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A Practical Interpretation of North Carolina's Comprehensive Plan Requirement

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A PRACTICAL INTERPRETATION OF NORTH CAROLINA'S COMPREHENSIVE PLAN REQUIREMENT

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I. INTRODUCTION

Zoning enabling legislation still in effect in most states\(^1\) requires that zoning "shall be in accordance with a comprehensive plan." The source of this language is the Standard Zoning Enabling Act published by the U.S. Department of Commerce in 1928.\(^2\) North Carolina imposes this requirement on both cities and counties.\(^3\)

The simple phrase, "zoning shall be in accordance with a comprehensive plan," has received widely varying interpretations among state courts and, occasionally, even within the court system of a given state. The resulting uncertainties create serious

\(^1\) As of 1973, forty-seven states still operated essentially under the Standard Zoning Enabling Act. 1 NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW §§ 18.01-18.02 (1974 & Supp. 1983). At that time, thirty-two states had zoning enabling laws which copied verbatim the requirement that zoning shall be in accordance with a comprehensive plan. Id. at § 18.05. At least six of these states have since revised their laws (see Mandelker and Netter, A New Role for the Comprehensive Plan, 33 LAND USE LAW AND ZONING DIGEST (no.9) 5, 6-8 (1981)), leaving twenty-six states retaining the language of the Standard Act.

\(^2\) U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1924).

problems for land developers and planners at a time when predictability in land use regulation is badly needed.4

This article offers a practical interpretation of North Carolina’s “comprehensive plan” requirement. Although this topic has been frequently analyzed,5 most other articles have concentrated on criticizing the existing case law and recommending statutory changes. By contrast, this paper is addressed to practicing planners, real estate lawyers and government lawyers who must work within the existing statutory framework. As a basic foundation, the author assumes that legislative changes are unlikely in North Carolina,6 and instead has attempted to reconcile existing case law with the original rationale for the planning requirement.

Although this paper focuses on North Carolina law, the interpretations recommended below should be applicable in most states which retain the language of the Standard Act. Further, North Carolina is particularly appropriate for a case study, because it now stands poised to experience growth pressures similar to those experienced in Florida, California and Oregon.7 Each of these three

4. Predictability in regulations has been cited as one of the most important factors in cutting land development costs. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, STREAMLINING LAND USE REGULATION 6 (1980).


6. The difficulties associated with the passage of North Carolina’s most significant recent planning legislation—the Coastal Area Management Act (CAMA) — have been well documented. See Heath, A Legislative History of the Coastal Area Management Act, 53 N.C.L. REV. 345 (1974). An attempt to establish a similar regulatory scheme for the State’s “Mountain Area” failed to pass the legislature, and a proposed statewide land use plan prepared by the State Land Policy Council died in committee. See Comment, supra note 5, at 95 n.79. Recent activity in the North Carolina General Assembly has concentrated more on streamlining CAMA requirements than on enacting new legislation.

7. North Carolina’s growth rate of 15.7% between 1970 and 1980 ranked it 20th among the fifty states (U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATE AND METROPOLITAN AREA DATA BOOK (1982)); however, this rate can be expected to accelerate considerably in the 1980’s. North Carolina was recently ranked the sixth best state for businesses. BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW (1980). Further, in a recent survey of desirable American metropol-
states has recently enacted significant land use legislation, with sometimes chaotic results\(^8\) and North Carolina is in a position to profit from these states' experiences. In order to do so, first it must clarify the ground rules for land development prior to the expected development boom.

The initial pressure on the State's laws is forming as the twenty coastal counties subject to the North Carolina Coastal Area Management Act (CAMA)\(^9\) complete the first updates of their mandated local land use plans.\(^10\) It will not be long before the courts are called upon to resolve some of the following questions concerning these plans: Must planning precede zoning? What, specifically is meant by a "comprehensive plan"? Does plan consistency mean map consistency, policy consistency, or both? Must special use permits and rezonings be consistent with the plan?\(^11\) How does a plan affect the vesting of development rights? When a plan indicates a greater intensity of uses than provided by ordinances, which controls? Under what situations does the plan function like an ordinance?

The author has attempted to answer these and other questions in the four major parts which follow. Part I summarizes the existing law governing zoning and comprehensive planning. Part II analyzes the reasons for the insertion of the original planning requirement; the early 20th century writings of planning lawyers are applied to this task.

Part III builds upon the logic behind the planning requirement, as developed in Part II, by applying it to North Carolina law. The resulting interpretation of the States's planning requirement is offered for guidance in future zoning litigation.

Part IV considers the implications of these interpretations for three major groups: state government, local governments, and pr-

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\(^8\) The Florida and California amendments in planning law are discussed in Netter and Vranicar, Linking Plans and Regulations: Local Responses to Consistency Laws in California and Florida, AMERICAN PLANNING ASSOCIATION, PAS REPORT No. 363 (1981). For a critique of the California experience, see Hagman, Inconsistency of Mandatory Planning and Consistency 34 LAND USE LAW & ZONING DIGEST (No. 5) 5 (1982).


vate developers and their attorneys.

II. THE PRESENT STATE OF THE LAW

A. The National Level

1. The Standard Zoning Enabling Act

The Standard Zoning Enabling Act was prepared by the U.S. Department of Commerce in 1923. While at one time the Act was adopted in all fifty states, today only approximately half of these states retain the Act's requirement that zoning "shall be in accordance with a comprehensive plan." As previously noted, this language has suffered widely varying interpretations in different states. Some of the reasons for this variance are obvious. Highly urbanized states are likely to experience different development pressures than those in rural states, and zoning interpretations naturally reflect these differences.

Yet much of the confusion in this area can be traced to circumstances surrounding the preparation of the Standard Act. Although the Act required zoning to be in accordance with a comprehensive plan, it was adopted by most states at a time, 1920-1930, when very few cities had active planning programs or had adopted plans. American cities clammered for zoning before they began planning. Consider, for example, the preparation of the Standard City Planning Enabling Act in 1928—five years after the drafting of the Zoning Act.

The Standard City Planning Enabling Act added to the confusion. This Act failed to define the term "master plan," and instead settled for a mere illustration of its contents. It stressed the plan's function as a general guide, but included a "zoning plan" as one of its elements. It contained wording which many cities were able to construe as sanctioning piecemeal planning procedures. These problems, when combined with the planning profession's lack of consensus on the proper form of a comprehensive plan, laid the groundwork for a series of unfortunate judicial constructions of

12. Supra note 1.
13. See Mel Scott, American City Planning Since 1890 193-94 (1969). By 1927, three times as many cities had adopted zoning ordinances as had adopted long-range plans. Id. at 227.
14. Id. at 243.
15. Id. at 244. For a more detailed criticism of the Standard City Planning Enabling Act, see T. J. Kent, Jr., The Urban General Plan 32-38 (1964).
the planning requirement.

