Planning and Law: Shaping the Legal Environment of Land Development and Preservation

by Charles M. Haar and Michael Allan Wolf

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Editors' Summary

It has been more than a century since the City Beautiful movement captured the imagination and attention of public officials throughout America. Today, many states and localities continue to wrestle with the need for, and legal and social significance of, comprehensive planning. In most of the country, zoning preceded planning, a fact that is often evident when one studies current land use patterns. In the last few decades, planning law has reached a new level of sophistication, as courts, commentators, and public officials have explored the ways in which environmental protection and land use controls intersect, at times in a complementary fashion and at other times in conflict. To be successful in this new legal milieu, the modern land use attorney needs to have a healthy respect for planners and planning theory, keeping in mind the needs and desires of their clients and the ways in which poor planning and zoning decisions and the footprint of the modern public-private partnership often have a lasting, negative effect on the unbuilt environment within and beyond our artificial political boundaries.

I. Figures and Lies: Appreciating the Demographic Landscape of Our Increasingly Urbanized Society

Although quantitative analysis is an essential part of the curriculum and practice for professional planners, this is not the case for many members of the bar. In order to serve their clients successfully, land use attorneys who represent clients on the public and private side should be at ease with people and with statistics. While admittedly these skills do not always go hand-in-hand, experience shows that the measure of success in the field of land use law is in the outcome of the many meetings lawyers hold with concerned parties, not a won-loss record in the courtroom. Indeed, when a land use dispute ends up in court, that is often the surest sign of failure.

Land use planning law practitioners should feel comfortable working with a wide range of people whose interests often *appear* to be directly in opposition—for example, representatives of neighborhoods whose residents are concerned about the impact of commercial growth and shopping mall developers that have purchased at great cost options on land in the vicinity, landowners who are frustrated by regulatory requirements that stand in the way of plans for enhancing the use and value of their property and professional planners who are employed by local and state governments and charged with overseeing the implementation of the master plan, grassroots environmental and conservation groups who are concerned about the pace of growth, and government transportation officials who provide the corridors for residential, commercial, and residential expansion. Often the major challenges faced by the land use attorney are enabling these potential foes to appreciate the common ground that they occupy and in the process to minimize the friction and delay that mark the most acrimonious examples of process failure. This is what the "people" side entails.

On the "statistics" side, the most skillful land use law practitioners are well aware that as the old chestnut states, "figures lie and liars figure." Nevertheless, often the most compelling evidence at a planning commission hearing or the most convincing argument at a gathering of disgruntled neighbors is expressed in cold, hard numbers—numbers that appear in floor area ratios, vehicle miles traveled, school body size, densities per acre, or parts per million of pollutants. We are not suggesting that the land use attorney should be able to generate this kind of statistical information on her own. Rather, not unlike the medical malpractice attorney who works closely with skilled professionals in the health care

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fields, the top practitioners in land use planning law benefit from active and mutually respectful partnerships with planners, transportation engineers, architects, and others whose work helps shape, and in turn is shaped by, planning, zoning, and environmental law.

Time, technology, and the changing needs and aspirations of human beings produce stresses upon existing legal institutions and doctrines. Thanks to the Internet, we have nearly instant access to valuable quantitative displays that suggest many salient facts about the conditions of land interdependence in the United States that have intensified ancient conflicts or spawned new problems. Many of these data collections teach the central lesson of change in the scale and pattern of growth found in America's urban, suburban, and rural communities. These numbers, charts, and tables convey some startling transformations in our social composition, in our settlement and work patterns, and in the state of our unbuilt environment over the past several decades. It is the impact of these and related forces that underlies and sometimes frustrates those efforts to arrive at a new synthesis of framework and function commonly subsumed under the title of planning law.

A major challenge for the lawyer is gathering the data necessary for an effective presentation of the client's side in discussions and disputes over the use or conservation of land. In *Dolan v. City of Tigard*,[1] the U.S. Supreme Court, in articulating a "rough-proportionality" standard for exaction cases, criticized local officials for their failure to link their regulatory activities closely enough to specific, local floodplain, and traffic realities. While allowing that "[n]o precise mathematical calculation is required," the Court instructed that "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[2] Compare the way in which attorneys for local homebuilders and organizations representing senior citizens and tenants mounted a successful attack on minimum floor area requirements imposed by Berlin Township, New Jersey,[3] with the failed attempt by a similarly situated developer challenging Wayne Township's ordinance 27 years before.[4] Or consider a Florida county's reliance on the report of a nationally recognized consultant in devising a school impact fee ordinance that gained the approval of the state supreme court.[5] And of equal importance is an acquaintance with the limitations of such information: some figures require as much reading between the lines as down the columns. It is on these same raw statistics—although with a different orientation and purpose—that the judge, legislator, administrator, planner, real estate speculator, builder, and all others concerned with land development often base their decisions.

II. Meanings and Means of Planning

A. *The Plan: An "Impermanent Constitution"*

Herbert Hoover, whose infamous presidential Administration was cursed by the stock market crash of 1929 and the ensuing Great Depression, was an important player in the predominantly local and state planning and zoning movement during its crucial growing stage. As Secretary of Commerce during the pro-business Calvin Coolidge Administration, Hoover appointed the Advisory Committee on City Planning and Zoning, which produced two important model acts: the Standard State Zoning Enabling Act (SZEA)[6] (published in 1924 and revised two years later) and the Standard City Planning Enabling Act (SCPEA) (published in 1928). Committee members came from business, law, planning, real estate, and industry, and included such important figures as Edward Bassett (law), Alfred Bettman (law), Frederick Law Olmsted Jr. (landscape architecture), and Lawrence Veiller (housing). While the SCPEA was not as popular as its predecessor (by 1930, the zoning act was relied upon by 35 states, whereas the planning act was used by 10), it nonetheless was and remains influential among those responsible for shaping planning laws and policies throughout the nation.[7]

Section 6 of the SCPEA (General Powers and Duties) provided: "It shall be the function and duty of the [planning] commission to make and adopt a master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment, bear relation to the planning of such municipality." A footnote at this point explains that, by "a master plan" the drafters "meant a comprehensive scheme of development of the general fundamentals of a municipal plan. An express definition has not been thought desirable or necessary." Instead, the model act provided illustrations, noting that the plan, supplemented by "maps, plats, charts, and descriptive matter" would reveal

> the commission's recommendations for the development of said territory, including, among other things, the general location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds and open spaces, the general location of public buildings and other public property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; also the removal, relocation, widening, narrow-

1. 512 U.S. 374, 24 ELR 21083 (1994).
2. 512 U.S. at 391, 395-96.
3. Home Builders League of S. Jersey v. Berlin Twp., 405 A.2d 381 (1979).
4. Lionshead Lake, Inc. v. Wayne Twp., 89 A.2d 693 (1952). For one law professor's reaction to the problematic reasoning in this case, and to the exclusionary potential of zoning, see Charles M. Haar, *Zoning for Minimum Standards: The* Wayne Township Case, 66 Harv. L. Rev. 1051 (1953), Charles M. Haar, Wayne Township: *Zoning for Whom?—In Brief Reply*, 67 Harv. L. Rev. 986 (1954).
5. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (the expert was Dr. James Nicholas).
6. The actual title was "A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations."
7. For more details on both model acts, see Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, Land Use L. & Zoning Dig., Feb. 1996, at 3.

