

## **A Review of International Best Practice in Planning Law**

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## Introduction

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1. The purpose of this paper is to examine international best practice in planning law.
2. Best practices have evolved from different historical contexts. In the United States, for example, the planning system developed from a fixed set of building standards for tall buildings in New York without a requirement for planning permission. In the United Kingdom, planning law emerged as a system of development control to correct unhealthy living conditions. However, planning law is never static and there is, in all countries, a constant attempt to innovate and experiment with new ideas to accomplish effective planning and this has led to practices that have proved successful.
3. The paper is divided into three parts. The first part examines the most effective arrangements to mediate the relationship of the state to local governments in planning. The second is concerned with discerning the best practice for the form and substance of the plan. The third part is an analysis of best practices for development control.

## Plan Making Governance Structures

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### *Degree of State Intervention in Local Plan Making*

4. The primary issue in making a plan is the appropriate balance between the creation of a local plan by an elected council and state intervention in the making of that plan by requirements to comply with state plans (state-wide, regional, or metropolitan) or state policies.
5. It has been stated<sup>1</sup> that internationally there is a sliding scale as to the degree of state intervention in the making of local plans ranging from a completely imposed state regime to one where there is absolute local autonomy.
6. In the United States, there are some States where a “bottom up” approach is favoured where the local plan is dominant and the State’s guidance is informal (Washington, Maine, Wisconsin, Rhode Island, Vermont) and others (a “top down” approach) where State plans and policies must be adopted by the local councils (New Jersey, Oregon, Florida). A specific study<sup>2</sup> of the Florida system revealed that the top down approach of State imposition of planning rules on local councils in that State had the effect of polarizing local councils and the State resulting in continuous litigation.
7. The same alternative approaches are found in Europe. As an example, the City of Helsinki 30-year strategic spatial plan: *From City to City-Region* has only one page at the end on implementation. This is because its implementation depends on the voluntary cooperation of the constituent municipalities, as regional plans are not valid in Finland

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<sup>1</sup> A. C. Nelson, J. B. Duncan, *Growth Management Principles and Practices*, Chicago: American Planning Association Press, 1995.

<sup>2</sup> M. Dawson, The Best Laid Plans: The Rise and Fall of Growth Management in Florida, 11 *J. Land Use & Envtl. L.* 325 (1996); analysed in respect of other systems in C. A. Anthony, The Structure of the Land Use Regulatory system in the United States, 22 *J. Land Use & Envtl. L.* 441 (2006-2007).

when there is a local plan.<sup>3</sup> In Germany,<sup>4</sup> there is a mix of both top down and bottom up approaches. The national German Federation enacts framework laws that provide guidance on spatial planning and the state and regions are required to create spatial plans. The local authority has two plans: the *Flächennutzungsplan* that is the spatial policy plan and the *Bebauungsplan* that is the binding regulatory plan. The F-plan must accord with state, regional and Federal spatial plans and is binding on public authorities but not private individuals. The B-Plan must accord with the F-Plan but, as the latter may be for a 10-15 year period, the B-Plan becomes out of date over time and therefore does not accord often with state or regional spatial plans.

8. The new *Localism Act 2011* in the UK is a complete movement away from state or national intervention and provides for the revocation of regional strategies and an almost exclusive emphasis on local planning. National guidance is provided only in respect of strategic issues.
9. As there is no ideal balance between state intervention and local autonomy, the best practice is to explain in the Act exactly what arrangements are contemplated, how they work, and why so that it is possible to determine easily when the state will intervene, when the local authority has autonomy. As an example, the Oregon State Legislature's *Comprehensive Land Use and Planning Cooperation Act* (Chap. 197) specifically provides for the respective roles of local government and that of the State and also contains provisions for a regional problem-solving process when conflicts arise.

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<sup>3</sup> Denmark Ministry of Environment, Forest and Nature Agency, *Regional Planning in Finland, Iceland, Norway and Sweden*, 2004.

<sup>4</sup> Akademie für Raumforschung und Landeskunde, *Spatial Planning in Germany: Structures and Concepts*, *Studies in Spatial Development Nr. 1*, Hannover (2002); European Commission *The EU Compendium of Spatial Planning Systems and Policies: Germany*, Regional Development Series, European Commission, Luxembourg: Office for Official Publications of the European Communities (1999).

