothetical, the reasoning would be that zoning consistent with the plan is inevitable.

107. In California this period is six months after Jan. 1, 1974, or within 90 days of enactment of a zoning ordinance or amendment. CAL. GOV'T CODE § 65860(b) (West Supp. 1966-1977). The same principle could apply to a change in the plan or the adoption of a plan. As to the latter, present California law requires the local government to amend its zoning ordinance "within a reasonable time." *Id.* § 65860(c). *See* note 105 *supra*.

lations for use of land presently experiencing strong development pressures.[108] The two-tiered doctrine combined with citizen challenges would protect individual property rights that are real and imminently threatened as opposed to those which are speculative.

A fourth approach is to allow a jurisdiction a reasonable transition period to achieve consistency. This could be developed as a variant of the two-tier system described above.[109] Finally, a fifth option is the original Florida proposal[110] which applied the general plan prospectively. Under that proposal only development by and development orders issued by local government and subsequently enacted land use regulations need be consistent with the general plan.

4. Can something be consistent with something which is inadequate or nonexistent?

A threshold consideration in adopting a planning mandate is the adequacy of the plan. What are the implications of a jurisdiction's having an incomplete plan, such as a plan lacking one or more of the state mandated elements? The plan can be inadequate even though it has been adopted by government if it fails to meet standards, such as those of internal consistency or inclusion of state developed guidelines for housing, transportation or noise. Can there be consistency with a plan that does not contain a mandated element but which otherwise addresses the issue being contested, for example, by reference to plan policy?

California

California requires that any actions by cities or counties regulating open space land be consistent with the local open space plan.[111] In *Save El Toro Association v. Days*[112] the California

108. The two-tier consistency approach is elaborated in section IV *infra*.

109. This is similar to the California approach described above except for the fact that the period of time allowed under the California provision has not been considered sufficient. This conclusion is based on the Surveys, note 8 *supra*. In the first, 13% of the respondents thought the consistency reform in California was "unrealistic because it requires already overworked local planning staffs to produce complex regulatory devices without adequate time or resources to develop prerequisite data." In the second, the percentage was fifteen.

110. *See* note 6 *supra*.

111. CAL. GOV'T CODE § 65566 (West Supp. 1966-1977).

112. 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977). For a discussion of an early trial court decision indicating that existence of all required elements was necessary

Court of Appeal held that failure to adopt an adequate local open space plan precluded approval of a subdivision map for a challenged development.[113] The court stated: "Obviously, for a subdivision map to be consistent with the open space plan there must first be such a plan."[114] As there was no valid open space plan, there could be no city action to "acquire, regulate or restrict open space land or approve a subdivision map."[115] There have been no cases taking an opposite position in other jurisdictions.[116]

In *Save El Toro*[117] there was some contention that a plan did exist. A partial plan was presented to the court although it did not include several mandated elements. Because the California courts have refused to allow cities or counties to regulate open space land when there was an inadequate plan it would seem that the absence of any plan at all would have the same result. There may

in order to meet the mandate of adoption of a general plan, see the analysis of City of San Luis Obispo v. County of San Luis Obispo, San Luis Obispo County Superior Court, No. 44172, in Pach *et al.*, *supra* note 89, at S68 n.34. For a situation in which the question whether zoning can proceed in the absence of a general plan was avoided by reinstatement of an earlier plan, see *id.* at S73.

113. Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 74, 141 Cal. Rptr. 282, 288 (1977). The court also addressed the issue of internal consistency: "Though we find no requirement that the general plan be enacted as a single ordinance it would be preferable as the Legislature intended that the local agency's general plan and its elements and parts would comprise an integrated, internally consistent and compatible statement of policies for the adopting agency.' " *Id.* at 72, 141 Cal. Rptr. at 287. The specified aspect of consistency discussed was CAL. GOV'T CODE § 65566 (West Supp. 1966-1977), which provides that "[a]ny action by a county or city by which open space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open space plan."

114. Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 73, 141 Cal. Rptr. 282, 288 (1977). In California, open space plan consistency is directed by a separate provision of the California Code, CAL. GOV'T CODE § 65563 (West Supp. 1966-1977), and open space law is quite strict; thus the court's conclusion that there can be no consistency with a plan that lacks a required element cannot be directly translated into consistency requirements in general.

115. Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 74 141 Cal. Rptr. 282, 288 (1977).

116. Other states requiring adoption of a general plan before regulatory action include Nebraska, NEB. REV. STAT. §§ 23-114.03, 23-376 (1977); Florida, FLA. STAT. ANN. § 163.3161 (Harrison 1978); New Jersey, N.J. STAT. ANN. § 40:55D-62 (West Supp. 1978); Vermont, VT. STAT. ANN. tit. 24 § 4401(a) (1978); and Kentucky, KY. REV. STAT. § 100.201 (Baldwin 1969). In Washington, the courts appear to be divided on the question. Compare Shelton v. City of Bellevue, 73 Wash. 2d 28, 435 P.2d 949 (1968), with Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832 (1969).

117. Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).

be, however, some instances when such an analysis does not pertain. Consider for example the city or county that for valid reasons has not yet developed a plan or a comprehensive zoning ordinance.[118] Certainly action taken could not be consistent with a plan, but it is not clear that all development should be precluded until the plan is adopted.[119]

D. *What Are the Available Remedies for Inconsistency?*

The impact of the consistency doctrine will be minimal unless there is an effective set of remedies associated with acts of inconsistency. A number of legal opinions have addressed the range of remedies that are available should inconsistency be found. In Kentucky a court may strictly review a local government zone change and upon disagreement with the local government's finding of changed conditions invalidate the zoning.[120] In Nebraska there is authority for invalidating zoning and subdivision regulations adopted before a comprehensive plan.[121] In Pennsylvania, case law supports the invalidation of a zoning decision which was not in compliance with a comprehensive plan.[122] However, this view was authorized prior to the amendment of the Pennsylvania Municipalities Planning Code which made permissive the adoption of a comprehensive plan.[123]

The California position on invalidation is ambiguous. Varying pronouncements probably reflect the considerable economic and political implications which strong consistency remedies can have. An early opinion of the legislative counsel[124] said that where a county or city failed to adopt a general plan by a statutorily set time, a court would probably not invalidate a zoning ordinance. On the other hand, in a 1975 opinion[125] the California Attorney Gen-

118. The issue was recently avoided in Oregon. Passage of Senate Bill 100, OR. REV. STAT. § 197.005-.795(1977), mandating adoption of a plan by cities and counties, mooted the question of resolution of zone change requests, absent the existence of a plan. *See* Comment, *Green v. Hayward: Crystalizing Oregon's Solution to Zone Change Conflicts*, 13 WILLAMETTE L.J. 173 (1976).

119. *See* discussion of remedies at section II-D *infra*.

120. *See* Manley v. City of Maysville, 528 S.W. 2d 726 (Ky. 1975).

121. *See* Bagley v. County of Sarpy, 189 Neb. 393, 395, 202 N.W.2d 841, 843 (1972).

122. *See* Nichols v. State College Borough, 53 Pa. D. & C.2d 41 (1971).

123. PA. STAT. ANN., tit. 53 §§ 10101-11202 (Purdon 1972).

124. OP. LEG. COUNSEL S.J. 8016 (1972).

125. 58 OPS. CAL. ATTY. GEN. 21 (1975). In a footnote, the Attorney General

eral stated that a court, in a situation where there was no general plan, would respond by "mandating a delinquent city or county to adopt a general plan and its required constituent elements in order that zoning ordinances may be found to be consistent."[126] The court would also, where a general plan had been adopted and a zoning ordinance found inconsistent with it, order that consistency be achieved by way of amending the ordinance.[127]

In *Save El Toro*[128] the California Court of Appeal concluded that among the remedies available was setting aside a subdivision approval. *Friends of "B" Street v. City of Hayward*,[129] however, was an apparently different reading by the same court for public works projects. That case involved an ad hoc environmental group seeking, *inter alia*, to enjoin a small city from proceeding with proposed street-widening projects until they were in conformity with the general plan. The court first concluded that the failure to include a noise element, a required element in California, "would not be the basis for enjoining all public works projects within the city . . . the proper remedy was an action to compel the city to adopt the mandated noise element."[130] As for the remedy for inconsistency between the proposed project and the general plan, an injunction of the project was deemed by the court not to be available. In a decision which flatters local government by deferring to its supposed compliance with state planning law the court said:

> Since the Legislature has provided that a charter city must adopt a general plan, and that its general plan must contain a circulation element as one of its components, the Legislature must have intended that the city would comply with whatever general plan and circulation element it adopted. But it does not follow that an injunction . . . is an available remedy, indirectly to compel compliance with the Planning and Zoning Law. The statute makes no provision for such a remedy and we find nothing to

stated: "A mandate action apparently would not lie under section 65860 sub (b) against a charter city, as Section 65803 specifically excludes charter cities from the provisions of Title 7, Chapter 4, Zoning Regulations. . . ." *Id.* at 26 n.7.

126. *Id.* at 26.

127. *Id.*

128. Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977). The relief sought was an order restraining construction of district improvements and the sale of subdivided lots, and an order annulling approval of the maps and adoption of the resolution which created the district.

129. 142 Cal. Rptr. 50 (1977).

130. *Id.* at 54.

suggest that the Legislature intended to create the remedy, at least as against a chartered city.[131]

The efficacy of available remedies is in part a function of the enforcement scheme which is created to promote compliance with the consistency requirement. Some states employ an administrative review process while others rely on citizen initiated lawsuits or on the vigor with which the attorney general brings suit. California, for example, explicitly provides for citizen initiated lawsuits to secure consistency.[132] No provision for the citizen suit is explicitly made, however, when inconsistency arises because of an amendment to a general plan. But in *Youngblood v. Board of Supervisors*[133] the Supreme Court of California affirmed a Court of Appeal decision that reasoned that when inconsistency arises because of plan amendments, zoning ordinances shall be amended within a reasonable period of time and a writ of mandamus would be appropriate if the local government failed to act within a reasonable period of time.

Administrative review procedures, as a means of enforcing consistency requirements, may have advantages over judicial review. Professor Mandelker has presented reasons for favoring a state administrative role. First, reliance on sporadic individual citizen initiative is avoided. Second, administrative agencies can utilize a comprehensive state and regional perspective. Third, rigidity imposed by substantive policies articulated by the legislature is avoided.[134] The ABA Advisory Commission Report has concluded:

> Administrative review can be used to secure a comprehensive evaluation of local land-use regulations that does not rely on the

131. *Id.* at 55 (citation omitted). The court's reference to a California government code section relating to general law cities leaves open a different result for non-charter cities. *See also* discussion of charter-general law city distinction at text accompanying notes 140–46 *infra*.

CAL. GOV'T CODE § 65860(b) (West Supp. 1966-1976) provides that any resident or property owner may bring suit to enforce § 65860(a) which requires that consistency between local zoning ordinances and a municipality's general plan have been achieved by Jan. 1, 1974. Section 65860(b) allows actions to be brought within six months of that date "or within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance . . . ."

133. 71 Cal. App. 3d 655, 139 Cal. Rptr. 741 (1977). In Oregon citizen suits have been found to be available to enforce, by mandamus actions, consistency between zoning ordinances and the plan. *See* Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975).