2. Common Judicial Interpretations

The confusion which surrounded the requirement that zoning be in accordance with a comprehensive plan provided courts with sufficient maneuvering room to sidestep the requirement in the first fifty years of zoning. Professor Norman Williams grouped the tests which courts have used into three categories: mere surplusage, mechanical criteria, and the substance of planning.\textsuperscript{16}

The "mere surplusage" test treats planning rudely. The plan requirement is simply viewed as a warning that zoning must be within the scope of enabling legislation and must be based on acceptable police power objectives.\textsuperscript{17} Since these same requirements apply to any ordinance, the effect is to render the plan conformity language meaningless.

The second interpretation is not far removed from the first. Under this test, the planning requirement can be satisfied by such mechanical criteria as: whether the ordinance is geographically comprehensive, whether the ordinance is rational, or whether the zoning was done with "some forethought."\textsuperscript{18}

Both of the above interpretations have proven popular when courts have reviewed basic zoning ordinances prepared in communities lacking planning departments and plans. Such cases occurred frequently in the early days of zoning, when most cities regarded planning as an expensive luxury. Now, with cities' greater access to planning services, more and more courts are adopting the third interpretation.

This third test requires that zoning be based on a sound planning analysis: if this is not the same thing as a comprehensive plan, then at least planning studies and consistent policies.\textsuperscript{19} Most cities now have access to planning advice, and many are trying to use zoning for a much wider range of objectives. Consequently, courts are beginning to examine the planning basis of community zoning decisions; such examinations assist the courts in distinguishing the permissible local objectives from the impermissible ones.

\textsuperscript{16} 1 \textsc{Norman Williams}, \textit{supra} note 1, at §§ 23.02-.04.
\textsuperscript{17} \textit{Id.} at § 23.02. \textit{See generally id.} at §§ 24.01-.02.
\textsuperscript{18} \textit{Id.} at § 23.03. \textit{See generally id.} at §§ 25.01-.09.
\textsuperscript{19} \textit{Id.} at § 23.04. \textit{See generally id.} at §§ 26.01-.23.
3. Recent Statutory Changes

The previous judicial reluctance to take the "in accordance" language seriously has led some states to amend their zoning enabling legislation; much of this activity has taken place in the last twenty years. Some thirteen states have enacted new legislation dealing with comprehensive planning, and most of these states have developed case law clarifying the effect of the new legislation.

Almost without exception, the new cases demand that zoning actions be taken in conformity with a "real" plan. This change is not surprising, since the purpose of the legislative revisions was usually to reinforce the point that the "in accordance" language meant just that.

4. Recent Case Law in Standard Zoning Enabling Act States

The amendment to enabling legislation tightening planning requirements, with the accompanying changes in case law, is the most significant development in the comprehensive planning area of zoning law. This legislative activity lies outside the scope of this paper. Nevertheless, the case law in the remaining Standard Act states reflects a lesser, yet still noticeable, tightening of the planning requirement. The clearest shifts toward a more literal interpretation of the "in accordance" language have come in New York, New Hampshire and Connecticut.

20. The following states have recently tightened their comprehensive planning requirements: Arizona, California, Florida, Hawaii, Idaho, Indiana, Kentucky, Montana, Nebraska, New Jersey, Oregon, Virginia and West Virginia. Mandelker and Netter, supra note 1, at 6-8.


B. Present North Carolina Law

While the major purpose of this paper is to address unanswered questions raised by North Carolina's comprehensive planning requirement, this section concentrates on the few issues that have been answered by the courts. An initial distinction must be drawn between cases involving cities which have enacted a plan, and cases in which zoning regulation is in effect but no plan exists.

1. When a Plan Does Not Exist

The absence of comprehensive plans has not caused North Carolina courts to invalidate zoning ordinances. Instead, the decisions follow the widely accepted approach of defining the comprehensive plan as something less than an independent document embodying policies backed by technical studies. 23

If something less than a complete plan will suffice, what are the specific minimum requirements? The answer depends on the nature of the zoning scheme being challenged and, to a lesser extent, on the nature of the challenging party. The range of requirements is illustrated in three cases.

In the first case, Shuford v. Waynesville, 24 the supreme court reviewed Waynesville's first, tentative, steps toward zoning. Waynesville had apparently enacted a zoning text, but it had only zoned one block of the city. 25 This "business zone" prohibited gas stations, and plaintiff developers brought a declaratory judgment action challenging the validity of the ordinance. 26 The court wasted

27. Id. at 136, 198 S.E. at 586.
28. Id.
little space in deciding that the ordinance failed to comply with the requirements of the Zoning Enabling Act; yet the inquiry did not stop there. The court proceeded to review the ordinance under traditional police power standards. Although the ordinance was ultimately struck down as an unconstitutional denial of equal protection, the opinion's analysis underscores an important point that is often overlooked in zoning litigation.

Where, as in Shuford, the ordinance adopted under the rubric of "zoning" does not stray a great distance from traditionally accepted purposes under the police power, the ordinance may be upheld notwithstanding its failure to follow the Zoning Enabling Act. The purpose of the Act, it must be remembered, was to provide explicit authorization for activities which had previously been interpreted as lying outside the scope of the police power.

The second case, Allred v. City of Raleigh, involved neighboring property owners' challenge to a zoning amendment that permitted garden apartments to be built in a single-family neighborhood. The supreme court overturned the court of appeals and invalidated the zone change. The case is noteworthy for the opinion's strong distaste for the City's "contract zoning." However, the supreme court opinion did not disturb the expressions of the court of appeals on the comprehensive plan requirement. The court of appeals had interpreted the zoning statute to require nothing more than geographically comprehensive zoning ordinances.

Two factors may explain this lenient interpretation. First, there was a common problem which Professor Norman Williams has identified in a discussion of neighbors' zoning challenges:

29. Id. at 138-40, 198 S.E. 587-89.
30. Id. at 140, 198 S.E. at 588.
31. These traditionally accepted purposes are discussed in the text infra at Sections II(A) and III(A)(1).
32. See discussion infra at Section III(B).
34. 277 N. C. at 532-33, 178 S.E.2d at 433.
35. Id. at 546-47, 178 S.E.2d at 441.
36. The city based the decision to zone on the attractiveness of the specific project rather than the entire range of permitted uses. Id. at 545, 178 S.E.2d at 440-41.
37. Id. at 544, 178 S.E.2d at 439-40.
38. 7 N.C. App. at 607, 173 S.E.2d at 536.
The most common case is one of a challenge to a zoning amendment; and there is a logical trap here. The plaintiff-neighbors are normally seeking more zoning protection, not less; if they prove there has been no plan, what is the legal status of original ordinances?39

Second, unlike Shuford, the challenged action had the effect of increasing the development rights of a private landowner. The comprehensive requirement is much less important in cases where property rights are being increased, if the plan requirement is regarded as a check on potential arbitrary zoning interferences with private property rights.40

The third case, A-S-P Associates v. City of Raleigh,41 concerned a developer's challenge to the City's historic district overlay.42 Unlike the traditional police power regulations challenged in Shuford, the Raleigh ordinance represented the outer limits of permissible regulatory purposes.