> ing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities, or terminals; as well as a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises. . . .

Section 7 (Purposes in View) established a very ambitious goal for the master plan, such as

> guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.

Note that the drafters were evidently mindful that courts then, as now, envisioned that the state's police power was designed to protect the public health, safety, morals, and general welfare.

A few decades later, when many American local governments had enacted or were in the process of developing master or comprehensive plans, the serious question arose as to the *legal* status of this unique document. Prof. Charles M. Haar, has conceptualized the problem in this fashion:

> If the plan is regarded not as the vest-pocket tool of the planning commission, but as a broad statement to be adopted by the most representative municipal body—the local legislature—then the plan becomes a law through such adoption. A unique type of law, it should be noted, in that it purports to bind future legislatures when they enact implementary materials. So far as impact is concerned, the law purports to control the enactment of other laws (the so-called implementary legislation) solely. 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. To enact a nonconforming measure amounts merely to passing the law twice. . . .
>
> [T]his seems the limited function to which the master plan can withdraw in order to perform most effectively in the grand effort to improve American cities: a reminder of the myriad of activities affecting land, their interrelation, their long-run effects which the day-to-day administrator is too busy to consider. The implementing legislation, on pain of being outside the statute, must conform to its generalized propositions. . . .[8]

For the remainder of the 20th century (and even beyond), courts and commentators have continued to wrestle with the nature of the relationship between this "quasi-constitution" and its conforming and implementing "legislation."

On May 21, 1975, after more than a decade of study, the American Law Institute released its official draft of *A Model Land Development Code (MLDC)*, a document designed "to coordinate and integrate all legislation of a state that attempts to control or influence development of land."[9] This creative effort, unlike its predecessors from the 1920s, failed to stimulate a significant amount of legislative imitation (with the important exception of the state of Florida). Nevertheless, the *MLDC*'s concept of a Local Land Development Plan remains an important starting point for the discussion of the role of planning in the early 21st century. According to §3-101 of the *MLDC*, this development plan would "be a statement (in words, maps, illustrations or other media of communication) setting forth its objectives, policies and standards to guide public and private development of land within its planning jurisdiction and including a short-term program of public actions. . . ." In the following section, the drafters identified the purposes of preparing this plan:

1. to initiate comprehensive studies of factors relevant to development;
2. to recognize and state major problems and opportunities concerning development and the social and economic effects of development;
3. to set forth the desired sequence, patterns, and characteristics of future development and its probable environmental, economic, and social consequences;
4. to provide a statement of programs to obtain the desired sequence, patterns, and characteristics of development; and
5. to determine the probable environmental, economic and social consequences of the desired development and the proposed programs.

As the fifth purpose makes clear, as with the National Environmental Policy Act (NEPA)[10] of 1969 that became federal law a few years before, under the *MLDC*, the consideration of the wisdom of land development would not take place in a vacuum devoid of social, economic, and environmental impacts.[11]

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8. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 Law & Contemp. Probs. 353, 375-76 (1955).

9. American Law Institute, A Model Land Development Code xv (1976) (Chief Reporter's Preface).

10. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.

11. *See* Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, *in* Modernizing State Planning Statutes: The Growing Smart Working Papers (PAS Report Nos. 462/463, 1996). Stuart Meck notes that the *MLDC* "was not intended as a unified document to be adopted in its entirety by states to replace the Standard Acts, but instead as a source of various statutory models to address specific development concerns. Each state could select the provisions it needed from the 12 articles in the code." *See also* James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 Harv. Envtl. L. Rev. 489, 512 (1994) (internal footnotes omitted):
> Both the Vermont and Florida growth management statutes require regional or state level approval for major development projects, thus

While the *MLDC*'s efforts did not attract widespread legislative attention, two decades later, state capitals were abuzz with planning and zoning reform bills. As reported by Prof. Patricia E. Salkin,

> by the end of the 1990s, there was so much activity in the business of land use law reform that it was a challenge to keep current on trends. By 1999, more than one thousand land use related bills were introduced in state legislatures across the country in one year alone. By the beginning of 2002, more than two thousand land use planning and land use control bills had been introduced by state legislatures; seventeen governors had issued nineteen executive orders; eighteen states had created legislative task forces or study commissions to evaluate smart growth ideas and opportunities; and 553 ballot initiatives in thirty-eight states focused on issues of planning and/or smart growth.[12]

Many of these initiatives fit within the wide umbrella of the "smart growth movement." Professor Salkin has explained:

> Armed with statistics about the costs of sprawl (such as unplanned leap frog development), the loss of the prime agricultural lands, and degradation of significant environmental and natural resources, the smart growth movement continues to promote statutory reforms to the state planning and zoning enabling acts. Advocates have also encouraged states to provide localities with more flexible zoning tools to best meet local and regional challenges. The smart growth legislation advocates local flexibility and promotes mixed-use development, in contrast to Euclidean zoning that promotes a more rigid separation of uses. Different from the environmental reforms of the 1970s and 1980s, the smart growth movement attracts notable private sector support as it broadens the message to include economic vitality and quality of life as two of the key platforms for necessitating change. Urban renewal, traffic congestion and infrastructure issues have also been part of the smart growth debate.[13]

Two difficulties facing contemporary observers and advocates are, on the one hand, distinguishing truly innovative "smart growth" tools[14] from the simple repackaging of zoning devices, and, on the other hand, making sure that the new agenda is not in actuality an anti-regulation Trojan Horse.

B. The Structure of Local Government Planning

Typically, the members of the first formal body to hear a land use change proposal—known most often as the planning commission—are not elected by the voters of the community. The same is also almost always true of the body that decides on variances, which is usually known as the Board of Adjustment or Board of Zoning Appeals. An Internet search will yield examples of varying planning structures and approaches, some of which can be quite complex. The Development Process for Austin, Texas, for example,[15] includes headings for Zoning, Subdivision, Site Plan, Building Plan, and Inspection. The approval authority switches from the Austin City Council (for zoning) to the Zoning and Platting Commission (for subdivision and site plan) to the Neighborhood Planning and Zoning Department (for inspection). In addition, Watershed Protection and Development Review comes into play for all but zoning decisions.

C. The Structure of Active Statewide Planning

Dissatisfied with the performance of local government planning and zoning bodies, particularly in their decisions affecting environmentally sensitive lands and water bodies, some states have attempted to "recapture" some significant supervisory responsibilities by instituting state layers of planning controls.[16] This is the case with Florida, a state that has been

shifting final authority away from municipalities. The Florida statute also enables state and regional agencies to identify certain natural areas of critical concern, in which local regulations can be superseded. The American Law Institute's Model Land Development Code (MLDC) was strongly influenced by the Vermont statute, and it served in turn as the model for both provisions of the Florida statute.