134. Mandelker, *The Role*, *supra* note 3, at 970-71.

> willingness or ability of private litigants to bring lawsuits . . . State and regional agency review will thereby assure the implementation of the consistency requirement, provided that the statute makes the review of local land-use regulations mandatory and confers sufficient authority on the review agencies to conform local regulations to planning practice.[135]

Both Professor Mandelker and the ABA Advisory Commission Report are quite sanguine about administrative agencies' capability and motivation to carry out the review process. However, in view of the past record of administrative agencies in performing regulatory functions it is doubtful that administrative review would be the smoothly functioning mechanism desired. Indeed, it is primarily because agencies have been remiss in meeting the objectives of control legislation that citizen suits have been provided for in the law.[136]

One drawback to administrative enforcement is that the enforcement process is likely to become routinized.[137] In the consistency case the existence of strong interest groups which oppose some of the substantive results of enforcing consistency—such as realization of fair share housing schemes[138]—probably hinders effective administrative enforcement. This is not to say that administrative responsibility for reviewing consistency requirements should not be determined and assigned; rather it is to point out the need for multiple sources of enforcement of a requirement that regulations carry out planning.

E. *To Whom are Consistency Mandates Directed?*

Another factor related to the success of consistency reform provisions is choice of targets. To require consistency while exempting large parts of the state population or failing to dictate who is to undertake consistency review is to dilute the reform. The present query is two-pronged. The first issue is: which units of government are addressed by mandates linking planning and regulation? The second question is: who within targeted jurisdictions is responsible for assuring and effecting consistency planning and regulation?

135. HOUSING FOR ALL, *supra* note 3, at 403.

136. *See* DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409 (1977) [hereinafter cited as Citizen Environmental Litigation].

137. *See* section III *infra*.

138. *See* section II-B *supra*.

In California the first question is answered by reference to specific consistency requirements, but those requirements make a distinction as to local government zoning consistency: consistency between zoning ordinances and general plans under present law[139] is required for counties and for general law cities but not for charter cities.[140] The other consistency requirements[141] apply both to charter and general law cities.

The legal reason for this exception is not obvious. Perhaps the exception was a legislative oversight. The provision happens to fall in a section of the California codes which specifically excludes charter cities.[142] However, the remainder of the code chapter applies mainly to procedural points; the substantive nature of the consistency requirement is conspicuous.[143]

A study of the substantive differences between charter cities and general law cities in California offers little additional guidance. The only useful analysis to apply may be political. The distinction may have been made in the hope that by dividing the legislative target of the planning reform, the reform could be diluted. In addition, charter cities represent a significant interest group in California.[144]

139. CAL. GOV'T CODE § 65860 (West Supp. 1966-1976).

140. California law defines a "chartered city" as one "organized under a charter", CAL. GOV'T CODE § 34101 (West 1968), and a "general law city" as "one organized under the general law." *Id.* § 34102.

A recent California statute requires plan-zoning consistency for charter cities with populations of over 2,000,000 which limits applicability of the law to the City of Los Angeles. 1978 Cal. Legis. Serv. 921 (amending CAL. GOV'T CODE § 65860).

141. *See* section II-A *supra*.

142. CAL. GOV'T CODE § 65803 (West Supp. 1966-1977).

143. The distinction is not easily defended and has been challenged in California courts. *See, e.g.*, Foothill Homeowners Ass'n v. City of San Buenaventura (SP48455 Super. Ct., County of Ventura, July 25, 1977), where plaintiffs argued that the distinction is invalid because of public policy reasons and the rules of statutory construction, Foothill Homeowners Ass'n, Points and Authority in Support of Petition for Writ of Mandamus at 12. But note that a California appellate court has made use of this distinction to avoid the issue of taking which might be affected by planning if consistency is required. *See* Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976); *see also*, section II-F *infra*.

144. *See* note 140 *supra*.

Under California law both charter and general law cities have the power to zone. Charter law jurisdictions can use their charters as shields against state intrusion regarding the administration of zoning. But this fact does not explain the distinction applied to consistency. If the arguments in favor of the consistency requirement are accepted (see the policy analysis section III *infra*) few would recognize an exemption for charter cities. A weak argument on the other side is that at least charter cities put citizens more clearly on notice of the function of the relationship between zoning and planning. For a discussion of the law governing zoning and planning in

Threats to their home rule, which consistency requirements may represent, may have prompted the cities to respond effectively as a lobby. So, strong resistance on the part of a large number of local governments may explain the distinction. A more rational analysis is elusive.

If the conclusion that consistency should be mandated has been reached, an agency responsible for carrying out that mandate must be identified. The local governing body has the ultimate responsibility for meeting state mandated planning requirements.[145] But achieving consistency during the transition period after enactment of the requirement is a formidable project; local elected officials cannot be expected to make the countless minor decisions involved. Local planning agencies, on the other hand, typically do not have enough staff or consultant resources to respond readily to wide ranging changes which some versions of consistency law require.[146] The alternative is non-compliance with state requirements or ad hoc attempts (often initiated by private citizens) to achieve consistency on individual parcels or individual projects. Therefore, while cities and counties are the legal targets of consistency reform, there are considerable obstacles to their fulfilling the obligation of compliance. The implications of this conclusion are presented in the section on recommendations.

F. *The Taking Issue and Consistency*

An issue that has received surprisingly little attention is the extent to which the consistency requirement will result in the challenge of a taking based on alleged inverse condemnation effected

general law and charter cities, see D. HAGMAN, CALIFORNIA ZONING PRACTICE (1969), and D. HAGMAN, PUBLIC CONTROL OF CALIFORNIA LAND DEVELOPMENT (Supp. 1975) (supplement to D. HAGMAN, CALIFORNIA ZONING PRACTICE (1969)). In other states consistency applicability is also differentiated. Kentucky's law applies to cities and counties and the consistency finding is made either by the planning commission (or legislative body) or by the fiscal court. KY. REV. STAT. § 100.203 (Supp. 1978). Oregon's law applies to cities. *See* Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975). The holdings of Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), can be read as applicable to all units of government.

145. *See* discussion of the relationship between local and state government planning efforts in section II-B *supra*. For a treatment of the desirability of having planning agencies be advisory bodies, see KENT note 2 *supra*.

146. *See* discussion of the California experience in DiMento, *Looking Back*, note 3 *supra*; Catalano & DiMento, *Mandating Consistency*, note 3 *supra*. These early studies and the 1976 survey, Surveys note 8 *supra*, indicate that some progress has been made in California counties' attempts to be responsive to the intent of consistency reforms.

by plan adoption. Perhaps this lack of attention is due to the growing literature describing how difficult it is to prove a taking based on governmental environmental regulation.[147] One aspect of this issue is whether planning itself can effect a taking; a second is whether the consistency doctrine actually raises planning to the level of a regulation.

California courts, including the Supreme Court, have addressed these questions. The argument of a taking has been that, since consistency law requires that regulations and the plan closely conform, the plan is raised to the level of a regulation, and damages accrue from the time of adoption of the plan (assuming that the plan calls for a less valuable use than the landowner envisioned).[148] Generally, in California law an action in inverse condemnation will not lie if a plan simply calls for a less valuable use of property than the landowner's preferred or proposed use.[149] However, where the government has acted to lessen the value of a piece of land prior to actually condemning it, the California courts have required some compensation.[150]

A 1975 California Court of Appeal case addressed the planning-taking question after the implementation of AB 1301. In *Dale v.*

147. *See, e.g.*, BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE (1973). However, a large body of literature argues for compensation in environmental regulation cases. *See* Hagman, *Windfalls for Wipeouts*, in THE GOOD EARTH OF AMERICA 109 (C.L. Harriss ed. 1974); Huffman, Book Review, 8 ENVT'L L. 217 (1977). Huffman describes THE TAKING ISSUE "as a manual for environmental activists on how to get away with violating the Constitution." *Id.* at 230 (footnote omitted). For a thorough treatment of philosophies underlying approaches to compensation and a critical airing of issues surrounding regulation of land use, see the debate between J. Costonis and C. Berger in the COLUMBIA LAW REVIEW: Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

148. The importance of the plan in determining land values is particularly great. "In the absence of existing development as an influence on the zoning pattern, and with widespread use of low intensity holding zones as the applicable zoning designations, it is the land use proposals of the comprehensive plan which have the greatest effect on the land market." D. MANDELKER, THE ZONING DILEMMA 62 (1971). For a detailed treatment of the planning blight cases in California, see DiMento *et al.*, *The California Supreme Court's Record in Land Development and Environmental Control Law; An Empirical/Policy Analysis* (forthcoming).

149. *See* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). Selby stated: "The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property." *Id.* at 119, 514 P.2d at 117, 109 Cal. Rptr. at 805.

150. *See* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). *See generally*, DiMento *et al.*, note 148 *supra*.

City of Mountain View,[151] plaintiffs alleged, *inter alia*, that the city's general plan, a 1973 amendment to allow only open space use of their land (which was used as a golf course), together with the zoning ordinance that had been or might be enacted consistent with the plan, constituted an uncompensated taking. The Court of Appeal affirmed the lower court holding which sustained defendant city's general demurrer. The court recognized that the value of the plaintiff's land was "diminished to a level of not more than one-sixth of the value of the land that it is contiguous to."[152] But the court, relying on *Selby*,[153] stated that "[t]he plan is by its very nature merely tentative and subject to change . . . if the plan is implemented by the county in the future in such manner as actually to affect plaintiff's free use of his property, the validity of the county's action may be challenged at that time."[154] The court also rejected the plaintiff's argument that the underlying zoning ordinances were invalid, stating in a footnote: "The [plaintiff's] contention that Government Code section 65860 requires the city's zoning ordinance to be consistent with the general plan is entirely without merit as Government Code section 65803 exempts charter cities from chapter 4, 'Zoning Regulations,' of which section 65860 is a part."[155]

While the distinction between charter cities and general law cities serves to keep alive the taking issue in a general law city case, other aspects of the opinion indicate that the court continued to see planning "as leagues away" from condemnation action. The court cited favorably language in another California decision[156] that "landowners have no vested rights in existing or anticipated zoning ordinances" and are not entitled to reimbursement "for losses due to changes in zoning."[157]

A more recent case in the California Court of Appeal also used

151. 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976).

152. *Id.* at 106, 127 Cal. Rptr. at 522.

153. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

154. Dale v. City of Mountain View, 55 Cal. App. 3d 101, 107, 127 Cal. Rptr. 520, 523 (1976) (quoting from Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 118, 514 P.2d 111, 115-16, 109 Cal. Rptr. 799, 803-04 (1973)).

155. Dale v. City of Mountain View, 55 Cal. App. 3d 101, 108 n.5, 127 Cal. Rptr. 520, 524 n.5 (1976).

156. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967). *Accord*, H.F.H., Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

157. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 602, 55 Cal. Rptr. 710, 712 (1967).

the charter-general law distinction to avoid judicial scrutiny of the effect of the consistency requirement on the taking issue. But in that case, *San Diego Gas & Electric Company v. City of San Diego*,[158] a local government's policy to have its zoning consistent with its general plan did combine with other factors to result in a condemnation of plaintiff's land, requiring compensation. The court adhered to the general rule in California that "[a]doption of a general plan does not result in condemnation unless there are additional specific acts which commit the governmental agency to purchase the property."[159] Here those acts were found. They included the original zoning, a rezoning specification of an open space use of the plaintiff's property in the general plan and the city's decision to acquire the property.[160]

Resolution of the taking issue is related to resolution of other questions about consistency discussed in this article. For instance, defining the nature of the consistency relationship will determine, in large part, to what extent designation of a use in a plan remains a "potential" use of land as opposed to a regulation of land use. It is possible that the adoption of a plan subject to a consistency requirement would be deemed a legislative act, especially if challenges at the time of legislation and at the time of amendments are allowed. This might create such a close nexus between planning and zoning that planning would become subject to the same restrictive standards as regulatory devices.[161] There are strong policy reasons for avoiding this conclusion. A holding that planning is equivalent to a regulation and is therefore a possible taking would

158. 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978). For an earlier California decision in which a zoning ordinance and a plan combined to be sufficient to constitute a taking, see Peacock v. County of Sacramento, 271 Cal. 2d 845, 77 Cal. Rptr. 391 (1969).