The Raleigh Historic District Ordinance is exactly the type of land use control that the original Standard Zoning Act draftsmen might have feared when they inserted the comprehensive plan requirement. When the case was heard, Raleigh had not completed its comprehensive plan.43 Although the supreme court upheld the City's ordinance, it did so only after examining technical studies and policies which supported the regulations.44

The present state of North Carolina law applicable to zoning actions by communities lacking plans can be summarized as follows. If the government's action increases developers' rights, very little documentation will be required. Further, if the community has zoned most of its territory, its actions will almost certainly be

39. 1 NORMAN WILLIAMS, supra note 1, at § 20.06.
40. This rationale for the comprehensive planning requirement is discussed infra at Section III(A)(2). It has been best stated in Udell v. Haas, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893-94, 235 N.E.2d 897, 900-01 (1968):
[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.

Moreover, the “comprehensive plan” protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials.
42. Id. at 209-12, 258 S.E.2d at 446-47.
43. Id. at 229-30, 258 S.E.2d at 458.
44. Id. at 228-30, 258 S.E.2d at 457-58.
upheld against challenges alleging lack of conformity to comprehensive plans.

If the government's action reduces developers' rights, the nature of the regulations becomes important. Regulations which do not stray too far from traditional police power purposes will probably be afforded a presumption of legislative validity. However, when innovative zoning schemes are involved, the planning background for the government's decision will be closely scrutinized. Although a comprehensive plan may not be required, sound technical studies and policies probably will be needed.

2. When a Plan Does Exist

There are at least four cases reviewing zoning actions of North Carolina cities which have enacted land use plans. In *Allgood v. Tarboro,* neighboring property owners challenged the City's rezoning of twenty-five acres from "residential" to "community shopping." Tarboro had adopted a land development plan ten years earlier; the zoning amendment conflicted with the map in the plan. The supreme court upheld the City's action, but not before noting the changing neighborhood conditions and the existence of a recent Community Planning Division of the North Carolina Department of Conservation and Development study on the city of Tarboro. This 1969 study departed from the 1963 plan by identifying the subject area as "good for commercial development." These changes, together with highway improvements made since 1963, permitted the court to find compliance with the comprehensive plan requirement.

A 1981 court of appeals case, *Graham v. City of Raleigh,* upheld a similar rezoning action against an attack launched by neighboring property owners. In *Graham,* the rezoning action technically conflicted with the planning map; however, the court cited a

46. Id. at 431-32, 189 S.E.2d at 257.
47. Id. at 432, 189 S.E.2d at 257.
48. Id. at 432-34, 189 S.E.2d at 257-58.
49. Id. at 446, 189 S.E.2d at 265.
50. Id. at 442, 189 S.E.2d at 263.
51. Id. at 443, 189 S.E.2d at 263.
53. Id. at 108, 284 S.E.2d at 743.
number of plan policies that supported the action. Additionally, the City Council's minutes listed four factors supporting the amendment: a change in neighborhood conditions, the peculiar shape of the property, the beneficial effect on traffic safety, and the unsuitability of the parcel for residential development.

After carefully reviewing these findings, analyzing the plan's policies, and noting the lengthy deliberations on the City Council's decision, the court of appeals upheld the rezoning action. The supreme court subsequently denied a petition for discretionary review.

A 1983 court of appeals case, *Godfrey v. Union County Board of Commissioners*, contains the most explicit endorsement of the comprehensive planning requirement. In *Godfrey* plaintiffs brought a declaratory judgment action seeking to nullify defendant County's rezoning of a tract from R-20 (single-family residential) to H-1 (heavy industrial). The Planning Director and Planning Board had both recommended rezoning.

Nevertheless, the trial judge declared the rezoning to be null and void, and characterized the County's action as "spot zoning." Findings of facts included: 1) the existence of a 1980 "Union County Land Use Plan" designating the property as low density residential, 2) the property is surrounded by R-20 on three sides and R-10 on the other side, 3) the predominant land use in the area was residential, and 4) no showing that the property could not be used for residential purposes.

In unanimously upholding the trial court's determination, the court of appeals stated:

There is no dispute that at the time the Rape tract was rezoned Union County had in effect a comprehensive land use and development plan. While such plans may be appropriately modified after their adoption, such changes must be made consistently with the overall purposes contemplated by the adoption of the plan, and not to accommodate the needs or plans of a single property

54. *Id.* at 113-14, 284 S.E.2d at 746.
55. *Id.* at 111, 284 S.E.2d at 745.
56. *Id.* at 114-15, 284 S.E.2d at 747.
57. 61 N.C. App. 100, 300 S.E.2d 273 (1983).
58. *Id.* at 100-01, 300 S.E.2d at 273-74.
59. *Id.* at 101-02, 300 S.E.2d at 274.
60. *Id.* at 103, 300 S.E.2d at 275.
61. *Id.* at 103, 300 S.E.2d at 274-75.
The most recent court of appeals case is *Piney Mountain Neighborhood Association, Inc. v. Town of Chapel Hill.* The petitioning neighborhood association challenged the Town’s finding that a proposed housing development conformed with the adopted Comprehensive Plan. The court of appeals upheld the superior court’s approval of the Town’s decision, noting that a Land Use Plan “does not set forth mandatory zoning requirements, but consists of general goals, standards and guidelines for the implementation of zoning policy.” First, however, the court devoted over two pages of analysis to the Plan’s policies, and determined that the housing development could be reconciled with these policies.

Firm conclusions cannot be drawn from these four cases, but two rules seem settled. First, in reviewing the conformity of a zoning action to a plan, the age of the plan is important. The older the plan, the more likely a court will accept a change in conditions as justification for a departure from the plan. Second, technical symmetry with the planning map will not be required, especially when the map projects detailed future land uses rather than a general land classification. Planning policies, on the other hand, will be considered by the courts in their “consistency” determinations.

At least three important questions remain to be answered: First, what are the minimum acceptable contents of a comprehensive plan? Second, will amendments clearly inconsistent with plan maps and policies be invalidated? Third, what effect does plan consistency have on the normal presumption of validity of zoning actions?

III. ANALYSIS OF REASONS FOR THE REQUIREMENT

In the sixty-year history of the Standard Zoning Enabling Act, few courts have objectively analyzed the original purposes of the comprehensive planning requirement. An understanding of these purposes is essential if meaningful interpretations are to be adopted in those states operating under the language of the Stan-
There is little information in the Standard Act or its associated comments to indicate why the draftsmen required zoning to be "in accordance with a comprehensive plan." However, the writings of the individual draftsmen on the following three points are relevant: the limits of the police power, the importance of technical studies in justifying zoning, and the contents of a comprehensive plan.