12. Patricia Salkin, *From* Euclid *to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 Pace Envtl. L. Rev. 109, 119-20 (2002).
13. *Id.*
14. The Smart Growth Network website is available on the Internet at http://www.smartgrowth.org/about/principles. It has identified the following 10 Principles of Smart Growth:
    1. Create Range of Housing Opportunities and Choices
    2. Create Walkable Neighborhoods
    3. Encourage Community and Stakeholder Collaboration
    4. Foster Distinctive, Attractive Communities with a Strong Sense of Place
    5. Make Development Decisions Predictable, Fair, and Cost Effective
    6. Mix Land Uses
    7. Preserve Open Space, Farmland, Natural Beauty, and Critical Environmental Areas
    8. Provide a Variety of Transportation Choices
    9. Strengthen and Direct Development Toward Existing Communities
    10. Take Advantage of Compact Building Design.
15. The plan is available on the Internet at http://www.ci.austin.tx.us/development/downloads/development_description.doc.
16. *See, e.g.*, Salkin, *supra* note 11, at 116:
    > As a result of the growing interest in addressing environmental concerns, some states began to adopt major land use reform in the 1970s. The result was a "quiet revolution" in land use law wherein states, including Vermont (1970 and 1988), Florida (1972 and 1985), Oregon (1973) and Hawaii (1978), made significant modifications to their systems of land use control, giving more power to the regional and state governments to deal with environmental protection through land use controls. Four more states made reforms in the 1980s, New Jersey (1985), Maine (1988), Rhode Island (1988), and Georgia (1988).

    The term "quiet revolution" derives from an influential early study of the statewide zoning phenomenon: Fred Bosselman & David Callies, The Quiet Revolution in Land Use Control (1971).

    The 1970s also witnessed keen interest in federal land use legislation. Only a few weeks after President Richard Nixon signed NEPA in January 1970, the chair of the U.S. Senate Committee on the Interior, Sen. Henry (Scoop) Jackson (D-Wash.)
    > introduced the first National Land Use Policy Bill, a bill which he called "the next logical step (to NEPA) in our national effort to provide a quality life in a quality environment. . . ." Jackson's bill would have provided money to develop state land use plans. Plans drawn up by each state would identify where to put projects like airports, powerplants, housing developments and parks. In Jackson's view, this was the way to avoid—or at least reduce—the increasingly bitter clashes between environmentalists and the developers; the way to assure economic growth and, at the same time, protect the environment.

    Noreen Lyday, The Law of the Land: Debating National Land Use Legislation 1970-1975, at 1 (Urban Inst. 1976).

tinkering with statewide review since the 1970s. The current incarnation is found in Florida Statutes §163.3184. Key components include:

- Coordination: "The state land planning agency shall have responsibility for plan review, coordination, and the preparation and transmission of comments, pursuant to this section, to the local governing body responsible for the comprehensive plan."
- Transmittal: "Each local governing body shall transmit the complete proposed comprehensive plan or plan amendment to the state land planning agency, the appropriate regional planning council and water management district, the Department of Environmental Protection, the Department of State, and the Department of Transportation, and, in the case of municipal plans, to the appropriate county, and, in the case of county plans, to the Fish and Wildlife Conservation Commission and the Department of Agriculture and Consumer Services, immediately following a public hearing . . . ."
- Intergovernmental Review: "The governmental agencies . . . shall provide comments to the state land planning agency within 30 days after receipt by the state land planning agency of the complete proposed plan amendment."
- Regional, County, and Municipal Review: "The review of the regional planning council . . . shall be limited to effects on regional resources or facilities identified in the strategic regional policy plan and extrajurisdictional impacts which would be inconsistent with the comprehensive plan of the affected local government."
- State Land Planning Agency Review: "The state land planning agency shall review a proposed plan amendment upon request of a regional planning council, affected person, or local government transmitting the plan amendment."
- Local Government Review of Comments: "The local government, upon receipt of written comments from the state land planning agency, shall have 120 days to adopt or adopt with changes the proposed comprehensive plan or . . . plan amendments."
- State Review of Plan Amendments: "[T]he state land planning agency, upon receipt of a local government's complete adopted comprehensive plan or plan amendment, shall have 45 days for review and to determine if the plan or plan amendment is in compliance with this act."[17]

A state level of review would seem to have two major advantages: First, officials who make the tough decisions are physically removed from any undue pressures exerted by developers or those in opposition to the plan change. Second, the central government typically has more funding available for sophisticated environmental, economic, and community development analysis.

Critics of this statewide approval process in Florida, asserting that comprehensive plan amendments are still too easy for developers to secure, have proposed a state constitutional amendment that would require a positive vote in a local referendum before a local government can adopt a new comprehensive plan or a plan amendment. In June 2009, the Florida Division of Elections certified the proposed "Hometown Democracy" amendment for inclusion in the November 2010 ballot. Supporters submitted more than 700,000 signatures so that "Amendment 4" would be presented to the voters.

III. The Evolution of Planning Theory, Tools, and Techniques

A. *Urban Design*

The long and storied history of city planning has taken many interesting turns over the last few thousand years. The complex relationship between humans and their built environment, and the effects each has on the other, has captured the attention of philosophers, architects, planners, social scientists, and politicians.

Chapter 35, verses 1-5, of the Book of Numbers[18] contains the following biblical version of urban design:

> Command the Children of Israel that they shall give to the Levites, from the heritage of their possession, cities for dwelling, and open space[19] for the cities all around them shall you give to the Levites. The cities shall be theirs for dwelling, and their open space shall be for their animals, for their wealth, and for all of their needs. The open spaces of the cities that you shall give to the Levites, from the wall of the city outward: a thousand cubits all around. You shall measure from outside the city on the eastern side two thousand cubits; on the southern side two thousand cubits; on the western side two thousand cubits; and on the northern side two thousand cubits, with the city in the middle; this shall be for them the open spaces of the cities.[20]

René Descartes observed

By the middle of the decade, federal land use planning was an idea that no longer carried significant political weight. According to Lyday: "The combination of grassroots opposition on an issue as volatile and complex as property rights, heavy lobbying among the mining, timber, farm interests and construction trades, and the Chamber [of Commerce], coupled with the confusion engendered by the [Nixon] Administration's defection, were sufficient to defeat the bill." *Id.* at 48.

17. A graphic representation of Florida's Comprehensive Plan Amendment Process can be found on the Internet at http://www.dca.state.fl.us/fdcp/dcp/Procedures/Files/PlanAdmb&w85x14.PDF.
18. *Bamidmar*, 35: 2-5.
19. The King James version translates this phrase as "suburbs."
20. This translation is from *The Chumash: The Stone Edition* 927 (Rabbi Nosson Scherman ed., 1993).