### **Best Practice for State Intervention in Local Planning**

Explain in the legislation in clear terms the responsibilities of the state, any named agency, and local governments.

#### *Effective State Intervention for Growth Areas*

10. Growth areas may transcend local boundaries and the timing of new zonings must be regulated. The standard models of state intervention for growth areas require power and authority dynamics that are similar in all systems: the local plan must conform to the state plan and this is enforced by state approval of the local plan, the state plan overriding the local plan where there is an inconsistency, or the state labelling projects as state significant to require state planning control.
  
11. Unlike most systems where there is a growth management plan that simply overrides local plans, the State of Maryland has developed a more effective system under the Maryland's *Priority Funding Areas Act*<sup>5</sup> that provides for the flow of State funds to "growth related projects" in existing communities and areas where growth is planned if the areas meet criteria for residential density and other matters relating to infrastructure. Development is not restricted outside these growth areas but State funding is not available thus creating an incentive for localities to drive growth to established or identified areas. It has been found that the greater the State subsidy of a project under this Maryland system, the more likely the local authority will comply with the State initiative.<sup>6</sup>

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<sup>5</sup> *Priority Funding Areas Act (the Smart Growth Act)*, Codified in §5-7B of the State Finance and Procurement Article of the Annotated Code of Maryland.

<sup>6</sup> M. Howland, J. Sohn, Has Maryland's Priority Funding Areas Initiative Constrained the Expansion of Water and Sewer Investments, 24 *Land Use Policy* 175 (2007). Cf.: R. Lewis, G-J. Knapp, J. Sohn, Managing Growth with Priority Funding Areas 75 *Journal of the*

**Best Practice for State Intervention For Growth Areas**

Give priority funding to projects in established areas (for infill) and also the nominated growth areas.

*Formalising a Duty to Cooperate for State Significant Projects*

12. The critical governance issue where there is state intervention in the local planning process is the cooperation of local government with the plan making or planning policies of state government. The requirement to cooperate is usually subsumed under the general constitutional and statutory powers of the regime and is not made explicit.
13. Section 110 of the UK *Localism Act 2011* imposes a limited requirement on local authorities to cooperate. It provides that there is a *duty* on every local authority as well as other authorities that are prescribed to “engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken.” The activities in subsection (3) are those that extend outside local boundaries and have an impact on sustainable development in other planning areas or strategic infrastructure. It is provided that the Secretary of State can provide guidance on how that cooperation is to be effected.

**Best Practice for a Cooperation of Local Government for State Significant Projects or Growth Areas**

Specify in the legislation that there is a duty on local government to cooperate for State Significant Projects or in Growth Areas.

### *Metropolitan Government Structures*

14. The advantage of a metropolitan commission is the ability to create policies and plans that transcend local interests and therefore it has a higher legislative power than constituent local authorities.
15. The corresponding difficulty with any metropolitan commission is the conflict between metropolitan goals and policies and local aspirations and instruments that then requires state intervention to give the metropolitan commission primacy.<sup>7</sup>
16. It has been said<sup>8</sup> that there is no one form of metropolitan government that is to be preferred as all metro government is a different blend of formal government structures as well as informal governance arrangements. As well, the origin of metro governments is a result of historical development. Co-operative *Metro Vancouver*, as an example, was a model that developed from co-operative sewerage and drainage arrangements starting in the early-20<sup>th</sup> century.<sup>9</sup>
17. The amalgamation of constituent local governments into one city has been said to be a cost effective means of metropolitan governance, although it is politically difficult.<sup>10</sup> As an example, *Metro Toronto* was replaced in 1998 by an expanded City of Toronto after dissatisfaction with that form of regional government, amalgamating seven constituent local governments into one city and combining 149 agencies, boards and commissions.

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<sup>7</sup> Issues are discussed in: Richard Briffault, *Localism and Regionalism*, 48 *Buff. L. Rev.* 1, 3 (2000).

<sup>8</sup> D. Phares, *Metropolitan Government with Metropolitan Governance*, Burlington, VT: Ashgate Publishing, 2004, p. 2.

<sup>9</sup> The history is discussed in: A.F.J. Artibase, K. Cameron, J.H. Seelig, *Metropolitan Organization in Greater Vancouver: 'Do it Yourself' Regional Governments* in *ibid* at p. 195.