A. Acceptable Police Power Purposes Prior to the Standard Zoning Enabling Act

The Standard Act enabled communities to enact certain types of regulations which may not have been supportable under the general police power. To fully understand what the Act added to local government powers, a person must first understand what were then considered to be permissible exercises of the police power prior to the zoning enabling legislation.

The writings of three prominent "city planning lawyers"—Franklin B. Williams, Edward Bassett, and Alfred Bettman—are available in a 1916 textbook edited by John Nolen and entitled City Planning. As an accepted text of the city planning profession, the book provides insights into legal thinking prior to the drafting of the Act.

These writers readily agreed on the planning measures which could be supported under the police power. Regulations designed to insure safe building structures and adequate sanitary and electrical facilities were certainly valid. Height limitations were acceptable due to their close ties to firefighting capabilities of the time. Bulk regulations relating to percentage of lot coverage and setbacks furthered the public health by providing adequate light and air for city dwellers. Regulations based on density considera-

68. City Planning was published seven years prior to the Standard Act, and was updated in a second edition in 1928.
69. For instance, foundations, wall and roofs.
70. For instance, plumbing and water supply.
71. Williams, Public Control of Private Real Estate, in City Planning 48, 70-73 (J. Nolen ed. 1928); Bassett, Zoning, in id. 404, 411 (1928).
72. Scott, supra note 13, at 75; Flavell Shurtleff, Carrying Out The City Plan 148 (1914), quoted in Scott, supra note 13, at 136; Bassett, supra note 71, at 414-36.
73. Williams, supra note 71, at 73; Bassett, supra note 71 at 414-36; Scott, supra note 13, at 75.
tions were more in doubt, but even these restrictions did not stray too far from traditional health, safety and welfare concerns.

The problems arose in two major areas—the division of a city into separate districts and the public acquisition of land for streets and parks. Concerning districting, it was generally accepted that activities with nuisance-like characteristics could be restricted from locating in certain areas. It was the use of districting in furtherance of other purposes—those of a more economic and aesthetic nature—that raised the greatest doubts of constitutionality.

With respect to public acquisition, American courts had traditionally employed a narrow definition of the term "public use" as it appears in the eminent domain clause of the Fifth Amendment to the United States Constitution. By 1914, there were indications that cities may be allowed to acquire land for such community facilities as playgrounds, but questions relating to street acquisition and "excess condemnation" were very much in doubt.

B. The Planning Requirement for Zoning

Given the strict attitude of the courts toward the use of the police power in furtherance of city planning concerns during this time period, (1900-1930), it is not hard to understand why the draftsmen of the Standard Zoning Enabling Act exercised great caution. This was the Lochner era, when substantive due process was cresting, and local ordinances were closely scrutinized for their actual adherence to health, safety and welfare criteria. In this climate, innovative regulatory schemes of any sort were upheld only after exhaustive factual documentation of their specific relations to...
proper police power objectives.  

The writings of the planners and lawyers of this era reflect a clear understanding of the courts' position. At a 1914 planning conference, Cincinnati lawyer Alfred Bettman stated the courts' concerns:

"it is necessary to show that the particular residential-district ordinance or statute under discussion has behind it a motive other than an aesthetic motive, has a motive related to safety or comfort or order or health." It would therefore be wise, he suggested, to precede the enactment of zoning regulations by some scientific study of the city's plan, so that the residential-district ordinances may bear a relation to the plan of the city, and the plan should be devised with a view to the health or the comfort or the safety of the people of the city.

The importance of sound technical studies in the overall process is obvious:

For example, the promoters of a residential district ordinance should first have some leading physicians make a study of the effect of noise upon the nervous system of human beings, and then, if the study showed that reducing "noises and turmoil and hurly-burly" tended to lessen nervous diseases in the city, there should be a systematic study of the distribution of residential and industrial districts which would, by directing the course of vehicular and pedestrian traffic, protect the residential districts from noise. No court, Bettman contended, could then say that the ordinance was passed solely for the promotion of aesthetic satisfaction. Constitutionality, in short, probably depended, ultimately, upon comprehensive planning for the promotion of the common health, safety and welfare.

Planner George Burdett Ford, a landscape architect by training, elaborated on the nature of these studies in a 1916 article entitled *Fundamental Data for City Planning Work*:

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82. Bettman, supra note 77.

83. Id.
In other words, it is now realized that the city is a complex organism, so complex that no doctor is safe in prescribing for it unless he has made a thorough-going and impartial analysis of everything that may have even the remotest bearing on the case. City planning is, therefore, fast becoming a well-defined science with definite prescriptions for definite ills, and satisfactory results can be arrived at only by applying modern scientific methods.  

Ford’s recommended fields for investigation and survey included geography and climate, topography, hydrography, demographics, history of growth, methods of growth control, and the city’s financial status.

C. The Nature of the Comprehensive Plan

Early planning lawyers agreed on the need for comprehensive planning to support zoning ordinances against constitutional attacks. However, the Zoning Enabling Act does not speak of “planning;” it requires zoning to be in accordance with “a plan.” Much confusion arises in making the transition from “planning” to “a plan.”

The ambiguities have been exaggerated. If the requirement in the 1923 zoning enabling legislation is interpreted according to its plain meaning and then, if necessary, according to the legislative intent, there should be little confusion. Two important elements of the plan are considered below: its subject matter and the form of its map.

1. Subject Matter of the Comprehensive Plan

Much has been made of the Zoning Act’s failure to define the term “comprehensive plan.” Five years after the preparation of the Zoning Act, the Standard City Planning Enabling Act used the term “master plan” and failed to define it; however, its contents were identified to include: streets, other types of public grounds, public buildings, public utilities and zoning.

The inclusion of the zoning element in the City Planning Act has been criticized; it is considered inappropriate to include a de-
etailed zoning scheme within a plan which focuses on general concerns. The City Planning Act does appear to contemplate a detailed zoning plan.88

Yet it is hard to understand why many commentators have imputed the confusion surrounding the 1928 City Planning Act back into the 1923 Zoning Act. The relevant period of inquiry for the Zoning Act's purposes is the time preceding its enactment and not a date five years in the future.

On balance, the Zoning Act's failure to define "plan" was a wise decision, given the frequently changing consensus on the plan's details.89 The term "comprehensive" is self-explanatory and is buttressed by the earlier writings quoted above. It requires a thorough interdisciplinary study of the city's problems;90 it obviously requires more than a zoning ordinance that simply "covers all the city's land area."91

2. The Form of the Map

Although the City Planning Act apparently does include a detailed zoning map as a plan element, no such requirement appears in the Zoning Act. Alfred Bettman's writings suggest a better interpretation: "Consequently, the plan of development needs must in-

Mandelker, supra note 5, at 903.