> that there is very often less perfection in works composed of several portions, and carried out by the hands of various masters, than in those on which one individual alone has worked. Thus we see that buildings planned and carried out by one architect alone are usually more beautiful and better proportioned than those which many have tried to put in order and improve, making use of old walls which are built with other ends in view.[21] In the same way also, those ancient cities which, originally mere villages, have become in the process of time great towns, are usually badly constructed in comparison with those which are regularly laid out on a plain by a surveyor who is free to follow his own ideas. Even though, considering their buildings each one apart, there is often as much or more display of skill in the one case than in the other, the former having large buildings and small buildings indiscriminately placed together, thus rendering the streets crooked and irregular, so that it might be said that it was chance rather than the will of men guided by reason that led to such an arrangement. And if we consider that this happens despite the fact that from all time there have been certain officials who have had the special duty of looking after the buildings of private individuals in order that they may be public ornaments, we shall understand how difficult it is to bring about much that is satisfactory in operating only upon the works of others.[22]

This metaphor of interdependency recurs in urban design, looked at from the outside. Thus, Arthur Cecil Pigou stated:

> It is as idle to expect a well-planned town to result from the independent activities of isolated speculators as it would be to expect a satisfactory picture to result if each separate square inch were painted by an independent artist. No "invisible hand" can be relied on to produce a good arrangement of the whole from a combination of separate treatments of the parts. It is, therefore, necessary that an authority of wider reach should intervene and should tackle the collective problems of beauty, of air and of light, as those other collective problems of gas and water have been tackled. Hence, shortly before the war, there came into being, on the pattern of long previous German practice, Mr. Burns's extremely important town-planning Act. In this Act, for the first time, control over individual buildings, from the standpoint, not of individual structure, but of the structure of the town as a whole, was definitely conferred upon those town councils that are willing to accept the powers offered to them.[23]

Pigou also offered these observations concerning what we would today label positive and negative externalities:

> [T]he essence of the matter is that one person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons (not producers of like services), of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties. . . .
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> Thus, incidental uncharged disservices are rendered to third parties . . . when the owner of a site in a residential quarter of a city builds a factory there and so destroys a great part of the amenities of the neighbouring sites; or, in a less degree, when he uses his site in such a way as to spoil the lighting of the houses opposite; or when he invests resources in erecting buildings in a crowded centre, which, by contracting the air space and the playing-room of the neighbourhood, tend to injure the health and efficiency of the families living there. . . .[24]

The most famous critique of Pigou is found in the highly influential article by R.H. Coase, *The Problem of Social Cost*.[25] In a late 20th-century reconsideration of the Pigou/Coase dispute, Prof. A.W.B. Simpson wrote:

> The first idea, which runs through all Coase's writings, is deep skepticism as to the desirability of government intervention. Various expressions are used, but the thought is the same. In "The Problem of Social Cost" this skepticism is very mildly expressed; he argues that action against a smoke-emitting factory will lead to results which "are not necessarily, or even usually, desirable." In *The Firm, the Market and the Law* Coase hardens his position, arguing that whether government intervention is desirable or not is a "factual question" and that economic theory does not support any presumption in its favor. He goes on: "The ubiquitous nature of 'externalities' suggests to me that there is a prima facie case against intervention, and the studies of the effects of regulation which have been made in recent years in the United States, ranging from agriculture to zoning, which indicate that regulation has commonly made matters worse, lend support to this view." . . .

The second idea is the corollary of the first; since government intervention is suspect, the alternatives to government intervention are viewed sympathetically. The drift of the argument favors leaving matters to the market. This possibility is dramatized by the thesis which has come to be called the Coase theorem: that in the absence of transaction costs the allocation of resources reached by negotiation and bargain, assuming economic rationality, would be unaffected by the rule as to legal liability. . . . This of course is a purely theoretical view as to what would happen in a world which does not exist. . . .[26]

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21. For an opposing view, consider the opinion of Sergeant Francis Troy, one of British literature's most famous cads:
    > A philosopher once said in my hearing that the old builders, who worked when art was a living thing, had no respect for the work of builders who went before them, but pulled down and altered as they thought fit; and why shouldn't we? 'Creation and preservation don't do well together,' says he, 'and a million of antiquarians can't invent a style.' My mind exactly. I am for making this place more modern, that we may be cheerful whilst we can.

    Thomas Hardy, Far From the Madding Crowd 235 (Signet Classic ed. 2002). Thomas Hardy was an architect by profession.
22. René Descartes, Discourse on the Method of Rightly Conducting the Reason (1637). This translation comes from *Philosophical Works* 87-88 (Elizabeth Haldane & G.R.T. Ross trans., 1931).
23. Arthur Cecil Pigou, The Economics of Welfare 195 (4th ed. 1932).
24. *Id.* at 183, 185-86.
25. 3 J.L. & Econ. 1 (1960).
26. A.W.B. Simpson, *Coase v. Pigou Reexamined*, 25 J. Legal Stud. 53, 75 (1996), asserted that Coase used Pigou as a strawman, portraying the latter as an un-

The legendary architect Le Corbusier condemned the phrase "family house" as touching and admirable, but one which no longer applied in reality, since the family "melts" in the course of 20 years and the family house has no duration. While the stability on which it is founded has been upset, "[a] society seeking to defend an equilibrium which it has already lost, looks for means of tying down the nomadic elements of a society which is in need of a new and harmonious organization of its life."[27] The result, to paraphrase him, would be a universal wasteland of garden cities. The solution he advanced was the vertical garden city.

As the 20th century progressed, "planning" expanded far beyond the technical issue of physical interfaces between uses and into the very quality of urban life. Prof. Suzanne Keller offered a sparkling effort to reduce the gap "between analytic social science and practical planning."[28] In recent years, some visionaries have looked backwards in an attempt to recreate at least the physical trappings of a simpler past. The best example is Seaside, Florida, whose origins are described on the community's website:

> The idea of Seaside started with the notion of reviving Northwest Florida's building tradition, which had produced wood-frame cottages so well adapted to the climate that they enhanced the sensual pleasure of life by the sea, while accommodating generations of family members; kids, if they were good, got to sleep on the porch . . . .
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> These cottages had deep roof overhangs, ample windows and cross ventilation in all rooms. They were built of wood and other time-tested materials and with reasonable maintenance, could last several generations. . . .[29]

Seaside has been called "a template for a kind of community planning called New Urbanism: anti-sprawl, pedestrian-friendly villages symbolized by bustling town squares and houses with inviting front porches and hidden garages."[30]

B. Planning for People

In the midst of the devastation wrought by World War II, one of the planning giants of the previous century offered a stark assessment of the crucial role place played in shaping not just community, but character. Lewis Mumford observed:

> In our anticipations of post-war planning, perhaps the most important thing to remember is that our task is not the simple one of rebuilding demolished houses and ruined cities. If only the material shell of our society needed repair, our designs might follow familiar patterns. But the fact is our task is a far heavier one; it is that of replacing an outworn civilization. The question is not how much of the superstructure should be replaced, but how much of the foundations can be used for a new set of purposes and for a radically different mode of life.[31]

About the "great industrial towns of the last two centuries . . . ," Mumford instructed that "[n]o money income could make amends for a life-confinement in these dreary infernos: counterirritants, narcotics, aphrodisiacs, mechanized fantasies only increase the debasement they seek to alleviate." Not surprisingly, "those who wish better conditions find a temporary surcease, if not an effective permanent solution, on the outskirts." This is far from a solution, however:

> Where the automobile has been most freely used, the disorganization and disruption of our urban centers is most marked; Los Angeles and Detroit, both largely the creations of this new machine, are also its most conspicuous victims. But in one degree or another, the tendency to planless dispersion is world-wide; in a hundred futile ways people seek an individual solution for their social problem, and so ultimately create a second social problem.[32]

The post-war challenge for planners, indeed for society, amounted to much more than the rebuilding of physical structures:

> The task for our age is to decentralize power in all its manifestations and to build up balanced personalities, capable of utilizing all our immense resources of energy, knowledge, and wealth without being demoralized by them. Our job is to repair the mistakes of a one-sided specialization that has disintegrated the human personality, and of a pursuit of power and material wealth that has crippled Western man's capacity for life-fulfillment. We must provide an environment and a routine in which the inner life can flourish, no less than the outer life . . . .
>
> In short, the balanced personality needs a balanced environment to support it, to encourage it, to give it the variety of stimuli and interests it needs in order to grow steadily and to maintain its equilibrium during this process. In purely urban terms—hence unbalanced in terms of man's fuller life-needs—the great metropolis provided this essential variety for man's occupational, professional, and political interests; and because of that fact the metropolis has played an indispensable part in the human economy since the seventeenth century. Now that the metropolis can no longer serve the new economy, except by helping to direct in the decentralization of its own power and authority, we must

abashed defender of government interference with the market:

> Coase, in the tradition of the political economists, adopts a rhetorical device, which is first of all to attribute a commitment to the merits of government intervention to Pigou and then to present Pigou as a deeply confused thinker. The form of the argument then is this: if you believe X, then you are in bad company, for you believe something particularly associated with the thinking of Y, a deeply confused economist. The very fact that Y believed X becomes itself a reason for skepticism.

27. Le Corbusier, Concerning Town Planning 67-68 (Clive Entwistle trans., 1948).
28. Suzanne Keller, The Urban Neighborhood 9 (1968). Professor Keller has continued to explore the meanings of community, and the way in which relationships are affected by the physical forms selected by developers and planners. *See* Suzanne Keller, Community: Pursuing the Dream, Living the Reality (2003), a compelling study focusing on three decades of life in Twin Rivers—New Jersey's first planned unit development.
29. *See* http://www.seasidefl.com/communityHistory3.asp.
30. *Inside Seaside*, Wash. Post, Jan. 29, 2004, at H3.
31. Lewis Mumford, The Social Foundations of Post-War Building 9-13 (1943).
32. *Id.*

> utilize the organizing and planning ability of the metropolis to achieve a much more comprehensive balance.[33]

Advocacy eventually gave way to empowerment, as many planners emphasized their role as facilitator rather than mouthpiece. This seems to be the equivalent of the modern lawyer who is trained to provide clients with the legal information that will enable them to make wise decisions for themselves. In *Planning With Neighborhoods*, William M. Rohe and Lauren B. Gates identified three types of neighborhood planning:

> The first involves independently organized efforts sponsored by indigenous neighborhood organizations. Although these organizations may receive grants from public agencies or private foundations, they are not sanctioned or controlled by them. These efforts typically aim to address a perceived problem or set of problems in the neighborhood through self-help or advocacy efforts.
>
> The second form of contemporary neighborhood planning consists of federally sponsored community development programs. Planners employed by local municipalities are charged with identifying problem areas, called neighborhood strategy areas (NSAs), developing a comprehensive rehabilitation program, and administering the implementation of that program. Although citizens have opportunities to comment at several public hearings required by federal regulations, their involvement in designing and implementing improvements is often limited. Furthermore, program activities are typically limited to a relatively small number of neighborhoods compared to the total number in any city.
>
> The third form comprises locally sponsored, city-wide neighborhood planning programs. These programs seek to involve all neighborhoods in public planning and municipal affairs. They are sponsored by municipal governments, although federal funds are often used to subsidize their operation. Participating neighborhood groups become involved in a wide variety of issues, including zoning changes, evaluation of local service delivery, comprehensive planning, and local problem solving. . . .[34]

In a provocative essay entitled *The Two Cultures of Planning: Toward the New Pragmatism*, Stuart Meck, former president of the American Planning Association, identified four qualities of the "old culture of planning . . . derived from the governmental reform tradition of the late 19th and early 20th centuries, which also included the civil service movement and the city manager form of government":

> First, the old culture believed that elected officials could not be trusted to plan, that planning was above politics; it removed the institutions of planning from their direct control. . . .
>
> Second, the old culture believed in environmental or physical determinism—that one's physical surroundings affected behavior. . . .
>
> Third, the old culture, reflecting the values of the dominant groups, believed in a middle-class lifestyle for all. . . .
>
> Fourth, the old culture, the result of a relatively stable environment, took the long view—20 to 30 years—because events weren't changing fast enough to cause it to alter its time span.[35]

In contrast, the "New Pragmatism" "embraces politics, rather than rejects it"; "values the small scale and the intimate in the everyday environment over the monumental and imposing"; "recognizes that the city and the suburbs may no longer be middle class in the purist sense"; and "is less concerned about the long-term."[36]

Meck identifies four causes for these definite shifts: (1) decisions from the courts imposing damages for regulatory takings; (2) a new perspective of land "as a resource as well as a commodity"; (3) pressure from citizen groups that are "smarter and tougher and more tenacious and who eye everything [planners] do with suspicion," leading to zoning by initiative and referendum; and (4) a greater state presence in the land use planning process. Many of the cases and materials included in this Article are representative of the trends that Meck discusses.

C. New Urbanism: Restoration and Sustainability

Disturbed with the socioeconomic, aesthetic, and ecological problems plaguing our sprawling megalopolises, the Congress of New Urbanism (founded by a group of architects in 1993 and now also including members of the planning, development, law, and environmental communities among its leadership) offers an alternative vision. The Charter of the New Urbanism is quite ambitious:

> The Congress for the New Urbanism views disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society's built heritage as one interrelated community-building challenge.
>
> We stand for the restoration of existing urban centers and towns within coherent metropolitan regions, the reconfiguration of sprawling suburbs into communities of real neighborhoods and diverse districts, the conservation of natural environments, and the preservation of our built legacy.
>
> We recognize that physical solutions by themselves will not solve social and economic problems, but neither can economic vitality, community stability, and environmental health be sustained without a coherent and supportive physical framework.