159. San Diego Gas & Electric Co. v. City of San Diego, 81 Cal. App. 3d 844, ____, 146 Cal. Rptr. 103, 112 (Ct. App. 1978).

160. The court, although finding planning issues raised by the state consistency requirement moot because San Diego is a charter city, did take the opportunity to comment on a potential effect of the consistency law: "[n]otwithstanding the differences in their purpose, scope and function, zoning and the general plan become inextricably linked by the passage of AB 1301 which mandates that zoning be consistent with the general plan." *Id.* at ____, 146 Cal. Rptr. at 111. The taking issue generated by plan adoption will no doubt demand increased judicial attention as more and more jurisdictions take planning seriously.

161. *See, e.g.*, Candlestick Prop. v. San Francisco Bay Conserv., 89 Cal. Rptr. 897, 11 Cal. App. 3d 557 (1970). These standards might include that of "undue restriction" absent a physical invasion.

virtually destroy the planning process.[162] Courts have, however, looked favorably upon sound local government planning in recent years.[163]

G. *The Emerging Issue of Spot Planning*

Consider now the case of a landowner in Southern California. He lives in a region where pressure for growth has been immense but where there are also small groups of growth control advocates. Here a consistency doctrine is law. The landowner in this hypothetical case wishes to attract industry into his fledgling community. The area, like many prior to experiencing actual developmental pressure,[164] is zoned agricultural; that designation is consistent with the locality's plan. Nonetheless, the landowner succeeds in having his land rezoned for industrial use. Under the consistency citizen suit provision[165] local residents bring an action challenging the consistency of the new zone with the general plan. They succeed in that the city council stipulates to rescind the industrial zoning.

Undaunted, the landowner moves for an amendment of the general plan. He succeeds: a small area in which his land is located is "colored" industrial. Now the local government is compelled to make the zoning of this parcel consistent with its general plan designation. The result is a spot within the agricultural district meeting the requirements of California planning law: its industrial zoning is consistent with its industrial designation in the general plan.

162. This impact was stressed in a recent California decision involving a regional comprehensive plan. *See* Navajo Terminals, Inc. v. San Francisco Bay Conserv. Dev. Comm'n, 46 Cal. App. 3d 1, 120 Cal. Rptr. 108 (1975). For a critique of the court's refusal to distinguish therein between "flexible" general plans and the rigid San Francisco Bay Plan and for an indication that this opinion may be a harbinger of the California courts' disposition of consistency suits, see Comment, *Inverse Condemnation—The San Francisco Bay Plan is a General Plan and Designation of Private Property for Public Use Pursuant to the Plan is Not Inverse Condemnation*, 16 SANTA CLARA L. REV. 167 (1975).

163. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); and Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). For a summary of the California court's record of deference to local government "preservation oriented" action, see DiMento, *et al.*, *supra* note 148. For a study of the situation in Connecticut see the empirical study by Haar, Sawyer & Cummings, *Computer Power and Legal Reasoning: A Case Study of Judicial Decision Prediction in Zoning Amendment Cases*, 1977 ABA RESEARCH J. 651 (1977).

164. *See* the discussion of phasing section II-C (3)(b) *supra*.

165. CAL. GOV'T CODE § 65860(c) (West Supp. 1966-1977).

Although the above described municipal actions may not be compatible with what some supporters contend is the purpose of the consistency requirement, the California scheme provides no strong legal constraint on such actions. These actions amount to a "spot planning"; such planning may be "spotty" either spatially or temporally. There may be an island of intensive use within a region of supposedly permanent open space. Or, one section within an area whose very long-range designation is for intensive use may be prematurely designated such. Spot planning actions result from what has been described as legislative "failure to forestall avoidance."[166] Regardless of one's opinion of the advisability of strong planning requirements, a statutory scheme which allows the above scenario seems deficient. For the advocate of influential planning, spot planning makes circumventing the effect of the original planning process quite simple: one need only muster sufficient support from the local governing body to push through a planning amendment.

Some states have moved to remedy this abuse of immature state planning law. California has some constraints on the practice. That state limits to three per year the number of plan amendments to mandatory general plan elements.[167] Also, a hearing for achieving consistency with the newly amended plan cannot be held until two weeks after an action on the plan makes the zoning inconsistent.[168] The aim of both provisions is to discourage avoidance of the effect of consistency.

Whether these constraints are sufficient is questionable.[169] The

166. H. JONES, THE EFFICACY OF LAW (1969).

167. CAL. GOV'T CODE § 65361 (West 1973).

168. CAL. GOV'T CODE § 65862 (West Supp. 1966-1977). For a case in which the simultaneous amending of a plan and approval of a project was upheld upon challenge, see Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 728, 135 Cal. Rptr. 462 (1977). In that case the court held that neither the consistency requirement nor limitations on the frequency of amending the general plan applied at the time the defendant's decision was made. Presumably a different decision would occur under the new provisions.

169. The 1974 survey of California counties, Surveys note 8 *supra* found that only 31% of the respondents felt the law limiting mandatory plan element amendments to be influential. This question was not asked in the 1976 survey. However, in California, constraints imposed by the state planning law are supplemented by constraints imposed by environmental laws such as the California Environmental Quality Act. CAL. PUB. RES. CODE §§ 21000-21176 (West 1977). *See* the discussion of the combined impact of these two statutes on plan changes in Los Angeles in Hall, "*The Right of Control Over the City Plan: Local Planner Versus the State Legislature and the Court*," 3 PEPPERDINE L. REV. S106, S125-26 (1976).

rationale may be that the legislation at least inhibits rampant amending of the plan. Furthermore, it makes obvious to the community—during one of the maximum of three meetings per year—that the plan upon which some of the local citizenry may have worked extensively, is being considered for amendment. It clusters the times when both developers and preservation-minded groups must be vigilant of their respective interests.

Other states have approached the spot planning problem with different answers. An Oregon trial court opinion had applied the holding of *Fasano v. Board of County Commisioners*,[170] to amendments to the comprehensive plan. On appeal, the Oregon Court of Appeals reversed the case. The opinion, *Tierney v. Duris*,[171] is interesting in that it addressed the issue of spot planning directly. The lower court had upheld a challenge to a plan and zone change which would have allowed use of eight acres of land in a manner consistent with the *policies* of a comprehensive plan but not with its map. Concluding that a local government is powerless to amend a comprehensive plan as to an individual parcel the lower court stated flatly: "Spot planning as such is no less to be condemned than spot zoning."[172] The Court of Appeals disagreed, concluding that changes in the comprehensive plan could be made in the particular circumstances. The scope of the change was minor, so *Tierney* does not decide the ultimate limits of local government action on spot changes. The case does, however, leave considerable room for local government spot planning. Such planning was held "permissible when the original plan was in error, or there has been a change in the community, or there has been a change in policy, such as could be produced by city and county election results."[173]

More recently[174] the Oregon Supreme Court applied *Fasano* and held that when a single parcel change in a plan is proposed the amendment must be consistent with both the unamended portions of the plan and with the goals of the Land Conservation and Development Commission.[175]

170. 264 Or. 574, 507 P.2d 23 (1973).

171. 21 Or. App. 613, 536 P.2d 435 (1975).

172. *Id.* at 619, 536 P.2d at 439.

173. *Id.* Reportedly four complete evidentiary hearings were held before the plan amendment and zone change were approved in this case. *See* Comment, *H.B. 2876: Providing Cities with Flexibility in Land Use Decisionmaking*, 56 ORE. L. REV. 270 (1977).

174. South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 569 P.2d 1063 (1977).

175. *Id. See* discussion of consistency with state objectives in section II-B *supra.*

In *Fifth Avenue Corporation v. Washington County*,[176] the Oregon Court of Appeals looked to the manner in which a comprehensive plan was adopted and invalidated a plan adopted by resolution. It concluded that one of the policy reasons for the statutory Oregon requirement that county governing bodies adopt comprehensive plans must have been the intention to create a reflective process "that affords an opportunity for expression of public opinion."[177] The court found that only with formal procedures would the purpose be realized.[178] When applied to plan amendments, formalization may be another control on spot planning. Thus, while some gaps exist in the Oregon framework, it comes close to a comprehensive restraint on spot planning.

In Hawaii strict procedural safeguards were imposed in order to protect against abuses of the planning amendment process.[179] But Hawaii's recently implemented policy planning process renders the safeguards of questionable authority.[180] In Kentucky procedures for amendment of a comprehensive plan are the same as those for the original adoption which is to be based on specified demographic, economic, land use, community facilities and transportation research.[181] Finally, in Pennsylvania a test consisting of the demonstration of "sensitivity to the community as a whole" and an

176. 28 Or. App. 485, 560 P.2d 656 (1976).

177. *Id.* at 491, 560 P.2d at 660 (quoting 5 MCQUILLAN ON MUNICIPAL CORPORATIONS § 15.01 (1969)).

178. Fifth Ave. Corp. v. Washington County, 28 Or. App. 485, 492, 560 P.2d 656, 660 (1976). Interestingly, the court also concluded that determinations of consistency are not administrative actions like the granting of variances or special exceptions. Rather, the question of consistency is a question of law. *Id.* at 495, 560 P.2d at 662.

179. *See* Dalton v. City & County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969) requiring that plan amendments be supported by studies as comprehensive as those needed for original adoption of the plan. However, Mandelker describes the decision as having limited utility in resolving the plan revision process. *See* Mandelker, *The Role*, *supra* note 3, at 949. On the other hand, Mandelker does recognize some substantive impact of Dalton in its articulation that the affected parcel must be shown to be the "best site." *Id.*

180. *See* HOUSING FOR ALL, *supra* note 3, at 375 n.152.

181. KY. REV. STAT. § 100.191 (Baldwin 1969). *See also* Hays v. City of Winchester, 495 S.W. 2d 768, 769 (Ky. 1973) which held that where a zoning change is made contrary to the planning commission's recommendation the "legislative body must make a finding of adjudicative facts, either from the record of a trial-type hearing held by the Planning Commission, . . . or by the legislative body . . ."; City of Louisville v. McDonald, 470 S.W. 2d 173 (Ky. 1971) which held that where there was no trial type hearing before the legislative body, and the zoning commission's facts did not support the legislative body's refusal of rezoning, the legislative body acted erroneously.

analysis of the impact of the new ordinance on the community was applied to the passage of new zoning ordinances which conflict with plans.[182]

Experience in several states hints at the difficulty of developing a fair and manageable approach to the amendment process while still maintaining the integrity of the plan. Certainly, however, treatment of spot planning both in consistency jurisdictions and in other jurisdictions should be based on an analysis of the extent of the input into the original plan, the quality of that plan, important changes in comprehensive local government policy (perhaps those reflecting regional needs assessments as opposed to changes desired by narrow economic interests), and the openness, including the apparent fairness,[183] of the amendment process. More will be said about implementing plan amendments in the policy analysis in the next section.