89. It can be argued that the earliest theories of comprehensive planning envisioned a generalized land classification map as the end product. See infra note 93. However, from 1930 to about 1960, the concept of detailed future land use maps dominated. The future land use map designated specific locations for specific uses, based on projected space needs, land capabilities and other factors. See generally F. CHAPIN, URBAN LAND USE PLANNING (2d ed. 1965). This approach began to receive criticism as "unrealistic" in the late 1950's and 1960's. See Meyerson, Building the Middle Range Bridge for Comprehensive Planning, 22 J. AMER. INST. PLANNERS 58 (1956); Perin, Noiseless Seccession From the Comprehensive Plan, 33 J. AMER. INST. PLANNERS 336 (1967). More recently, the land classification-critical areas concept endorsed by the American Law Institute has rapidly gained general acceptance. MODEL LAND DEV. CODE (1976).

90. See Ford, supra note 83. This requirement was restated in Udell v. Haas, 21 N.Y.2d 463, 469, 288 N.Y.S. 2d 888, 893, 235 N.E. 2d 897, 900:

Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and learning of the philosopher, the city planner, the economist, the sociologist, the public health expert, and all the other professions concerned with the urban problem.

91. As noted above, supra note 25, the "geographically comprehensive" interpretation has been endorsed in North Carolina.
clude some degree of the general location or distribution of private structures and uses.” There is simply no evidence to suggest that the Zoning Act draftsmen envisioned a detailed future land use map showing specific uses for each tract of land. By contrast, there are strong indications that a generalized land classification map was contemplated.

D. Summary—What the Draftsmen Meant By “In Accordance With a Comprehensive Plan”

If one of the planning lawyers involved in the drafting of the plan requirement in the Standard Zoning Enabling Act were asked to summarize the state of the law at that time, the response would probably read as follows.

Legislation adopted in support of city planning can take many forms, including regulation of structures, plumbing and sanitary requirements, building height and bulk, density, nuisances, proper location of land uses, and public acquisition. Many of these regulations are permissible exercises of a city's traditional police power authority, and require no specific legislation.

However, some of the techniques—primarily the designation of desirable locations for non-nuisance land use—require specific enabling authority. This is because this “zoning of uses” does not flow naturally from public health and safety concerns.

Because zoning lies at the outer reaches of the police power, it not only requires specific enabling authority, it also requires a comprehensive, i.e., interdisciplinary, collection of background studies tied together in a sensible fashion. These studies will demonstrate, to reviewing courts, the relation between the regulations and proper police power objectives.

Properly viewed, the Zoning Enabling Act offers a cautionary authorization, and a general blueprint, for cities attempting to regulate land in accordance with purposes not traditionally accepted

92. Bettman, City Planning Legislation, in Nolen, supra note 71, at 431, 443 (emphasis added).

93. Land use planning and zoning in Germany, which preceded American activities by some thirty years, built on a basic land classification scheme. The inner city was distinguished from the outer city; and the outer city was divided into: “an inner, an outer, and a rural zone, in which the permissible height of new buildings and percentage of the lot that they may cover progressively decrease.” Williams, supra note 71, at 77.

94. Much as Brandeis’ brief demonstrated such a relationship in Muller v. Oregon.
under the police power.

IV. APPLYING THE INTERPRETATION IN NORTH CAROLINA

The interpretations discussed in Section II above can be adopted in North Carolina while doing little violence to existing case law. Two distinct forms of judicial review are proposed. The first applies to communities with no comprehensive plans, while the second governs communities which have adopted plans.

A. Judicial Review When No Plan Exists

The Shuford case establishes the proper analysis for North Carolina zoning cases. First, the court determines whether the governing body has complied with the mandates of the zoning enabling legislation. If no plan exists, compliance with the enabling legislation is not achieved, and the governing body cannot use this legislation in support of its local ordinances.

The unavailability of the zoning enabling authority does not end the inquiry. A remarkable number of the techniques and regulations which we now call "zoning" can be upheld under traditional police power analyses.95

1. Some Accepted Police Power Purposes

The following types of regulations are generally accepted as valid public health and safety measures under the police power.

Permissible safety measures include regulations of building construction, building height,96 location of heavy industries and other potential nuisances, and location of activities generating heavy traffic.

Permissible health-based regulations include plumbing codes, housing codes, building bulk limitations97 and residential density limitations in areas with poor soils not served by public sewers.98 It is apparent from the above list that a North Carolina city or county could devise a satisfactory "safety net" of land use regulations even if it lacks the comprehensive plan needed to support

95. See generally 1 NORMAN WILLIAMS, supra note 1, at §§ 8.01-.03; 10.01-.12; Shuford v. Waynesville, 214 N.C. 135, 138, 198 S.E. 585, 587 (1938); Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978).
96. As building height relates to local firefighting capabilities.
97. Building bulk limitations based on access to light and air.
98. 1 NORMAN WILLIAMS, supra note 1, at §8.02.
regulations based on zoning enabling legislation.

2. Some Less Accepted Regulatory Measures

The following types of regulations are farther removed from the health and safety aspects of the police power; consequently, strict scrutiny of such regulations is appropriate when no comprehensive plan exists.

Zoning of land uses based on economic or aesthetic reasons is suspect. Examples include the separation of non-nuisance land uses, the separation of attached residential units from detached units, and the separation of modular housing or mobile homes from the conventional site-built homes. When the outright exclusion concerns a particular use such as attached housing or mobile homes, then the exclusion is particularly suspect.99

99. Any community which excludes or overregulates attached housing or mobile homes can expect to lose its normal presumption of validity when its ordinances are challenged.

Concerning mobile homes, it must first be noted that the North Carolina Court of Appeals has upheld a rural county’s minimum dimension requirement (24’ x 60’) for mobile homes which in effect permits only doublewide units in that county. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52 (1980). However, careful planners will not rely too heavily on this opinion. On the national level, decisions have moved in the opposite direction as courts recognize the improved quality of mobile home construction and these homes’ increasing significance in the moderate income housing market. See 2 NORMAN WILLIAMS, supra note 1, at § 57.03 (Supp. 1982); Oak Forest Mobile Home Park, Inc. v. City of Oak Forest, 27 Ill. App. 3d 303, 326 N.E.2d 473 (1975). A number of courts have invalidated the complete exclusion of mobile homes from a community. See, e.g., East Pikeland Tp. v. Bush Bros., Inc., 13 Pa. Commw. 578, 319 A.2d 701 (1974). Michigan and Illinois have held that mobile homes can not be confined to mobile home parks only. Robinson Township v. Knowll, 410 Mich. 293, 302 N.W. 2d 146 (1981)(see 17 A.L.R.4th 79); People v. Husler, 34 Ill. App.3d 977, 342 N.E.2d 401 (1975); however, Texas still recognizes such restrictions as valid exercises of the police power. Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982). See generally Annot., 17 A.L.R.4th 106 (1982).