33. *Id.*
34. William M. Rohe & Lauren B. Gates, Planning With Neighborhoods 3-5 (1985).
35. Stuart Meck, *The Two Cultures of Planning: Toward the New Pragmatism*, Land Use L. & Zoning Dig., 3 (July 1991).
36. *Id.*

> We advocate the restructuring of public policy and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.
>
> We represent a broad-based citizenry, composed of public and private sector leaders, community activists, and multidisciplinary professionals. We are committed to reestablishing the relationship between the art of building and the making of community, through citizen-based participatory planning and design.
>
> We dedicate ourselves to reclaiming our homes, blocks, streets, parks, neighborhoods, districts, towns, cities, regions, and environment.[37]

Some of the leading figures of the New Urbanist movement call for a reconnection between the design of human-built communities and nature. Peter Calthorpe presented this provocative perspective on the role of nature in the planning process:

> Nature should provide the order and underlying structure of the metropolis. Ridgelands, bays, rivers, ocean, agriculture, and mountains form the inherent boundaries of our regions. They set the natural edge and can become the internal connectors, the larger common ground of place. They should provide the identity and character that unifies the multiplicity of neighborhoods, communities, towns, and cities which now make up our metropolitan regions. Preservation and care for a region's natural ecologies is the fundamental prerequisite of a sustainable and humane urbanism. . . .
>
> At the regional scale, the man-made environment should fit into and along natural systems. Urban limit lines or growth boundaries should be set to preserve major natural resources at the edge of metropolis. This line should be large enough to accommodate growth for the next generation but small enough to encourage infill, redevelopment, and density at the core. Within this regional boundary major natural features and streams should form an internal structure of park-like linkages, trails, and bikeways throughout the metropolis. Such open space elements should link and limit individual communities. In these areas the natural systems should be preserved and repaired.
>
> At the scale of the neighborhood, parks and open space should stop occupying residual space or "buffer" zones between segregated uses. They should be used as formative elements, providing the focus and order of the neighborhood. Neighborhood parks could be smaller and more accessible, and have a strong civic character. Every child should be able to walk safely to a neighborhood park, a park that need not be "naturalist" but should be of the place, socially and ecologically. Such parks can become the foundation of a memorable unique public domain for each neighborhood, community, or town.[38]

Andres Duany and his co-authors have used the term "neotraditionalism" to describe New Urbanism,

> because the New Urbanism's intention is to advocate what works best: what pattern of development is the most environmentally sensitive, socially responsible, and economically sustainable. As is often the case, what seems to work best is a historic model—the traditional neighborhood—adapted as necessary to serve the needs of modern man.
>
> The commonsense nature of the New Urbanism bodes well for its future. The fact that it was not invented, but selected and adapted from existing models, dramatically distinguishes it from the concepts of total replacement that preceded it. It took many years and many failures for planners and architects to reach this point, but so many new inventions have fared so badly that designers have been forced to put some faith in human experience. Further experience will no doubt modify the precepts and techniques of the New Urbanism, but that is as it should be.[39]

D. Updating the Planning Toolbox

The course of planning practice has long been tied to developing technologies. In the early years of the profession,

> [p]lanners depended on printed national census reports that were soon out of date. Local information on land ownership, land use, and land use controls had to be gathered from paper maps, and from voluminous printed volumes that were often incomplete, inconsistent, and outdated. Planning analysis and communication required laborious (and error-prone) computations, hand copying of information, and manual typing of maps and graphs.[40]

From the 1960s to the 1970s, the move was made from data processing to management information systems (MIS) and geographic information systems (GIS). As the 20th century closed, planners were employing computer models, the Internet, and other decision support systems (DSS) and

37. *See* http://www.cnu.org/charter.

38. Peter Calthorpe, The Next American Metropolis: Ecology, Community, and the American Dream 25-26 (1993). For more on Calthorpe's vision, including details on his firm's projects including Regional Plans, Urban Revitalization, Community Design, and International Masterplans, see http://www.calthorpe.com/projects.

39. Andres Duany et al., Suburban Nation: The Rise of Sprawl and the Decline of the American Dream 258-60 (2000). *See* Beth Dunlop, *The New Urbanists: The Second Generation*, Architectural Rec., Jan. 1997, at 132:
> A new generation of New Urbanists is coming of age. No less fervent or idealistic than their mentors, these latter-day New Urbanists carry the movement's banner but are unafraid to diverge a bit. Responding in part to criticism that the first wave of New Urbanist projects were mostly middle-class, suburban developments comfortably buffeted from the hard realities of urban America, the second generation of New Urbanists (as well as many of the first generation) are now applying the principles of traditional town planning to a wider range of projects—including ones in the inner city and third-world countries.

40. Charles J. Hoch et al. eds., The Practice of Local Government Planning 41, 42 (3d ed. 2000).

planning support systems (PSS). Not all attempts to integrate computer technology have been successful, particularly when the goals were too ambitious and the equipment too meager. GIS has proved to be one of the most promising technologies, not only in planning but also in many planning-related fields such as transportation, ecology, geology, taxation, and sociology. According to Elliot Allen and Randy Goers:

> The new generation of GIS tools can empower planners and citizens in three ways:
>
> *Accessibility*: GIS technology is increasingly accessible, both to professional planners using distributed desktop systems and to citizens doing community mapping via the Internet. In some cases, tools are showing up at public meetings for real-time use during deliberations.
>
> *Analysis*: The new tools produce much more than colorful maps because GIS technology can now create complex models. Community data can be turned into insightful evaluations of alternative plans and development impacts.
>
> *Action*: Perhaps most exciting about these GIS tools is their interactivity and relevance to real world decision making. Non-technical users can create scenarios "on-the-fly," get immediate feedback on the implications of their choices, and reach consensus on outcomes much more quickly.[41]

IV. Putting Theory and Practice Together: The Legal Effect of the Plan

There is probably no phrase that has caused more consternation in all of land use planning law than "in accordance with a comprehensive plan." The meaning and legal import of these six words, included in the standard act circulated by Secretary Herbert Hoover's Department of Commerce and then adopted by more than 40 state legislatures in the early decades of the 20th century, have generated mounds of expert commentary[42] and reams of case pleadings and court opinions. Section 1 of the SZEA, titled "Purposes in View," reads as follows:

> Such regulations shall be made in accordance with a comprehensive plan[43] and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.[44]

Two relatively recent cases illustrate extreme judicial (and legislative) positions related to the "in accordance" requirement. In *State ex rel. Chiavola v. Village of Oakwood*,[45] the Missouri appeals court rejected the plaintiff landowner's assertion that a bedroom community consisting of 80 homes was required to have a freestanding comprehensive plan:

> This court finds the better reasoned cases, as they apply to the fact pattern at hand, are those which do not require a comprehensive plan separate and apart from the zoning ordinance itself. This court holds a comprehensive plan may be validly enacted in an ordinance itself without existing in some form separate from the ordinance.

41. Elliot Allen & Randy Goers, *Beyond the Maps: The Next Generation of GIS*, Planning, Sept. 2002, at 26-27. For further reading on the use of GIS by planners, community organizations, and citizens, see Emily Talen, *Bottom-Up GIS: A New Tool for Individual and Group Expression in Participatory Planning*, 66 J. Am. Planning Ass'n 279 (2000): ("[I]n addition to using GIS to inform and analyze in a conventional sense, planners should consider using it as a cognitive tool. In this alternative approach, residents learn to manipulate GIS data to express their views about planning issues, neighborhood meaning, and future preferences."); Robert B. Kent & Richard E. Klosterman, *GIS and Mapping: Pitfalls for Planners*, 66 J. Am. Planning Ass'n 189 (2000) (some of the mistakes noted in the article are "Failing to Understand the Purpose of the Map," "Trying to Improve Accuracy by 'Zooming In,'" "Neglecting Map Projections and Coordinate Systems," and "Failing to Evaluate and Document Map Sources").