H. *A Mid-way Summary*

Several questions remain unanswered in most consistency schemes that have been proposed or adopted. Perhaps this is because the consistency doctrine directly alters the approach toward the management of a commodity which is increasingly becoming the nation's most valuable: land. Yet some of the uncertainty that surrounds land use reforms is unnecessary. Choices available to the states can be articulated to decrease some of the unknowns about the effects of laws on local government and on property owners. These choices, which include considerations of the fairness of a developmental control scheme guided by planning consistency considerations, evolve from a variety of assumptions concerning the

182. Cheney v. Village 2, 429 Pa. 626, 241 A.2d 81 (1968).

183. The State of Washington requires that in order for the enactment of a zoning amendment to be valid the proceeding must pass the "apparent fairness" test. Under this doctrine not only must the proceeding be bias- and interest-free, but it must also appear to the public to be so. The test for determining whether this has been met

> is whether . . . a fair-minded person in attendance at all the meetings on a given issue, could at the conclusion thereof, in good conscience say that everyone had been heard, who in all fairness, should have been heard, and that the legislative body required by law to hold the hearings gave reasonable faith and credit to all matters presented, according to the weight and force they were in reason entitled to receive.

Smith v. Skagit County, 75 Wash. 2d 715, 741, 453 P.2d 832, 847 (1969). The doctrine may apply beyond the zoning amendment process. *See* Comment, *Zoning Amendments and the Doctrine of Apparent Fairness*, 10 WILLAMETTE L.J. 348 (1974). *See also* discussion of the alternatives to consistency in section III-D *infra*.

nature of planning in our society.[184] The next section presents these assumptions in the form of a policy debate.

III. PLANNING ISSUES AND POLICY ISSUES: THE CONSISTENCY DEBATE

A. *Introduction*

This work has thus far presented various approaches to the consistency relationship which have been adopted or considered in several jurisdictions. Other jurisdictions will no doubt continue to consider various types of local consistency requirements. The growing understanding of difficulties in achieving sound local developmental control and the regional impacts of local decisions may lead to increasing dissatisfaction with prevailing approaches that relate planning to regulation. It is possible that such dissatisfaction will result in legislative and judicial reforms. The remaining portion of this article will evaluate arguments relating to the advisability of planning reform, and to the alternative modes of reform that are available.

B. *Assumptions About the Nature of the Planning Process*

1. The case for consistency

a. A missing link

Advocates of consistency generally believe that society has demonstrated a clear capacity to plan for its future, that planning promotes the realization of a more desirable future than does lack of planning, and that consistency provides a missing link in a workable process of planning. These beliefs are buttressed by the observation that planning methods are becoming increasingly sophisticated and planning professionals are receiving better training. Therefore, the potential for effective long-range planning in American municipalities has been enhanced. Consistency can be the means for integrating a growing series of planning skills and methods.

184. Evaluation of the assumptions upon which each of the consistency arguments is based is the subject of a forthcoming work by the author. Therein social science research and theory is applied to premises about individual and organizational behavior which here are uncritically presented. In addition, the debate on consistency is presented in greater detail. J. DIMENTO, THE CONSISTENCY DOCTRINE (forthcoming).

b. Comprehensive planning's resource allocation potential

Acceptance of several assumptions leads to the conclusion that the influence of the comprehensive plan process should be increased. One such assumption is that well developed planning procedures promote efficient allocation and distribution of available resources. Because there are limitations on socially desirable goods, it is important that the allocation be done in a fair and equitable manner. Planning mechanisms, while not perfect, come closer than other mechanisms to making these decisions justly.[185] They are based on overviews not possessed by those who would directly share in resource distribution. Moreover, they encompass technical forecasts and information not accessible or understandable to the lay person.[186]

This argument has taken various forms over the years, from contentions that the planner can achieve economic rationality by facilitating those processes which achieve the highest and best use of land[187] to neo-rationalist approaches which add health, environmental and social costs to the best use calculation. The same view less strongly articulated is that in the absence of a perfect allocative mechanism, planners make more efficient decisions than do others —for example, developers.[188] Less strong still, the position holds

185. *See* the articulation of this position in Fainstein & Fainstein, *City Planning and Political Values*, 6 URB. AFF. Q. 341 (1971). They write: "Traditional planning assumes that its goal of orderly development of the environment is in the general public interest and that planners are in the best position of any group to determine the plan's immediate goals." *Id.* at 343.

186. For an articulation of the position that while planners are not wiser than other specialists in certain areas (such as siting) they are the most competent specialists, see Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

187. Haig, *Toward An Understanding of the Metropolis*, 40 Q.J. ECON. 403 (1926).

188. Constance Perin has tactfully articulated this position:

> Planning in the United States seems least able to collaborate with the private sector to good mutual effect, but by tying planning more closely to legislative action, on which the private sector has considerable effect, the imbalance of development that is not in the "public interest" may be correctible. Real estate interests, special transportation industry interests, and other lobbies have not yet met a substantial rebuttal from planners in the legislation drafted at all levels of government. Planners may thus be denied (through planning reforms which tie plans into regulatory schemes) the luxury of indefensible utopianism, but they may find it replaced with the satisfactions of having influenced tomorrow's decisions.

Perin, *Noiseless Secession From the Comprehensive Plan*, 33 J. AM. INST. PLANNERS 336, 342 (1967).

that at least the community will perceive the decisions as equitable.[189] Finally, it is argued that the process of planning leads to the creation of a consensus if planning, by encompassing consistency, earns the respect of those in the community who are most interested in and affected by allocative decisions.[190]

Underlying the various forms of this position is an assumption about the values of planners. This assumption traditionally has been controversial in American planning and becomes increasingly so in a consistency context.[191] It defines the planner as a strictly professional being, whose individual values have been sacrificed to those of the profession. The planner's espousal of the public interest can take many forms, but many consistency advocates agree it must go beyond consideration of the positions of local governments with regard to the allocation of uses of land and resources found within existing planning jurisdictions. For planners consistency reform, understood as internal consistency of planning requirements, as consistency among local plans and state goals,[192] and as consistency among the resulting local plans and regulations,[193] thus becomes a vehicle for promoting broader views of the public interest. In this view, planners carry out the Canons of the American Institute of Planners.[194]

189. One reason is that the community has been involved in the articulation of the allocative decisions. Based on several different theories in social psychology, participation would be positively correlated with acceptance of the results of the participatory activities. On the theories behind these processes, see J. DIMENTO, MANAGING ENVIRONMENTAL CHANGE (1976). On the effects of participation in the planning process on those who participate, see DiMento, *Have We Found a Free Lunch? Evaluating Public Participation in Environmental Decision Making*, PUBLIC PARTICIPATION IN NATURAL RESOURCE DECISIONS (A. Randall ed. forthcoming). On the effects of participation see generally G. WATSON, SOCIAL PSYCHOLOGY ISSUES AND INSIGHTS (1966).

190. Haar, *In Accordance With*, note 2 *supra*.

191. Piven, *Whom Does the Advocate Planner Serve?* 1970 SOC. POL'Y 32; Rein, *Social Planning? The Search for Legitimacy*, 35 J. AM. INST. PLANNERS 233 (1969).

192. *See* section II-B *supra*.

193. *See* section II-A *supra*.

194. 1.1 (a) A planner serves the public interest primarily. He shall accept or continue employment only when he can insure accommodation of the client's or employer's interest with the public interest.

(b) A planner shall seek to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons and shall urge the alteration of policies, institutions and decisions which militate against such objectives.

CANONS OF THE AMERICAN INSTITUTE OF PLANNERS, Article IX, CODE OF PROFESSIONAL RESPONSIBILITY (1972).

c. Responsive arguments

The consistency case may be made by responses to attacks on strong links between plans and regulations as well as by the affirmative arguments presented above. One of these attacks, presented in more detail below, is that consistency requirements make into law plans which may be "stale", i.e., plans which no longer reflect the salient environmental and social conditions of the community. Consistency advocates concede that conditions change and make plans less useful for directing future growth. They contend, however, that these changes can be reflected in revisions to the plan undertaken in a systematic and procedurally open manner.[195] A further response goes directly to the reform encompassed in the consistency doctrine. If consistency reform is successfully implemented, changes in the social and environmental setting will not "simply appear" and require reactive regulatory changes on the part of local governments. Rather, changes will be anticipated and, for the most part, directed.

A second anti-planning position to which consistency advocates have responded is that the planning process is neither open nor representative at the local level.[196] Consistency advocates acknowledge that deficiencies in plan development exist in most local communities. Plans have tended to reflect the values of a minority of the population.[197] Few local governments have devised proce-

195. As an example, the California State Housing Element Guidelines state that "the housing element shall be revised as the need indicates, but no less than once every five years." *See supra* note 39, at 6472. Other approaches to insuring plan updating are also being employed. *Id.* at 6472. *See* discussion of responses to spot planning at section II-G *supra*. Several states require periodic review of the plan. In New Jersey the review of the master plan and development regulations must be done once every six years. N.J. STAT. ANN. § 40:55D-89 (1978). Florida's attitude seems to be experimental; Florida law calls for the assessment and evaluation of the success or failure of the plan at least once every five years. FLA. STAT. ANN. § 163.3191 (1978). Kentucky law requires that the local comprehensive plan should be reviewed and, if necessary, amended at least every five years, or sooner if conditions require. KY. REV. STAT. § 100.197 (1971). In Washington an annual report on the comprehensive plan is required. WASH. REV. CODE § 36.70.000 (1976). Section 4387 of Title 24 of the Vermont Code is a mandatory review provision: the plan has a life span of five years. At its expiration the local legislative body may re-enact the same plan or enact a new plan. VT. STAT. ANN. § 4387 (1975).

196. This position is presented in text accompanying notes 214-19 *infra*.

197. Mandelker, *The Role*, *supra* note 3, at 950. Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), concluded that "almost irresistable pressures . . . can be asserted by private economic interests on local government. . . ." *Id.* at 588, 507 P.2d at 30.

dures which solicit, process and reflect the input of all citizens who would participate if they either knew of the plans or of the implications of the planning process. The advocates' retort is that approaches can be devised which incorporate the most representative samples of citizen opinion.[198]

Arguments for the consistency requirement are based on the need for greater citizen control over the planning process. For instance, the reviewing court, which under consistency reforms still has a function,[199] will look to the process of plan formulation to determine if it was sufficiently open to merit judicial deference. In addition, the consistency reform can be coupled with state planning changes that read due process requirements into the planning function.[200]

2. The Case Against Consistency

a. Planning deficiencies

An overriding criticism of any legal change that increases the importance of planning is that planning is not done well in this country. According to this argument, processes are not sufficiently developed and proven to merit greater deference to the plan. In addition, the actors who undertake planning are seen as incompetent to plan.[201] The implication for the present discussion is that the prerequisites necessary to implement a meaningful consistency relationship do not exist.[202]

198. An example offered is the Oregon Land Conservation and Development Commission, which has set nineteen goals for the State of Oregon. The work was performed by a seven member commission, which has been generally regarded as representative. On the degree of representativeness of public meetings, see the summary of previous criticisms and the surprising findings of Herberlein, *Some Evidence that Public Meetings are Representative*, in PUBLIC PARTICIPATION IN NATURAL RESOURCE DECISIONS (A. Randall ed. forthcoming).