The exclusion or restrictive regulation of attached housing is now particularly suspect in light of the exclusionary zoning litigation of the past decade. Although the separation of attached housing from single-family housing was upheld in the landmark decision in Euclid v. Ambler Realty, 272 U.S. 365 (1926), many of the reasons for that distinction are no longer applicable. 3 NORMAN WILLIAMS, supra note 1, at § 66.48; R. Babcock, The Egregious Invalidity of the Exclusive Single Family Zone, 35 LAND USE LAW & ZONING DIGEST (No.7) 4 (1983). New Jersey, New York and Pennsylvania have recently required local governments to revise their zoning regulations to allow for their respective “fair shares” of needed low-cost housing. See Southern Burlington County N.A.A.C.P. v. Township of Mount
Density control based on minimum lot size requirements is suspect unless the regulations are based on documented health concerns such as soil suitability for septic tanks. Obviously, sophisticated zoning measures such as historic districting and growth management cannot be supported without a comprehensive plan.\textsuperscript{100}

The strict scrutiny to be used by courts in the review of the above regulations would be similar to that already used in equal protection analysis: it would require communities to demonstrate, in specific factual terms, an actual distinct relationship between the regulatory measures and traditionally accepted police power purposes.\textsuperscript{101}

\textbf{B. Judicial Review When a Plan Exists}

When a community has adopted a plan which meets minimum standards of technical competence and comprehensiveness, its zoning actions should be presumed valid, provided that: 1) the zoning action is within the scope of the general police power or the zoning enabling authority, and 2) the action is consistent with the plan.\textsuperscript{102}

Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975). The exclusionary zoning litigation strategies which developed in the 1970's can be expected to expand to encompass a broader base of housing needs as moderate and middle-income families join in the struggle for affordable housing in the 1980's. In this economic climate, courts can be expected to consider reversing the presumption of validity in cases challenging governmental regulation of attached housing or mobile homes. \textit{See} 3 Norman Williams, supra note 1, at §§ 66.50-66.52; The President's Commission on Housing, Final Report 201 (1982), discussed in Burch and Ryals, \textit{Land Use Controls}, 15 \textit{Urban Lawyer} 879, 882 (1983).


101. In a 1970 case, the Michigan Supreme Court stated: "The absence of a formally adopted municipal plan, whether mandated by statute or not, does not of course invalidate municipal zoning or rezoning. But it does...weaken substantially the well known presumption which, ordinarily, attends any regular-on-its-face municipal zoning ordinance or amendment thereof." Raabe v. City of Walker, 383 Mich. 165, 176, 178-79, 174 N.W.2d 789, 792, 795-96 (1970).

102. Even Professor A. Dan Tarlock, a critic of the comprehensive planning requirement, has conceded that governmental actions consistent with adopted plans should be afforded a presumption of validity:
1. Minimum Standards for Comprehensive Plans

Obviously, any community can prepare a document and identify it as a "comprehensive plan." Therefore, the comprehensive plan requirement is meaningless if there are no minimum standards of acceptability.

There are two elements of a satisfactory comprehensive plan. First, it must be comprehensive; that is, it must examine the social, economic and physical aspects of a community's growth. Second, its policies must be based on technically sound background studies of social, economic and physical conditions.

Who determines acceptability? Courts could examine plans on a case-by-case basis. There are two problems with this approach: it would be extremely time-consuming, and judges are not trained to analyze planning studies and their relationship to plan policies.

The North Carolina Department of Natural Resources and Community Development (DNR&CD) is experienced in certifying land use plans under the State's Coastal Area Management Act (CAMA). DNR&CD's plan review staff could be expanded to allow for additional review of comprehensive plans from North Carolina cities and counties not subject to CAMA. Legislative authority for such state review of local land use plans exists in North Caro-

Adopted plans should, however, be given some weight in determining the reasonableness of legislative or administrative decisions. When the choice is between the proposed and existing uses, it would be reasonable for a court to presume that a selection made through the comprehensive planning process surveys a greater range of alternative uses for a tract of land than does a choice made through the usual ad hoc process. Thus a party proposing a change that departs from the plan ought to carry some burden of showing that the planning choice was unreasonable.

Tarlock, supra note 5, at 83-84. See also Mandelker, supra note 5, at 937. Obviously, if the community has adopted a plan, and takes actions inconsistent with the plan, its actions will probably not be presumed valid. In fact, one court has held that action taken in conflict with a plan should be reviewed by reversing the normal presumption of legislative validity. Forestview Homeowners Ass'n., Inc. v. County of Cook, 18 Ill. App.3d 230, 244-46, 309 N.E.2d 763, 764-65 (1974).

103. BUREAU OF COMMUNITY PLANNING, UNIVERSITY OF ILLINOIS, WHAT IS THIS THING CALLED PLANNING? 5-6 (1966-1967) (quoted in D. MANDELKER AND R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 40 (1979)).


105. N.C. GEN. STAT. § 113A-110 (1978) requires local land use plans to be reviewed by the Coastal Resources Commission, which has used the Department of Natural Resources and Community Development for staff support in such reviews.
lina's Land Policy Act. Since comprehensive planning remains optional for North Carolina cities and counties, the decision to seek certification would lie within the discretion of the local government.

2. Effects of Certification

The certification granted by DNR&CD would provide needed guidance to courts reviewing a community's land use regulations. Courts could assume that approved plans meet the enabling legislation's definition of a "comprehensive plan;" consequently, all zoning actions taken in accordance with the plan, and within the scope of the zoning enabling legislation, should be granted a presumption of validity. This presumption should not be irrebuttable.

Uncertified plans provide no such presumption of validity. In some respects, the review of zoning actions based on uncertified plans would closely resemble the review of actions based on no plans. In both cases, strict scrutiny would apply.

106. The Land Policy Act directs that a State land classification shall include, in relevant part:

Guidelines and procedures for the preparation of official land use plans by the land-planning agencies of local government, including a procedure for review by an appropriate State agency for sufficiency and consistency with the provisions of this Article, and a procedure for assembling local plans into regional plans.


107. See Tarlock, supra note 5, at 83. Additionally, zoning expert Richard Babcock has criticized the precept that "the validity of local land-use laws should be measured only by their consistency with the municipal plan." Richard F. Babcock, The Zoning Game 122 (1966). He explains as follows:

The municipal plan may be just as arbitrary and irresponsible as the municipal zoning ordinance if that plan reflects no more than the municipality's arbitrary desires. If the plan ignores the responsibility of the municipality to its municipal neighbors and to landowners and taxpayers who happen to reside outside the municipal boundaries, and if that irresponsibility results in added burdens to other public agencies and to outsiders, whether residents or landowners, then a zoning ordinance bottomed on such a plan should be as vulnerable to attack as a zoning ordinance based upon no municipal plan.

Id. at 123.

108. Babcock, supra note 107, at 123.
Nevertheless, even an uncertified plan could assist a city or county's legal defense of its actions. While an uncertified plan may not meet comprehensive planning standards, it will still contain studies and findings which may sufficiently withstand strict judicial scrutiny.\(^{109}\) It is certainly better to have some facts, and some findings, in support of an action than it is to have none.