42. Representative articles include Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 839 (1983); and Charles L. Siemon, *The Paradox of "In Accordance With a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 Stetson L. Rev. 603 (1987).

    In his 1955 article, Professor Haar, at 1174, articulated the fundamental problem of zoning without planning, which was a reality in most of the states that had passed an enabling act authorizing local governments to engage in zoning but had not passed planning enabling legislation:

    > It is difficult to see why zoning should not be required, legislatively and judicially, to justify itself by consonance with a master plan . . . . It might even be argued that any zoning done before a formal master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare. Granted that this argument would have small chance of success because of judicial precedent, there is still strong reason for legislative action on the state level to make accordance with a master plan a statutory requirement for zoning regulation. Such a requirement will mean that the municipal legislature has an ever-present reminder of long-term goals which it has been forced to articulate, and will give lesser play to the pressures by individuals for special treatment which tend over a period of years to turn the once uniformly regulated district into a patchwork. Further it will give courts a standard for review more sharply defined than the reasonable *in vacuo* test upon which they are now forced so largely to rely.

    By the end of the century, several jurisdictions, by statutes, court decisions, or both, had moved in the direction urged by this article, with mixed results.

43. The drafters inserted the following footnote here: "With a comprehensive plan: This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study."

44. Even more than 80 years after the SZEA was first circulated, many states still have identical or nearly identical versions of §3 in their statute books. The diverse list of states includes, among several others, Alabama, Connecticut, Delaware, Iowa, Louisiana, New York, North Dakota, Oklahoma, and Wisconsin. In a few instances, state lawmakers made minor adjustments to incorporate special needs. *See, e.g.*, Colo. Rev. Stat. §31-23-303 ("to promote energy conservation"); Conn. Gen. Stat. §8-2: ("Such regulations may, to the extent consistent with soil types, terrain, infrastructure capacity and the plan of conservation and development for the community, provide for cluster development . . . in residential zones."); and Wyo. Stat. §15-1-601: ("With consideration given to the historic integrity of certain neighborhoods or districts and a view to preserving, rehabilitating and maintaining historic properties and encouraging compatible uses within the neighborhoods or districts, but no regulation made to carry out the purposes of this paragraph is valid to the extent it constitutes an unconstitutional taking without compensation.").

45. 886 S.W.2d 74 (Mo. Ct. App. 1994), *cert. denied*, 514 U.S. 1078 (1995).

. . .

> Comprehensiveness may be found in the fact the ordinance zones all, or substantially all, of a political subdivision; that it regulates all uses; or that it covers all of the usual factors of land utilization, height area and use. Haar, *In Accordance With a Comprehensive Plan*, 68 Harv.L.Rev. 1154, 1158-67 (1955). . . .[46]
>
> [T]his court finds that Oakwood acted in conformance with its comprehensive plan because the preamble to the ordinance indicated an intent to create a single residential district with the same boundaries as the incorporated Oakwood; because there was a meeting by the trustees of the village which appointed a zoning commission to meet and make recommendations regarding regulations. The board met and the notice for a public hearing was given. The commission made its final record at the meeting and recommended the ordinance be enacted. The ordinance was subsequently enacted. The ordinance was comprehensive in scope; setting out both the area, height, and use requirements. Since there is evidence that planning was done, and there is no specific requirement that the village pass a separate comprehensive plan as a condition precedent to the passage of zoning ordinances. This court finds that Ordinance No. 10 was both constitutionally and statutorily valid.[47]

In contrast stands *Pinecrest Lakes, Inc. v. Shidel*,[48] in which a Florida appellate court approved the demolition of apartment buildings that were built in opposition to a legislatively mandated comprehensive plan, despite the fact that the local government had granted development permission to the defendant developer:

> Section 163.3194 [Florida Stat.] requires that all development conform to the approved Comprehensive Plan, and that development orders be consistent with that Plan. The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the Comprehensive Plan. Consistency with a Comprehensive Plan is therefore not a discretionary matter. When the Legislature wants to give an agency discretion and then for the courts to defer to such discretion, it knows how to say that. Here it has not. We thus reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own comprehensive plan. . .
>
> Under section 163.3215 citizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan. Deference by the courts—especially of the kind argued by the developer in this case—would not only be inconsistent with the text and structure of the statute, but it would ignore the very reasons for adopting the legislation in the first place. When an affected property owner in the area of a newly allowed development brings a consistency challenge to a development order, a cause of action—as it were—for compliance with the Comprehensive Plan is presented to the court, in which the judge is required to pay deference only to the facts in the case and the applicable law. In light of the text of section 163.3215 and the foregoing history, we reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own Comprehensive Plan.[49]

In these and other cases, the determinative factor is the level of deference the judicial branch will grant local lawmakers. It is no coincidence that legislators in Florida and in other states in which development pressures on local governments have been quite severe, and in which popular support for the protection of environmentally sensitive lands is acute, have enabled stronger judicial oversight of comprehensive plan mandates. Nevertheless, there seems to be no truly effective check on a real estate development industry that is highly organized, well-funded, and determined to satisfy consumer desires.

V. Environmental Regulation and Land Use Planning: Common Ground and Important Distinctions

Land use planning and environmental regulation are often confused in practice and in legal analysis. Local governments are becoming increasingly active in the regulation and control of the environmental impact of activities that occur within their borders.[50] Typically, this local regulation is in compliance with or complementary to federal and state standards and mandates. Indeed, many federal environmental laws encourage state and local experimentation, as long as minimal safety standards are not violated.

Even Supreme Court Justices have split over the distinction between these two sets of controls. In *California Coastal Commission v. Granite Rock Co.*,[51] a decision involving the validity of a permit imposed by a state agency on mining activities in a national forest, Justice Sandra Day O'Connor wrote for the majority, which held that the federal Mining Act of 1872 did not preempt the permit requirement under the California Coastal Act. She explained:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land

46. 886 S.W.2d 74.
47. 886 S.W.2d 74.
48. 795 So. 2d 191 (Fla. Ct. App. 2001), *rev. denied*, 821 So. 2d 300 (2002).
49. 795 So. 2d 191.
50. For two provocative collections of essays on this topic, see John R. Nolon, New Ground: The Advent of Local Environmental Law (Envtl. L. Inst. 2002); and Craig Anthony (Tony) Arnold, Wet Growth: Should Water Law Control Land Use? (Envtl. L. Inst. 2005).
51. 480 U.S. 572, 17 ELR 20563 (1987).