199. Consistency with adopted plans has been interpreted as simply another factor which a court will consider in reviewing local regulations. *See* Tarlock, *The Case Against*, *supra* note 3, at 109. Other interpretations are offered at text accompanying notes 220-29 *infra*.

200. In California there is no constitutional requirement for notice and hearing prior to enactment of the general plan. *See* Pach, *et al.*, *supra* note 89, at S76. The statutory notice requirements for adoption of a general plan (CAL. GOV'T CODE §§ 65351, 65355 (West 1966)) do not apply to charter cities. Regardless of the decision on consistency there are strong policy arguments for requiring notice and hearing prior to plan adoption, Pach, *et al.*, *supra* note 89, at S78.

201. *See* Siegan, note 50 *supra*.

202. Several innovative approaches to land use regulation are summarized in

b. Planners' naiveté

Planners themselves have been criticized for being insufficiently attuned to highly political decisions inherent in local government action. Critics maintain that the very notion that allocations of immensely valuable land uses can be made in long-range plans, reflecting a modicum of technical expertise, "utopian" values[203] and non-representative citizen sentiment, is naive.[204] They claim that consistency, by affording the planning process greater status in the local allocation of resources, favors those people with the poorest understanding of land use values and the least personal involvement in local outcomes. According to this view, instead, developers and elected political leaders have the most expertise and personal involvement and should possess this power.

c. Constraints on planning

A more fundamental criticism of planning underlies other opposition to consistency. This assertion is that planning cannot be done well, and that the idea that there is a missing link in the planning process[206] is not well-founded. The argument has several compo-

Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183 (1972). The author proposed that "the primary values of rationality and equality" are capable of being protective under these innovations with the assistance of comprehensive planning. *Id.* at 207. However, actual practice at the local level has lagged far behind the innovative ideas generated in academe and can be fairly described as pedestrian. *See* Kaufman, *Contemporary Planning Practice: State of the Art*, in PLANNING IN AMERICA: LEARNING FROM TURBULENCE (D. Godschalk ed. 1974). Professor Kaufman reports that implementation of comprehensive plans is an area in which the planning profession perceives itself as performing poorly.

203. On the values of planners see text accompanying notes 217-18 *infra*.

204. Professor Tarlock has presented one prong of this position: "planners fail to recognize the importance of conflict, and they assume that consensus is possible without recognizing the deep value cleavages involved in many land use conflicts." Tarlock, *The Case Against*, *supra* note 3, at 80.

205. A general statement of the position that freedom from responsibility for decisions is poor training for planning is given in Altshuler, *The Goals of Comprehensive Planning*, 31 J. AM. INST. PLANNERS 186 (1965), based on the works of Chester Barnard and Winston Churchill. Opponents of consistency recognize that, although officially local elected bodies maintain control over the plan, immense demands on local government make this formal control mostly unrealized.

206. This position is presented in Section III-B (1)(d) *supra*. For a classic statement of this position, see Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959).

Others have elaborated parts of the argument with insight from their various subfields. *See* Banfield, *The Uses and Limitations of Metropolitan Planning in Massachusetts*, in 2 TAMING MEGALOPOLIS 710 (H.W. Eldredge ed. 1967) [hereinafter nents and is based on the belief that planning must be incremental and therefore the aim must be to develop a strategy to cope with problems, not to solve them.

One reason given for the contention that planning must be incremental is that people are not eager to set the long-range goals of which planning is made.[207] Second, it has been argued that planning must be incremental because there exists no clear understanding of what comprehensive planning means, even on the part of planning professionals,[208] so in order to be meaningfully addressed by citizens it must be short range.[209] Finally, it is maintained that the specific problems encountered in areas with extreme pressure for expansion and limited planning resources force planning to be incremental. Relationships between planners who are attempting to maintain some control over the growth process and developers who are both creating development demand and attempting to respond to strong demand have developed over time. These relationships are fragile but workable. Rather than being constrained by static plans formulated by those who are not cognizant of the intricacies

cited as Banfield, *Metropolitan Planning*]. *See also* DiMento, *An Accommodation of the Environmental Impact Assessment Process to the Incremental Mode of Analysis* (forthcoming); Self, *Is Comprehensive Planning Possible and Rational?*, 2 POL'Y & POL. 193 (1974); Howard, *The State of the Art of "Comprehensive Planning,"* 1 TRANSP. 365 (1973).

207. *See* Klosterman, *Foundations for Normative Planning*, 44 J. AM. INST. PLANNERS 37 (1978) (quoting Altshuler, Banfield and Appleby).

208. *See* Banfield, *Metropolitan Planning*, note 206 *supra*; Peroff, *Metropolitan Planning: Comments on the Papers by Nash and Banfield*, 2 TAMING MEGALOPOLIS 719 (H.W. Eldredge ed. 1967). For definitions of comprehensive as that word is employed in the description of a comprehensive plan see BLACK, THE COMPREHENSIVE PLAN: PRINCIPLES AND PRACTICE OF URBAN PLANNING 349 (W. Goodman & E. Freund eds. 1968); KENT, note 2 *supra* (the emphasis therein is on geographical parts and functional elements); Altshuler, *The Goals of Comprehensive Planning*, 31 J. AM. INST. PLANNERS 186 (1965); Friedmann, *A Response to Altshuler: Comprehensive Planning as a Process*, 31 J. AM. INST. PLANNERS 195 (1965).

In her critique of existing approaches to comprehensive planning, Perin noted: "Comprehensive planning can be thought of as the articulation of an outline of probable future interactions among imperfectly analyzed variables." Perin, *A Noiseless Secession From the Comprehensive Plan*, 33 J. AM. INST. PLANNERS 336, 339 (1967).

On the need for codification of land use reforms, resulting in part because of the absence of a clear understanding of the meaning of comprehensive planning, see Barnard, *The Comprehensive Plan Concept as a Basis for Legal Reform*, 44 J. URB. L. 611 (1967).

209. For an argument that planners' concerns with comprehensiveness and search for the public interest are incompatible with acceptance of the tenets of participatory democracy, see Hague & McCourt, *Comprehensive Planning, Public Participation and Public Interest*, 11 URB. STUD. 143 (1974).

of the developmental process in rapid growth cities and counties, both planners and developers prefer to maintain their shaky but workable "common law marriage." It is argued that consistency requirements would supplant this ad hoc decision process with a cumbersome planning framework and that the plan would inevitably be circumvented when actual decisions had to be made,[210] leaving the actual process incremental.

d. Planning's special functions

Other opponents of the consistency requirement do not oppose attempts to plan. Rather they feel that planning serves a function very different from land use or "working and living areas"[211] regulation. According to this view, society needs a mechanism to focus and direct long-range and comprehensive thinking about its environment. But, they argue, society cannot address long-range phenomena with the specificity necessary to enlighten its individual decisions.[212] Local decisions must be incremental: they reflect changing circumstances which cannot be anticipated in planning activities. True participation based on input of those whose interests are affected comes only upon recognition that a decision about property is imminent. Certainly, long-range participatory planning

210. On de facto planning powers and the use of discretionary authority in the planning and zoning processes, see Henke, *Judicial Review of Local Governmental Administrative Decisions in California*, 10 U.S.F.L. REV. 361 (1976).

The extreme version of this position is that planning is not necessary. Market forces will solve whatever transition problems result from development decisions: the argument has a laissez-faire tone, a tone some might refer to as that of not so benign neglect. Siegan, *supra* note 50, at 396.

211. The term is T.J. Kent's and indicates the need to emphasize:

> basic human activities, rather than the convenient but frequently misleading method of simply classifying the way land is used. The phrase "land use" is also confusing because it has been used to refer to all physical elements dealt with in the plan, since community facilities and streets are, in fact, uses of land.

KENT, *supra* note 2, at 19.

212. *See* Plager, *The Planning Land-Use Control Relationship: A Look at Some Alternatives*, 3 LAND USE CONTROLS Q. 26 (1969). The author concludes that what he terms the "planning as prerequisite" approach is deficient because:

> The approach continues the emphasis on plans, rather than on planning processes. It defines the contents of the plans in descriptive terms which provide no measure of quality or adequacy of the plans for the job to be done. It leaves untouched the question of testing the specific land-use decisions to determine whether the plans provided information that was useful in making decisions.

Id. at 30-31. This criticism applies to some understandings of the consistency relationship but not all. *See* section III-D *infra*. For a vitriolic attack on planning see Siegan, note 50 *supra*.

is desirable and feasible—but not at the level necessary to direct action on individual pieces of property.[213] The proponents of this view assert that planning and regulation are quite distinct activities, which should be undertaken by different experts cognizant of one another, but these activities should not be merged so that their individual functions become lost.

e. The representation issue

A second aspect of the argument that planning cannot be done well enough to support a doctrine of consistency is that planning cannot be truly representative. Fundamental to an acceptance of a consistency doctrine is acceptance of a well made plan. At least one aspect of a "good" plan[214]—perhaps the only aspect on which there is agreement by evaluators—is that the plan be responsive to those who are affected and who wish to have input into its development.

Countering the contention that planning is representative in the sense that a cross section of interests is involved in the process, consistency opponents respond by attacking the process with or without citizen participation. They do not believe that mechanisms exist for the kind of participation that is needed, contending that most jurisdictions in which planning is done are simply too large to solicit and hear the views of interested parties. Consistency opponents emphasize that without public participation the views of planners prevail and these views are not representative of the general population. For example, the traditional American desire for a single family dwelling on a sizeable lot with considerable privacy seems not to be reflected in the projections of the "best" plans.[215]

Consistency advocates contend that the planning profession is more likely to work for the public interest than are other groups of actors involved in the land use allocation and local planning processes.[216] Opponents counter that planners are advocates—for causes which are clearly not representative of the desires of a cross

213. Indeed, once incremental planning is done, regulations will be consistent with short-range thinking. A kind of consistency requirement thus results, but it is a trivialization of the concept discussed in this article. Tarlock, *The Case Against*, *supra* note 3, at 76.

214. *See* the discussion of the definition of "good" regulation in section III-B (2)(e) *infra*.

215. Wheaton, *Operations Research for Metropolitan Planning*, 29 J. AM. INST. PLANNERS 250 (1963).

216. *See* text accompanying notes 185-94 *supra*.

section of citizens.[217] Herbert Gans has flatly stated one variant of the latter position: "The planner has advocated policies that fit the predispositions of the upper-middle class. . . ."[218] Consistency critics also maintain that consistency would allow those who have appropriated the goods of a local community the benefits of property ownership without its responsibilities. For example, exclusionary practices that became acceptable under the local plan would be fortified by its consistent zoning and subdivision schemes.[219]

f. Further legal considerations

Finally, consistency antagonists argue that even if planning could be done in a drastically improved manner, planning cannot be done legally with consistency as the only standard. First, the plan is at best an advisory document in jurisdictions where the Standard Act language[220] is read not to require a separate planning document. Second, constitutional issues are raised by strict consistency requirements. It could be contended that strict adherence to the plan should remain a choice of local elected officials even if consistency legislation has been enacted, because the community cannot delegate to the planners its use of the police power to adapt to changing conditions.[221] Consider, for example, a jurisdiction whose

217. Long, *Planning and Politics in Urban Development*, 25 J. AM. INST. PLANNERS 167 (1959).

218. H. GANS, PEOPLE AND PLANS 21 (1968). *See also* Piven, *Planning and Class Interests*, 41 J. AM. INST. PLANNERS 308 (1975); Davidoff & Reiner, *A Choice Theory of Planning*, 27 J. AM. INST. PLANNERS 103 (1962). These authors were not directly addressing the question of consistency.