3. The Importance of Consistency

Zoning actions taken in accordance with a certified comprehensive plan should be presumed valid; by contrast, actions in direct conflict with significant plan elements should be presumed to be arbitrary.\(^{110}\) The consistency question should be a key issue in future North Carolina zoning litigation. Properly viewed, as a question of fact, the answers should depend on expert planning testimony.\(^{111}\) In recent zoning opinions, courts in other states have analyzed the consistency questions;\(^ {112} \) North Carolina courts are beginning to consider it also.\(^ {113} \)

Does consistency mean "policy consistency" or "map consistency"? This question which has plagued other state courts,\(^ {114} \) usu-

\(^{109}\) See, e.g., A-S-P Associates v. City of Raleigh, 298 N.C. 207, 228-30, 258 S.E.2d 444, 457-58; see also Hubert Realty Co. v. Cobb County Bd. of Comm'rs, 245 Ga. 236, 264 S.E.2d 179 (1980), in which the Georgia Supreme Court upheld a county's rezoning denial, based largely on the county planner's testimony summarizing the community's land use planning strategies.

\(^{110}\) See Forestview Homeowner's Ass'n. v. County of Cook, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); Babcock, supra note 107, at 122; Mandelker, supra note 5, at 932; Comment, supra note 5, at 99.

\(^{111}\) Planners in Santa Rosa, California have established a two-step procedure to assist them in deciding whether or not a project in consistent with a plan:

1. Staff compare the proposed project with the density and use indicated on the plan map. If the project falls within the categories, staff recommends a finding of consistency to the planning commission.

2. When a project is not consistent with the map plan, planners then turn to the text of the plan. They ask two questions: (a) If approved, will this project undermine the policies contained in the plan? (b) If other projects similar to this one were approved, would their cumulative effect undermine the plan policies?

Netter and Vranicar, supra note 8, at 7.

\(^{112}\) The recent cases are summarized in Mandelker and Netter, supra note 1, at 12, and Netter and Vranicar, supra note 8.


\(^{114}\) The most thorough discussion of this problem is contained in a 1976 opinion of the Oregon Supreme Court. In Green v. Hayward, 275 Or. 693, 552
ally arises when courts review plans which incorporate detailed future land use maps. In these cases, the zoning action usually conflicts with the specific land use indicated on the map; yet policies in the plan can support the action. The plan creates a conflict within itself.

However, conflicts between maps and policies will rarely arise when the map reflects broad categories of land use rather than specific designations, and planners themselves are now expressing a preference for policies plans (often supplemented with generalized land classification maps). 118

4. When the Plan Functions Like an Ordinance

Although a community's comprehensive plan is highly relevant in zoning litigation, it is not law. A person does not "violate" a comprehensive plan in the sense that one violates an ordinance. Actions of private individuals or government officials which are inconsistent with the plan do not afford independent grounds for legal relief.

Instead, the plan serves as important evidence at zoning trials. If the government's action is consistent with the plan, those challenging the action will have to introduce sufficient evidence to overcome a presumption of legislative validity. By contrast, inconsistent actions will compel the city or county to introduce evidence

P.2d 815 (1976), rev'g 23 Or. App. 310, 542 P.2d 144, neighboring property owners challenged a zone change (from agricultural to heavy industry) granted by the Lane County Board of Commissioners. The court of appeals invalidated the rezoning on the grounds that it conflicted with the map portion of the county's comprehensive plan. The supreme court reversed, noting that previous case law, "does not hold that a diagram or map which constitutes a part of a comprehensive plan is necessarily the controlling land use document." After finding substantial conformity with the plan's written objectives, the court upheld the rezoning action.

115. Supra note 89. Mandelker summarizes the changes as follows: Comprehensive plans historically have included land use maps that projected a precise "end-state" to which the community was supposed to conform at the close of the planning period. The mapped, end-state plan has been subject to growing criticism as an overly rigid and not very useful technique for the statement of community planning goals. It has been replaced in many communities by a more flexible policy plan that deemphasizes mapping in favor of textual statements delineating the community's general planning policies.

Mandelker, supra note 5, at 918-19. See also Haar's criticism of the "overloading of detail" at Haar, supra note 5, 20 LAW & CONTEMP. PROBS. at 373.
counteracting its own plan’s studies and findings.

In North Carolina, the rule that the plan does not function as an independent ordinance has one limited exception. In “areas of environmental concern” designated pursuant to CAMA, development permits cannot be granted for activities deemed to be inconsistent with local land use plans.116 DNR&CD’s office of Coastal Management makes the consistency determination although it usually consults local planning staffs.117

V. GUIDELINES FOR GOVERNMENTS AND DEVELOPERS

This section recommends guidelines for state government, local governments and private developers; the guidelines are derived from the interpretations developed in Section II above.

A. Guidelines for State Governments

Except for CAMA, North Carolina has no state level requirement that cities and counties prepare comprehensive plans. By contrast, California, Florida and Oregon recently acted to: 1) require local governments to prepare and adopt comprehensive plans, and 2) specify, in great detail, the elements of these plans. Neither requirement is necessary, nor desirable, in North Carolina. Many local governments in the State have never exercised the zoning powers authorized by the Standard Act; in fact, as late as 1979, only twenty-five of the State’s one hundred counties had enacted countywide zoning ordinances.118 Further, the detailed state requirements for plan elements are now beginning to lose favor in the very states that first endorsed them.119 Rather than

116. N.C. GEN. STAT. § 113A-111 (1983). An earlier draft of CAMA had required consistency “throughout the planning area;” however, the House Committee on Water and Air Resources amended this language so as to limit the requirement to areas of environmental concern. Heath, supra note 6, at 376.

117. Typically, upon receipt of a request for a major development permit in an area of environmental concern, the Office of Coastal Management of DNR&CD will send a letter to the applicable local planning department. The letter will request the planning director to offer his or her opinion on whether the described proposal is consistent with the community’s land use plan.

118. Ducker, Land Use Planning in Rural Areas, 46 POPULAR GOVERNMENT No. 1, at 28 (1980).

119. The California legislature is now considering major changes in that state’s local plan requirements. Some of the major revisions being considered by the planning law task force include:

a. A simplification of the general plan requirements, elimination of refer-
adopting detailed regulations prescribing plan elements, DNR&CD should simply concentrate on the important plan characteristics of comprehensiveness, technical soundness and practical land classification.

1. Comprehensiveness

The plan should be comprehensive in time, scope and geography. It must not address one narrow subject area, e.g., environmental amenities, to the exclusion of other important areas, e.g., housing. Its policies for different subject areas should be reconciled to avoid internal inconsistency.

2. Technically Supported Findings and Policies

The plan should include written findings and policies governing community growth and development. These findings and policies must be based on a reasonable technical foundation. Obviously, the technical studies themselves must be reasonably scientific and accurate.