> but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. . . . 43 U.S.C. §1712(c)(9) [part of the Federal Land Policy and Management Act of 1976] requires that the Secretary of the Interior's land use plans be consistent with state plans only "to the extent he finds practical." The immediately preceding subsection, however, requires that the Secretary's land use plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." §1712(c)(8). Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies. The stated purpose of part 228, subpart A of the Forest Service regulations, 36 C.F.R. §228.1 (1986), is to "set forth rules and procedures" through which mining on unpatented claims in national forests "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." The next sentence of the subsection, however, declares that "[i]t is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior." Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation. Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be per se pre-empted as an impermissible exercise of state land use planning. Congress' treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.[52]

Justice Lewis Powell, joined by Justice John Paul Stevens, begged to differ:

> [T]he Court nevertheless holds that the Coastal Commission can require Granite Rock to secure a state permit before conducting mining operations in a national forest. This conclusion rests on a distinction between "land use planning" and "environmental regulation." In the Court's view, the [federal statutes] indicate a congressional intent to pre-empt state land use regulations, but not state environmental regulations. I find this analysis unsupportable, either as an interpretation of the governing statutes or as a matter of logic. . . .
>
> The lack of statutory support for the Court's distinction is not surprising, because—with all respect—it seems to me that the distinction is one without a rational difference. As the Court puts it: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." This explanation separates one of the reasons for Forest Service decisions from the decisions themselves. In considering a proposed use of a parcel of land in the national forest, the Forest Service regulations consider the damage the use will cause to the environment as well as the federal interest in making resources on public lands accessible to development. The Forest Service may decide that the proposed use is appropriate, that it is inappropriate, or that it would be appropriate only if further steps are taken to protect the environment. The Court divides this decision into two distinct types of regulation and holds that Congress intended to pre-empt duplicative state regulation of one part but not the other. Common sense suggests that it would be best for one expert federal agency, the Forest Service, to consider all these factors and decide what use best furthers the relevant federal policies.[53]

In the years since the *Granite Rock* decision, the "environmentalization" of land use controls has accelerated at a significant pace.

Many local governments are striking out on their own without federal and state mandates. They place heavy emphasis on ecological criteria in making their zoning and planning decisions, provide for conservation and preservation through their growth management programs, restrict development that has a negative impact on visual access, and outlaw real estate development activities that are deemed dangerous to human and nonhuman life.

Similarly, federal and state lawmakers over the last few decades have entered the land use planning arena with increasing frequency. Congress requires bureaucrats who manage federal lands to produce and follow detailed land use plans. The federal government has provided seed money to states and localities through the Coastal Zone Management Act[54] so that well-balanced and effective land use plans can be developed for coastal areas. Additionally, federal controls on criteria air pollutants have had a direct impact on the commuting patterns to and from central cities and an indirect impact on local planning decisions. Since the "quiet revolution" that began in the 1970s, even more states have taken up planning approval functions either statewide or in areas deemed environmentally sensitive. Some states, feeling the pressure from federal waste treatment and disposal legislation, have intervened in local planning decisions that concern the siting of treatment and disposal sites. Other states have brought local zoning and planning decisions under the umbrella of state environmental policy acts.

Some major problems exist with the "environmentalization" phenomenon. First, because there is no barrier separating land use planning from environmental regulation, local officials often operate in a realm in which they have little expertise and even less control over negative externalities.

52. 480 U.S. 587-88.

53. 480 U.S. 572, 601, 603 n.5. (1987).

54. 16 U.S.C. §§1451-1466, ELR Stat. CZMA §§302-319.

The spillover effects are greater, the public health and private property stakes are higher, and the opportunities for abuse (for example, cloaking discrimination or outright confiscation of private lands for public use) are greater in the absence of administrative law protections, interest group give-and-take, and technical expertise.

Second, activist judges can use the corruption, haphazardness, and prejudice frequently associated with local land use planning and zoning to rationalize greater activism in the area of environmental regulation—at local, state, and federal levels. It is very tempting for judges who believe strongly in the protection of private property rights to jump on the anti-environmental bandwagon. In other words, confusing the two realms of regulation of the use and abuse of land invites judicial interference with elected officials by some judges.

Third, decisionmaking in private real estate markets is frustrated because of the ambiguities of decisional law on the boundary between private property rights and public protection and because of the merging of land use planning and environmental law tools and analysis. Developers put a premium on predictability when it comes to regulatory schemes, and multiple layers of environmental regulation can prolong the already protracted period between land assembly and construction.

It is much too late to call for the segregation of land use planning and environmental regulation, in theory and in practice. It may be noncontroversial to assert that planning and zoning are designed to function as preemptive tools to separate discordant land uses, to enhance and maintain real property values for the community as a whole, and to accommodate growth and change when and where they are needed. Similarly, we can appreciate that lawmakers often intend modern, federal environmental statutes to serve as reactive controls designed to ensure that human life and health are protected from a wide range of harms. However, the proliferation of hybrid and duplicative regulations and the discomfort with the kind of hairsplitting found in *Granite Rock* illustrate the difficulty involved in drawing meaningful distinctions in practice.[55]

VI. The Role of the Land Use Attorney

The objectives of a legal system may complement or conflict with those of a land use planning system. On the one hand, in 1953, a most distinguished planner, Dennis O'Harrow, wrote in an editorial in the official newsletter of the American Society of Planning Officials:

> It is my belief, based on bitter experience, that (a) with few exceptions, attorneys have not the faintest knowledge of zoning theory; and (b) with the exception of those cities that have had the foresight to assign a special assistant corporation counsel to the planning and zoning department, the chief planner in a city is much more familiar with zoning law than the corporation counsel's office. So don't let yourself be pushed around.[56]

On the other hand, Harlan Bartholomew (for many years the head of one of the largest planning firms), could opine:

> Most of the favorable decisions on zoning appear to me to be the result of a clear expression of ideas and the principles in the minds of city planners by competent lawyers. I should like to cite two illustrations. Two years ago the Ware case in Wichita, Kansas, was decided by the Supreme Court in favor of the constitutionality of zoning. More recently Mr. Ware brought a whole series of cases involving practically every phase of zoning. When these cases came before the court, the city was represented by an exceedingly able city attorney who presented to the courts the broader aspects of zoning and only ten days ago one of the most cleancut and remarkable decisions in favor of zoning was handed down. . . .[57]

Success in the practice of land use planning law is not marked by courtroom victories. Indeed, the existence of a lawsuit is, in nearly all instances, an indication that the lawyering on all sides has failed. The best land use attorneys work closely, comfortably, and respectfully with professional planners, especially those who advise municipal planning commissions and local legislators, with representatives of neighborhood organizations, and with developers and builders. Negotiation and compromise, not deposition and interrogatory, are their specialties. Perhaps most importantly, they are skilled in explaining to nonlawyers the legal import of the database of demographic, socioeconomic, financial, ecological, architectural, and historical information that comprises a real-life zoning, planning, or eminent domain situation. A great deal of listening and questioning precedes articulation. Undoubtedly the interdisciplinary and intractable nature of land use problems will necessitate the perseverance of this close but uneasy alliance between planning and law.

55. Much of the discussion in these paragraphs derives from Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 Wash. U. J. Urb. & Contemp. L. 5 (1996).

56. Dennis O'Harrow, Editorial, Official Newsletter of the American Society of Planning Officials (1953).

57. Harlan Bartholomew, Planning Problems of Town, City, and Region 201 (1925).