Some argue that the concern with representativeness is overly stringent and that the measure of a good plan should be its acceptability to the client. Once acceptable to the client, then a consistent relationship should be effected with local government regulatory action. But it simply is not clear who is the client of the general plan. Is it the local community? If so, as represented by whom? Or is it the natural area for which planning should be done—perhaps the region? Or is it simply the council? *See generally* KENT, note 2 *supra*.

219. Attempts by planners to cement the status quo to avoid influx by people whose values, interests and colors differ from those who arrived first have explained the formation of peculiar coalitions in recent years of civil rights groups, developers, and the construction industry. Under consistency law the planners become important in land use decisions; they are more often approached by those in whose economic interest it is to gain control over the planning process.

220. *See* note 10 *supra*.

221. Tarlock, *The Case Against*, *supra* note 3, at 74. On the delegation doctrine as it relates to local government zoning decisions in California, see Henke, note 210 *supra*.

comprehensive and representative plan has been reflected in a series of local regulations. Since the plan is a legislative act, delegated in certain jurisdictions to a planning commission but ultimately adopted by the local elected officials, what prevents a majority of representatives of the local government (absent a literal reading of "plan as constitution") from exercising changes in that scheme based on their judgment that in order to promote the public health, safety or welfare a decision which runs directly counter to the plan should be taken? All observers of planning admit that changes do occur which were not anticipated by the comprehensive plan.[222]

A response to the constitutional challenge is that the local governing body that officially adopts the plan is simply holding itself and the administrative bodies involved in developmental decisions, to its own highly detailed enactments.[223] Therefore, local elected officials have not delegated police power to the planners. In practice, the anti-planners observe, this model is not readily found, because local governments—typically overwhelmed by developmental decisions and policies in countless substantive areas—rarely

222. California law prevents amendments to the plan in excess of three times per year. CAL. GOV'T CODE § 65361 (1973). *Quaere* as to the effect of an urgency measure on the part of local government, contrary to the general plan, undertaken after the last opportunity for plan changes in a year had been held. Professor Tarlock has expressed a similar constitutional issue:

> In a planning decision the real issue is the legitimacy of value choices made by the government unit adopting the plan. 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 . . . subject only to broad ultra vires limits.

Tarlock, *The Case Against*, *supra* note 3, at 84.

One response to this position is that passage of a consistency requirement simply alters the nature of the ultra vires test. If an action is taken by an administrator on a subject which is adequately addressed by a legislatively adopted comprehensive plan, and if that action "does not correspond" to the action directed by the plan, then the administrator's act—whether that of a local zoning board or other group which administers development regulations which flow from the plan—is ultra vires.

223. In Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975), the Oregon Supreme Court, "looking to the substance of the action rather than the mere title," Id. at 511, 533 P.2d at 777, concluded that it matters not whether the plan was adopted by ordinance or resolution.

Professor Haar has noted, if a plan is written with sufficient detail, *i.e.*, if it "can clearly state the type of policies and goals that should be covered by the plan, the master plan can be given substance, for any implementing legislation that does not accord with such statement would be *ultra vires* the enabling act." Haar, *An Impermanent Constitution*, *supra* note 2, at 367.

address a plan with the specificity necessary to conclude that they have approved its general policies and programs, let alone its details.

Consistency opponents argue further that when a local government does approve, with knowledge, the contents of the plan, the plan ususally leaves much room for administrative discretion. The process of applying the plan to a specific zone change, subdivision approval, conditional use permit or variance is not mechanical. Rather, local administrators must consult the plan, interpret it, and apply it along with other indicators of local government policy.[224] In these situations the judiciary, when challenges arise, must determine if these interpretations were authorized. Consistency opponents contend that the judiciary lacks the expertise to review this administrative "translation", that a consistency requirement does not expedite the process,[225] and that in fact, under a consistency requirement, the court must look to a new set of criteria: for example, what in total, are the policies, land uses, and objectives of the plan? Consistency opponents conclude that with such an imprecise and subjective set of standards, change from the traditional police powers test (at least in the absence of any clear benefits from the consistency scope of review) is not compelling.[226]

224. Political considerations, for example, will be at work.

225. Tarlock, *The Case Against*, *supra* note 3, at 84. *See also* Plager, *supra* note 212. Generally on the role of courts in implementing reform decisions see Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976).

226. In Allan v. City of Glendale, 2 Civ. No. 52161 (City of Glendale, May 17, 1978) (Super. Ct. No. C-177607), the court applied a substantial evidence test in reviewing a local government's determination of consistency in light of what it called "striking deviations" between a proposed subdivision and a local government open space element of a general plan. Here, as in other areas of environmental and land use law, application of a substantial evidence approach to review undermines much of the original intent of reform legislation. If consistency determinations by local governments are based on only a modicum of resemblance between an action and a plan yet are nevertheless upheld by reviewing courts, no real remedy is provided by legislation of a citizen suit provision for enforcement of consistency law. In *Allan*, for example, the court demonstrated how easily the substantial evidence test can be met. The court held that "in a number of respects" the project was compatible with the specified uses and programs of the open space element. Under the test, filling in vegetation corridors where only 40% of the project area would remain open space did not do violence to the object of retention of the area in its natural setting. *Id.* at 27. Judicial Review of this kind is no review at all. Only in the most flagrant cases of total disregard for the plan would a court feel free to substitute its judgment for that of the local governing body.

On the scope of review to be applied in environmental cases, see Sive, *Some*

Another analysis of judicial expertise goes less to judicial competence and more to an understanding of traditional judicial functions. Throughout Anglo-American legal history courts have considered themselves protectors of private rights threatened by collective action. The judiciary in this view can apply the mechanical consistency doctrine, but it may be reluctant to do so. It is more probable that judges will see their function as calculators of the fit between a proposed individual action and a collectivity's plan, as balancers of an alleged individual right against the plan. Professor Mandelker has addressed this general tendency in his work.[227] He has also given examples of a court's assumption of authority to disregard totally a plan "under its own view of whether the plan is outdated."[228]

Consistency advocates counter that courts can assume that the planning choice is rational—an assumption not unlike that which underlies court deference to legislative action.[229] This analysis allows the court to respect the doctrine of separation of powers while maintaining its authority to remand actions which are based on irrational relationships between alleged comprehensive planning and regulation. Advocates add that the application of a consistency test is well within commonly accepted understandings of judicial capability, once consistency is adequately defined either by the courts or by the legislature.

C. *Assumptions About the Impact on the Planning Process*

Closely related to considerations of the nature of planning is concern about the *impact* of a consistency requirement on the planning process. One such concern is that consistency requirements

Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612 (1970); *Citizen Environmental Litigation*, note 136 *supra*. For an argument that courts should be willing to rely on their own judgment in review of local government decisions which are important in their "outcome to the life situation of individuals . . . ," see Henke, *supra* note 210, at 387.

227. Mandelker, *The Role of Law in the Planning Process*, 30 LAW & CONTEMP. PROB. 26 (1965). Courts, in his view, are hampered by individualistic bias and precedent in their attempts to promote certain long range policies. *See also* Bross, *supra* note 3, at 104-08.

228. Mandelker, *The Role*, *supra* note 3, at 947 n.194.

229. *But see* note 178 *supra*. The rational basis test is generally applicable when government action does not threaten a fundamental right or amount to an invidious discrimination. *Quaere* as to the impact of a conclusion that planning with consistency may give rise to a taking. The taking issue is discussed at section II-F *supra*.

threaten home-rule[230] by providing another entrance for state and federal interference with decisions optimally made at the local level.[231] It is recognized that, theoretically, the consistency doctrine sometimes means no more than that locally formulated and generally acceptable regulations should be promulgated with a view to locally formulated and generally acceptable plans. Opponents recognize, however, that state and federal planning requirements continue to grow—whether explicitly through planning laws, or implicitly through the "quiet revolution" in land use controls.[232] If local plans and regulations must be consistent with these requirements, planning will take place at a higher level of government.

Consistency requirements are also criticized for their failure to discourage, in practice, spot planning. It will be recalled that spot planning refers to the process by which a plan reserves a spot for a particular use in an area generally contemplated for a drastically different use.[233] The process of spot planning feared by consistency opponents can be seen through the example in section II-G. There a plan change was approved by a sympathetic council which had previously been prohibited from allowing a zone change; it then became obligatory to make zoning consistent with the plan. The same result is possible in jurisdictions which have no consistency requirement. However, consistency opponents argue that two evils now result. First, the integrity of the planning process is threatened; planning becomes more subject to political pressures. Furthermore, zone changes now are even less visible to those in the community who would be most likely to oppose them, because

230. *See* the discussion of home rule in the section on applicability of the California consistency requirement to charter cities at section II-F *supra*.

231. On the regional and state implications of consistency thinking see section II-B *supra*.

232. The phrase "the quiet revolution in land use controls" refers to land use results effected by regulations which provide some degree of state and regional involvement in major land-related activities, even if not ostensibly directed to land use. Environmental controls, for example, which are addressed to the objective of clean air are implemented through regulation of a wide variety of land-based activities. The term was employed by, *inter alia*, F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1972). The *ancien regime* to be overthrown was "the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less about what happens to all the others." *Id.* at 1.

233. *See* section II-G *supra*.

community watchdogs are told that the zone change is necessary to meet the requirement that zoning be consistent with community adopted general plans.

A third alleged impact of consistency reforms on the planning process is that consistency requirements force premature planning.[234] Under legislation like California's, local governments are required to address—often with drastically deficient resources—the long-range future of areas of the community which are presently subject to little or no development pressure. This policy promotes low quality planning decisions, which become locked into regulations.

Finally consistency legislation removes from planning its visionary function and flexibility, considered by some to be the most valuable attributes of planning mechanisms.[235] One consistency critic has argued that "[t]o the extent that the plan . . . is a detailed map of the land indicating specific uses, it differs hardly at all from the zoning itself. Under these circumstances . . . the plan becomes rigid and of little use in dealing with dynamic community growth."[236] Furthermore, it is contended that the plan becomes subject to the same pressures which have plagued the administration of zoning.[237] The concern is that the consistency reform, although beneficent in intent jeopardizes the benefits planning provides.

Consistency advocates' responses to the above arguments are straightforward. First, home-rule should be threatened; it is the

234. On premature planning, *see* Tarlock, *The Case Against*, *supra* note 3, at 71 n. 8.

235. McBride & Babcock, *The "Master Plan"*—A Statutory Prerequisite to a Zoning Ordinance? 12 ZONING DIG. 353 (1960). They continue:

> Let us admit without fear of undercutting a good thing, that it is possible to have a zoning ordinance which will accomplish many useful things without a preexisting community plan. To make a plan (comprehensive, master, or general) mandatory not only encourages bastardization of planning, but also deprives the conscientious, if impecunious, municipality of the chance to have a zoning ordinance.

Id. at 358.