3. Generalized Land Classification Maps

The CAMA guidelines now used for review of local land classification maps are well-conceived and should serve admirably as a basis for review of plans from the rest of the State. Basically, the guidelines require a map dividing the planning jurisdiction into the following classifications: developed, transition, rural and conservation.


\[\text{Callies, Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls, 14 URBAN LAWYER, 781, 800 (1982).} \]

\[\text{120. Both California and Oregon have developed lists of areas which must be addressed by local plans. In California, these include: land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highway and safety. CAL. GOVT. CODE § 65302 (1983).} \]

\[\text{121. 15 N.C. ADMIN. CODE 7H, .0204 (1984).} \]

\[\text{122. The CAMA guidelines will serve well for the review of land classification maps from other areas of the State because the CAMA statute governing such maps is closely tracked by the N.C. Land Policy Act. Cf. N.C. GEN. STAT. §§113A-110 (1983) with N.C. GEN. STAT. §§113A-156 (1983).} \]
B. **Guidelines for Local Governments**

1. **The Decision to Adopt a Plan**

As rapid growth continues in North Carolina, many counties and cities will consider whether they should prepare comprehensive plans. Communities desiring to use complex land use controls will have little choice; such controls will probably not be upheld if they are not based on sound planning.\(^{123}\)

Yet there are a number of reasons why a community using conventional land use controls should consider adopting a plan. Specifically, the adoption of a plan can assist a city or county in defusing three types of legal attacks: equal protection, due process and antitrust.

Speaking to the first of these, Professor Charles Haar has stated:

>A basic legal consequence of the master plan follows from its "comprehensiveness." This can be broken down into two aspects: by its requirement of information gathering and analysis, controls are based on facts, not haphazard surmises—hence their moral and consequent legal basis; by its comprehensiveness, diminished are the problems of discrimination, granting of special privileges, and the denial of equal protection of laws. Hence, the two most favored sorts of attack upon government becomes less available to the private landowner.\(^{124}\)

Concerning substantive due process, that test requires that regulations be based upon, and reasonably related to, permissible police power objectives. As noted above,\(^{125}\) a comprehensive plan provides a community the chance to document, through technical studies and findings, the public purposes served by its policies.\(^{126}\)

Recent decisions of the United States Supreme Court have eroded local governments’ "state action" immunity to antitrust actions.\(^{127}\) Antitrust cases are now being brought against cities and

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123. *Supra* note 100.
125. *See supra* Section II(B).
126. More specific recommendations for accomplishing this are presented in Silliman, *Constitutional Guidelines for Land Use Planning Offices* (unpublished paper) (available from author of this article).
counties in the zoning field. While the specific boundaries of local government liability have yet to be drawn, antitrust experts are now counseling cities and counties to be scrupulous in providing "detailed articulation of the economic and other public-interest considerations upon which [land use decisions] are based." Moreover, this documentation should be in place before a decision is reached. The implications of this advice for the decision whether to prepare a comprehensive plan are obvious; in fact, one city successfully defended an antitrust challenge to a rezoning decision by referencing its adopted comprehensive plan.

2. The Decision to Amend a Plan

Once local government has adopted a comprehensive plan, it must then decide another question: under what circumstances can the plan be amended? The plan should be amended, or updated, whenever its underlying technical studies no longer represent existing conditions. Additionally, even if the plan's technical studies remain valid, the governing body can revise the plan's policies to reflect political changes affecting the community as a whole.

However, plan amendments conceived as direct responses to specific zoning requests are a different matter. Professor Daniel Mandelker's warning bears emphasis:

If the community contemplates a revision of the plan to support a zoning change, its safest course is to undertake an independent and fully considered amendment of the comprehensive plan. When a limited plan amendment is made expressly to permit a particular zoning change, the community risks intensive judicial scrutiny . . . .

In other words, plan amendments should be based on reasons

128. See Mason City Center Assoc. v. City of Mason City, Iowa, 468 F. Supp. 737 (N.D. Iowa 1979); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. 64,029 (D. Colo. 1980); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1978) vacated, 435 U.S. 992, on remand, 576 F.2d 696 (5th Cir. 1978), cert. den., 440 U.S. 911 (1979); Westborough Mall Inc. v. City of Cape Girardera, 693 F.2d 733 (8th Cir. 1982).


130. Id. at 103.


132. Mandelker, supra note 5; see also Godfrey v. Union County Bd. of Comm'rs, 61 N.C. App. 100, 300 S.E.2d 273 (1983).
which are applicable to the community as a whole, rather than particular concerns expressed by specific developers or neighbors.

C. Guidelines for Developers

The comprehensive plan's function as a preview of governmental action is frequently overlooked by North Carolina developers. Professor Haar describes this function as follows:

The master plan is at the very minimum an intelligent prophecy as to the probable reaction of the local governmental authorities to a given proposal for development. . . . In the light of the master plan, the private land owner may shape his own plans in the plastic stage when they have not yet crystallized; collision with the public interest can in some cases be deflected. 133

North Carolina developers will soon have to learn what California developers already know: that communities experiencing rapid growth can and will change the zoning laws applicable to a project after development has commenced. Whether the developer is entitled to complete his or her project in the face of such changes depends on whether his or her rights have "vested." 134

Consequently, prior to development, the developer whose attorney examines not only the usual ordinances, but also the comprehensive plan, is better prepared to defend his or her project against midstream ordinance amendments. In the past, comprehensive plans have been successfully used to establish developer's rights to complete particular projects. 135

The careful developer's lawyer will proceed as follows when presented with a proposed development. First, the zoning, subdivi-
sion, building and health ordinances should be analyzed and applied to the project. This will determine whether the project as designed is permitted under existing laws.

Second, the project's consistency with the comprehensive plan should be carefully studied. A project which complies with the ordinances, but conflicts with the plan, faces a risk of governmental ordinance amendments that may result in prohibiting the project.

By contrast, a project which is clearly consistent with the ordinances and the plan will be fairly well insulated against ordinance amendments. Given the consistency of the project plan, the government will be placed on the defensive when it attempts to enact regulations restricting or prohibiting the project.136

VI. CONCLUSION

North Carolina courts have followed traditional zoning doctrine by loosely interpreting the Standard Zoning Enabling Act's requirement that zoning be in accordance with a comprehensive plan. To date, communities which enacted zoning ordinances unsupported by plans have encountered little difficulty in upholding their actions.

An examination of the legal thinking of those planners and lawyers who were influential in the drafting of the Standard Act suggest a more literal, yet still practical, interpretation of the comprehensive plan requirement. Under this interpretation, a plan will be required whenever a community's zoning activities exceed the conservative limits on general police powers which existed prior to the adoption of the Standard Act. The absence of a plan in such a situation would not automatically invalidate the community's action; however, it would remove the legislative body's normal presumption of validity of its ordinances.

Obviously, there is no assurance that the courts of North Carolina will adopt this interpretation. Nevertheless, at a time when certainty in land use case law is often the exception rather than the rule, those government officials and private developers who voluntarily elect to govern their business affairs with this interpretation should find themselves well-prepared to defend their actions in court.

136. Supra note 110.