236. Plager, *supra* note 212, at 29.

237. Again the applicability of this argument depends directly on the rigidity of the consistency relationship contemplated. Professor Haar wrote that the existence of a master plan and a requirement of zoning's "consonance" with that plan "will give lesser play to the pressures by individuals for special treatment which tend over a period of years to turn the once uniformly regulated district into a patchwork." Haar, *In Accordance With*, *supra* note 2, at 1174.

source of many urban and regional planning problems. Second, spot planning, while a potential evil, is subject to legislative and judicial control. Procedural safeguards are available.[238]

Finally, countering the view that consistency requirements cause planning to be rushed and then cemented, advocates state that bad planning can be avoided by additional planning reforms effected simultaneously with the consistency change. State funding of local planning efforts is one such reform.[239] A second approach is that areas of critical concern can be differentiated from areas where present pressure on development is not great: different compliance periods could be legislated for each of these areas. In effect, a two-tier system for consistency implementation would result.[240] Consistency advocates admit that planning is subject to improvement; they contend that the results of most planning efforts do not reflect potential benefits of planning because of the absence of a commitment to high quality planning by state and federal governments.[241]

D. *Assumptions about the Availability of Alternatives*

Another set of assumptions that affects decisions about adoption of consistency reform concerns the nature of alternatives available to meet the objectives of consistency legislation. While the precise

238. A markedly different understanding of planning's eminence is reflected in a variation of this position. The impact on planning's functions described above is predicted; here, however, the rationale evolves from a much less positive evaluation of the value of planning. Professor Tarlock argues flatly: "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." Tarlock, *The Case Against*, *supra* note 3, at 107. *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969), provides a model response: there it will be recalled that the Supreme Court of Hawaii held that the amendments to the general plan must be "comprehensive and long-range in nature." The Court concluded that "to allow amendment of the general plan without any of the safeguards which were required in the adoption of the general plan would subvert and destroy the progress which was achieved by the . . . plan." 51 Haw. at 416, 462 P.2d at 209 (Hawaii 1969), discussed at text accompanying notes 179-80 *supra*.

In response to the contention that the plan itself is obsolete and that spot planning is an incremental approach to its update the court noted: "[I]f the city believes the general plan of 1964 is obsolete, then comprehensive updating of the 1964 plan's studies of physical, social, economic and governmental conditions and trends is in order." *Id.* at 416-17, 462 P.2d at 209.

239. *See* the discussion of this suggestion in section IV *infra*.

240. *Id.*

241. Manor & Sheffer, *Can Planning Be Salvaged?* 1977 *Pub. Ad.* 211,213.

nature of these objectives is not easily determined[242] those who favor consistency generally aim to upgrade the quality of planning and ensure that local government actions reflect comprehensive plans or processes.[243] In this section a representative sample of alternatives to meeting one or both of the consistency objectives is presented.[244]

One alternative is the upgrading of the quality of planning—but without the concomitant change in the traditional relationship between planning and regulation. According to this view, as improvements in planning occur, respect for planning will accrue. As a result, a greater portion of the citizenry will eventually voluntarily participate in planning. It is thought that courts may even adopt adherence to plans as a standard by which to evaluate the nature of local government decisions.[245] Suggestions of techniques which expedite the improvement of planning are numerous. Some are mentioned in the remaining discussion.

Under a second alternative, zoning uniformity requirements are scrapped, subdivision exaction limitations are eliminated and consistency requirements are dissolved.[246] The specific plan becomes

242. *See* discussion of legislative history of consistency statutes in section I-A(2) *supra*; *see also* note 90 *supra*.

243. Perin's comment on the reasons for developing a new form of comprehensive planning provides another means of articulating the objectives of the consistency reform: "to improve the standing in the courts of the analysis and the interpretation of land development data." Perin, *supra* note 188, at 340.

244. The ultimate objectives of any type of planning reform include more rational use of resources and improvements in the quality of life. When the goal is framed this broadly, the alternatives to the consistency requirement include a variety of market approaches. For a recent analysis of the capability of land development by government to meet the goals of planning see Lefcoe, *When Governments Become Land Developers: Notes on the Public-Sector Experience in the Netherlands and California*, 51 SO. CAL. L. REV. 165 (1978). There is also a growing body of literature on economic interventions including differential taxation, adjustments in state and federal taxing schemes and tax increment financing aimed at land use control. These subjects are beyond the scope of the present work and of the author's expertise. *See*, for example, Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80 (1970). An articulate statement of the function of welfare economics in creating a theoretical basis for planning, including the specification of the goals of planning intervention, is given in Oxley, *Economic Theory and Urban Planning*, 7 ENV. & PLAN. A. 497 (1975).

245. Professors Hagman and Tarlock, for example, no starry-eyed supporters of planning in practice, recognize it as useful in some instances. This alternative sees the usefulness increasing, as the profession merits increased status. But supporters reject artificial attempts to upgrade planning by tying it into the official regulatory framework.

246. *See* the articulation of this scheme in D. HAGMAN, CALIFORNIA LAND

the control device. Community planning decisions are made at the time of proposed action when a choice seems urgent. Consequently, community values and real—as opposed to utopian or long-range—interests are likely to be mobilized and tapped.

Third, a set of procedural reforms is offered as meeting the objectives of consistency requirements.[247] Supporters of this alternative believe that the presence of informal, invisible, and sometimes illegal pressures on local government decisions explain the low esteem in which planners are held by other professionals and by the public generally. They therefore seek to target and eliminate opportunities for graft and corruption in the development control process, and make the development decisions open and public.

Concern with procedure is manifest in another proposal.[248] It calls for an improvement of input to the land use designation process by means of a "dynamically functioning input system" or, more colloquially, the "information machine."[249] Under this system clearly usable information would be provided to the decisionmaker. The emphasis here is on availability of facts, policies and alternatives to those who must determine uses of land.

A fourth alternative is based on an appreciation that development decisions are inherently adversarial. It calls for increased and

DEVELOPMENT—PUBLIC CONTROL (forthcoming), and the reforms contemplated in ALI, MODEL LAND DEVELOPMENT CODE, discussed in HOUSING FOR ALL, note 3 *supra*.

247. For a complete discussion of procedural safeguards applicable to land use decisions, see HOUSING FOR ALL, *supra* note 3, at 280-303. The doctrine of apparent fairness is one such safeguard. This doctrine is summarized at note 183 *supra*. Another element even precludes planners from meeting ex parte with interested parties on issues of future local government action. A variant of this procedural reform has been offered: the establishment of clear guidelines for structuring discretion. *See* Bross, note 3 *supra*. *See also* Comment, *Zoning Amendments and the Doctrine of Apparent Fairness*, 10 WILLAMETTE L.J. 348, 351-52 (1974). Concern with ex parte communication can be taken to great extremes as was done by plaintiffs in Tierny v. Duris, 536 P.2d 435 (Or. 1975). There the attempt by city council members to obtain information for their decision on a zoning change by soliciting opinions of residents and commercial interests in the area to be affected by the change was challenged as ex parte. The Oregon Court of Appeals, stating that the exact meaning of ex parte prohibitions of Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) was unclear, found the instant communications acceptable, if not desirable. Further, it stated that in light of a recent United States Supreme Court decision the holding on ex parte communications of *Fasano* may itself be unconstitutional. That case, Withrow v. Larkin, 421 U.S. 35 (1975) held that ex parte contacts are not per se due process violations.

248. Plager, note 212 *supra*.

249. Donald Hagman's term (personal communication to author).

improved advocacy planning by providing representation by groups whose interests are directly affected by imminent and short-range development decisions.[250] Final regulatory decisions would remain with the local government body—which would be guided by explicit statements of objectives and interests of each party to a decision, as opposed to formal plans and parties' ad hoc informal additions to the plans. Implementation of advocacy planning poses problems,[251] but some proponents contend that inequities and inefficiencies in governmental planning action are more likely to be decreased through perfections of advocacy planning than through attempts to improve centralized planning. Others support centralized planning but conclude that advocacy planning is necessary to improve the process.[252]

The final alternative to consistency analyzed here is a two-tier approach to the consistency requirement.[253] Under this option, a designated area is classified into two segments. The first includes

250. A prevailing assumption of advocacy planning proponents is that data choices, interpretations of information gathered, and emphasis on values vary dramatically with the position of the participant in a decision: developer, regulator, third party. Thus the planning input of each makes explicit the very conflicts which official centralized planning mechanisms attempt to minimize.

It is apparently possible to have an advocacy planning department within a city government. *See, e.g.*, the City of Cleveland's approach in Piven, note 191 *supra*.

251. *See, e.g.*, Peattie, *Reflections on Advocacy Planning*, 34 J. AM. INST. PLANNERS 80 (1968). *See also* Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331 (1965) and Davidoff & Gold, *Suburban Action: Advocate Planning for an Open Society*, 36 J. AM. INST. PLANNERS 12 (1970).

252. Among innovations recently suggested within the advocacy school are articulation of a right for interest groups to actual notice of a hearing on any plans which will affect them, designation of officially constituted representative advocacy bodies, and indemnification of organized interest groups when certain development decisions are contrary to their interests.

Many planning theorists concede that development control and resource management decisions are inherently adversarial and that conflicts over land use cannot be avoided, but nonetheless reject advocacy planning. In its stead, they call for changes in the process of planning. Transactional planning and long-range social planning are examples of planning forms aimed at improving the nature of the decisions that are made and increasing satisfaction with those decisions. *See, e.g.*, J. FRIEDMENN, RETRACKING AMERICA: A THEORY OF TRANSACTIVE PLANNING (1973); D. MICHAEL, ON LEARNING TO PLAN—AND PLANNING TO LEARN (1973); Godschalk, *The Circle of Urban Participation*, in 2 TAMING MEGALOPOLIS 971 (H.W. Eldredge ed. 1967). Those who share this view may or may not reject the search of plan as product, but they do share an understanding that planning should be subject to change, not only as environmental and material changes occur, but also as the planning process proceeds.

253. The approach is more fully described in section IV *infra*.

those parts of the area that presently are experiencing development pressures (or perhaps are critical areas from a natural resources point of view), and the second comprises parts of the area that are not subject to development pressures. Some variant of a consistency requirement would be applied to the first segment. However, the second could be the domain of planning by the community unfettered by concerns with implementation and regulation. Under this alternative, where regulation is imminent and should be guided by short-range planning, it will be. Where no need for rigorous regulation exists, short and mid-range planning methodologies are ignored, and approaches which are appropriate for thinking decades ahead are employed.[254]

These suggestions envision concomitant changes in the local government decisionmaking environment. Citizens would have greater monitoring roles. Disinterested parties to uses of specific parcels of land would be actively involved and the state role would increase, providing support and accreditation to the process.

Logically, there is no reason why some of the above policy choices cannot be linked to consideration of the consistency doctrine.[255] Generally, however, those who seek alternatives to consistency would avoid that link, sometimes because they do not wish to place time constraints on the upgrading of the planning process. They believe that although planning may eventually guide regulatory decisions directly, if that day comes it should be because the political process recognizes that planning efforts are reasonably and rationally translated into zoning, subdivision control, and other regulations. Moreover, they assert that any hope that planning will automatically improve following a state legislature's fiat that a link between planning and regulation should be made, is thought to be unrealistic.

254. Perin seems to be advocating a similar notion in her reformulation of comprehensive planning. According to her model, one function of planning is to designate future uses of property by legislating amendments to the land use regulations and to the "preamble" plan. Another function is "continuous planning . . . a dynamic instrument for visualizing and inventing the future at the same time that it offers realistic reasons for continuing or changing the policies of the preamble plan." Perin, *supra* note 188, at 344.

255. HOUSING FOR ALL, note 3 *supra*, for example, argues that "[t]he consistency required between local land-use decisions and policy plans . . . can be more flexibly interpreted by local governments or the courts than a zoning classification and designated use in a mapped land-use plan. . . ." *Id.* at 338.

IV. RECOMMENDATIONS FOR THOSE WHO WOULD PROMOTE CONSISTENCY

Although different conclusions may be reached as to the advisability of adopting consistency reforms, several recommendations are offered here for those who would attempt to implement consistency. First, for any change in the standard understanding of local planning that is of the magnitude of a consistency requirement, an adequate schedule for implementation must be allowed. Although there is some room for forcing action and technology by means of planning law, unrealistic implementation schedules may lead planners to conclude that any change required in so short a period certainly could not be significant.[256]

Those who advocate expediting implementation of planning reform include proponents of the two-tier approach to consistency introduced above.[257] Such an approach would enable controls to

256. Excessively demanding deadlines for compliance may have been set in California, resulting in some dissatisfaction with the requirement. The percentage of respondents to the Surveys, note 8 *supra*, who considered the California law unrealistic because it "requires already overworked local planning staffs to produce complex regulatory devices without adequate time or resources to develop prerequisite data" was 13% in 1974 and 15% in 1976. (Quotation is language from question six of the 1976 survey). *See also* State of California, Office of Planning and Research, Local Government Planning Survey 1977, note 8 *supra*.

257. Classifying areas of the state by degree of need for control and for planning improvements would not be without precedent. Distinctions along the lines of "(a) size and population density; (b) legal, fiscal, and administrative capabilities; (c) land use and development issues; (d) human needs; and (e) physical resources" have been recognized in assessment of California's planning law. *See* Goals, *supra* note 55, at 9.

Indiana law distinguishes among its jurisdictions in its limited consistency law. IND. CODE ANN. § 18-7-2-71 (Burns 1974) (variance consistency required in Indianapolis and Marion County). Note also that one of the incentives that the American Law Institute chose to induce local governments to plan was to select certain areas of special planning needs and develop "precise plans" for these areas. *See* Bosselman, *The Local Planner's Role Under the Proposed Model Land Development Code*, 41 J. AM. INST. PLANNERS 15 (1975).

Other areas of environmental law make such distinctions. One example is the 1977 Amendments to the Clean Air Act of 1970, 42 U.S.C.A. §§ 7401-7642 (West Supp. 1977). *See also* the Clean Air Act Regulations on "no significant deterioration" based on an area classification plan, 40 C.F.R. § 52.21 (1971); these effectively "zone" state land by reference to air quality. *See also* W.H. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 13.12 (1977). The Environmental Protection Agency produced a transportation plan for California under the Clean Air Act of 1970 which required transportation controls for only some areas. 38 Fed. Reg. 31,232 (1973).

Furthermore, there are jurisdictions already making classifications for planning law although the bases for some of these classifications might be questioned. *See* the discussion of the distinction between charter and general law cities, notes 139-44 be implemented rapidly in areas where they are crucial without holding the entire planning process to an unreasonable schedule. Shorter time horizons in critical areas may encourage greater citizen involvement in the creation of the plan. Challenges to decisions which delegate control to planning boards and commissions may be avoided if citizens conclude that the process of planning is just and that their views are given fair airing.[258]

The quality of planning must be upgraded if consistency requirements are to be meaningful. In order to further this objective, each state contemplating planning reform should establish schedules for plans which would thus avoid administrative vagaries about the desirability of consistency reform. States contemplating planning reform also need to develop more thoughtful approaches to implementation and enforcement of mandates. They must decide what the functions of administrative agencies and private citizens in the enforcement scheme are to be.

Choosing among a wide range of litigation options to enforce consistency is a considerable policy decision in itself.[259] Citizen suits are one option, but citizens have not been properly educated about the availability of and potential use of the citizen suit. There is also some concern that "resort to" the citizen suit in certain

supra. Proposed California legislation would exempt cities having less than a specified amount of agricultural land from a requirement of preparing an agricultural plan. (S.B. 193, introduced by Zenovich & Garamendi, Jan. 25, 1977).

Some states explicitly provide for a progressive zoning. For example, in Washington, for "practical considerations" the sections of a county "may be divided into areas possessing geographical, topographical or urban identity and such divisions may be progressively and separately officially mapped." WASH. REV. CODE § 36.70.740 (1964). Minnesota law has an interesting provision whereby township building and zoning regulations will be adopted if 70% or more of the voters vote for controls at an annual town meeting or a special meeting. MINN. STAT. ANN. § 366.12 (West 1966).

258. Advocacy models, transactional approaches and participatory schemes could all be integrated into the tier system. The second planning tier of a jurisdiction could not be ignored altogether, for considerations of ultimate uses in that tier might influence whether controls found in the first tier are adequate and just. Nonetheless, planning for this area could be more visionary and speculative, rather than regulatory-specific. On the tendency of new administrators to "personalize" legislative programs, explaining in part recurrent shifts in federal urban policy, see DiMento, Book Review, 15 URB. STUD. 114 (1978) (a review of B.J. FRIEDEN & M. KAPLAN, THE POLITICS OF NEGLECT (1975)).

259. For example, it must be decided whether attorneys' fees should be provided for individual litigation, and how long after an action results in an inconsistency citizens should be allowed to sue. *See Citizen Environmental Litigation*, note 136 *supra*.

jurisdictions would directly undermine local planning efforts.[260]

Private citizen action can be supplemented with or replaced by a strong state enforcement policy. The state attorney general could aggressively bring a series of suits and the state planning office could supply either incentives for compliance with the state planning requirement, or disincentives for non-compliance. However, it is possible that state governments in some jurisdictions will be confronted with strong home-rule provisions. In addition, although state influence over local government may be legally applied, it is often a finite resource in practice.[261] Other problems requiring stronger state influence over local government may be deemed more pressing or ultimately more important. The limits of state influence are further affected by the competency of state bureaucracy as well as by formal organizational policy.[262]

An additional recommendation for states which would promote consistency is to develop as precise a definition as possible before attempting to formulate legislation.[263] The definition should be so exact that even if compliance with the totality of planning and environmental law appears to be infeasible within a given time period, local government will have a clear idea as to how to assign priority. Careful consideration of the content of a consistency requirement also allows the state to review and coordinate its various planning mandates.[264]

260. One local government in a rapidly developing area reported that the few citizens who were aware of the citizen suit provision in California consistency law, CAL. GOV'T CODE § 65860 (b) (West Supp. 1966-1977), felt that attempts to use it to enforce consistency with the open space plan would result in "loss of the open space plan." Surveys, note 8 *supra*. The jurisdiction asked to remain anonymous.

261. An example of an incentive to increase state influence is found in CAL. GOV'T CODE § 11011.1 (West Supp. 1978), which makes a locality eligible to receive surplus lands at less than market value if its development plan conforms to its general plan.

262. Bolan, *Community Decision Behavior: The Culture of Planning*, 35 J. AM. INST. PLANNERS 301 (1969).

263. The feasibility of passing legislation in the absence of any consensus as to the desired outcome is discussed in A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed. 1974). On the reasons why organizations prefer to refrain from stating clearly the objectives of their programs, see Long, *Making Urban Policy Useful and Corrigible*, 10 URB. AFF. Q. 379 (1975). Lack of clarity of the California consistency mandate was one of the main concerns expressed by local government respondents to the Surveys, note 8 *supra*.

264. Recommendations for streamlining and integrating planning mandates have been offered. *See* Goals note 55 *supra*. *See also*, Catalano, General Plans and EIRS: Complementary or Redundant? (mimeograph, Public Policy Research Organization, Univ. of Calif., Irvine.) Proposed California legislation would exempt certain con-

At the very least, the state should be able to articulate:

a) the kinds of local actions to which the consistency requirement applies;
b) whether map designations will be a part of the consistency analysis, or whether policies alone will direct the process;
c) how implementation of consistency is to be phased;
d) what remedies are available to enforce consistency and whether these are applicable in situations where a plan has yet to be adopted;
e) the function of internal consistency in determining the availability of minor amendments to the plan.

Precision in definition and objectives does not preclude state enforcement flexibility when areas of conflict between consistency and other state and local government objectives develop.[265] In the final analysis, the advisability of enforcing consistency will be based on measurement of the quality of planning in a jurisdiction under review. Among the factors which might be utilized are the following:

1. Did the jurisdiction promote the spirit of the consistency reform through policies, programs and planning?[266]
2. Is there a history of broad-based participation by citizens in the development of regulations? (Put another way, is there community reliance on the plan?)
3. Has planning been strengthened in the jurisdiction in the period since the consistency reform was adopted?
4. Has planning been comprehensive enough to address adequately the instant decision?
5. Is an important regional, state, or federal interest jeopardized by failure to achieve consistency?[267]

struction projects in built-up urban areas from the environmental impact assessment process requirement if the proposed project is "consistent with an adopted specific plan or certified local coastal plan," and other requirements are met. (A.B. 3717, introduced by Lockyer, Apr. 10, 1978.) Explication of the planning reform and its objectives vis-a-vis several other state goals may influence the desire of local government to comply.

265. A good example of enlisting county supportive action in a state attempt to regulate unincorporated shore land according to state standards is given in Weber & Peroff, *Local Government Response to State-Mandated Land Use Laws*, 43 J. AM. INST. PLANNERS 352 (1977).

266. An example of a decision in which the court considered the failure of a local government to follow consistently its own development policy as a factor in holding unconstitutional a zoning that was applicable to the property in question is Board of Supervisors v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975).

267. The ABA Advisory Commission provides this criterion for the decision on

6. Is there evidence of a heavy burden placed on those who have sought administrative approval of other actions inconsistent with the plan?

V. SUMMARY AND CONCLUSIONS

Legal issues surround the consistency requirement. The values which consistency brings to the fore trigger the adversary system in its most vigorous form. Those affected by land use law wish to insure their property rights and to maintain some predictability about the impact of land use decisions on their land. The definition of consistency, the scope of the reform and its application determine in part the impact of a planning document or planning process on a particular piece of land. Even in the absence of ambiguity in application the resulting impact of planning requirements may be challenged on constitutional grounds as a taking.

An immediate aim of this article has been to present details regarding consistency reform that should be of interest to legislatures considering changes in the importance of the plan. It may be argued that the present elaboration further prods the legal system to complicate planning ideas. However, because planning is perceived as affecting the economic value of land, promoting social integration and directing state and federal environmental programs, increased litigation can be expected unless reform law is specific. The present article may serve as a guide to those who seek to decrease uncertainty in the land use control process and increase its fairness, and who attempt to reach their goals to implement planning through regulations.

the "rigidity" of the consistency requirement:

> [w]here state enabling legislation, or, perhaps, state and federal constitutional law, provide a specific basis for consistency with the plan—e.g. consideration of regional housing needs or protection of critical environmental areas—the requirement for consistency . . . may necessarily be more rigid and demanding due to the complexity and controversy associated with such issues.

HOUSING FOR ALL, *supra* note 3, at 409.