<sup>10</sup> G. E. Frug, *Beyond Regional Government*, 115 *Harv. L. Rev.* 1763, 1784 (2002)



18. When any metropolitan commission is created, there are three basic forms for its constitution. The first is that the members are appointed by the state: an example is the Minneapolis – St Paul (Twin Cities) Metropolitan Councils where members are appointed by the State. The second is where there is election of members of the Board. This latter method appears to be more favourable because it offers citizens a greater opportunity to participate in decisions by voting.<sup>11</sup> The third method is where each constituent local government supplies a member to the metro commission. This latter method has been criticized because they are: "collections of local government officials in regional guise but ultimately accountable politically only to their local constituencies (and) cannot be expected to produce effective advocacy for state and regional interests."<sup>12</sup>
19. An elected body of members to a metropolitan commission has been considered the best practice if they are elected generally and not by constituent local governments. It has been said:
- A representative form of government assures greater accountability to the people. Elected officials, especially those at the regional or local levels of government, can more effectively monitor smart growth implementation than unelected agency heads who often lack feedback from the citizenry or firsthand observation. Voters can remove elected officials who fail to meet their expectations, but possess very limited ability to oust appointed governmental officials.<sup>13</sup>
20. The most effective models are those where there is a willing collaboration between local governments and a metropolitan commission. This avoids the need for conflict between local and metropolitan interests, it reduces the need for state imposition on local governments, and also limits the requirement to take away local

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<sup>11</sup> A comparison of Portland and the Twin Cities is discussed in: C. Daniel, *Land Use Planning - The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort*, 27 *Wm. Mitchell L. Rev.* 1941, 1956-68 (2001)

<sup>12</sup> S. R. Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 *Ind. L. Rev.* 659, 680 (1997)

<sup>13</sup> J. C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 *Ga. St. U. L. Rev.* 1019, 1019 (2001)

government powers. However, this is not easy to achieve as seen in the failure of collaboration in Toronto and the subsequent amalgamation of all local governments into one city government.<sup>14</sup>

21. A well recognized collaborative system is in Brazil where the *Public Consortia Law 11.107/2005* provides a legal organization that consists of all state, federal, local government and agencies. Initial use of the law was to promote shared municipal visions and that in turn led to a dialogue in a formal setting about regional issues. Visions, such as integrating local planning with the regional goals coinciding with respect for local government autonomy, were drafted.<sup>15</sup>
  
22. The *Consortia Law* is an indication of the basic proposition that cooperation can be achieved best by *formal* collaboration. The best example is the *Metro Vancouver* metropolitan governance arrangement. As mentioned, this developed from a historical system of cooperation but has become the clearest model of minimal conflict for a metropolitan commission.
  
23. *Metro Vancouver* is a federation of 24 municipalities and other regions and includes the City of Vancouver. The “Directors” are elected (not appointed) by local government councils. One vote is given for every 20,000 residents of the constituent local government but with an upper limit of 5 votes so that the City of Vancouver does not control the Board. The Chairperson and Vice-Chair are not appointed by government but

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<sup>14</sup> J. A. Boudreau, P. Hamel, B. Jouve, R. Keil, New state spaces in Canada:

Metropolitanisation in Montreal and Toronto compared, 28 *Urban Geography* 30 (2007)

<sup>15</sup> An example of the method of operation is set out in: A. L. N. Palhano, et al, The Role of Municipal Planning Secretariats in Strengthening Collaborative Metropolitan Governance: a Comparative Case Study Approach from the Metropolitan Region of Belo Horizonte, in T. McGee, E. de Castro (eds.), *Inclusion, Collaboration and Urban governance: Challenges in Metropolitan Regions of Brazil and Canada*, Vancouver: Univ of British Columbia, 2010, p. 307.

are elected by the Directors.

24. The *Vancouver Regional Growth Strategy* came into effect only after local authorities agreed on its content. Thereafter each local authority can make requests for major amendments that require unanimous approval or for minor amendments, which require 50% approval of the Metro Board and the constituent councils. Each local plan in the Vancouver Region includes a *Regional Context Statement* that indicates how it is consistent with the *Regional Growth Strategy* and these statements require the approval of the Metro Board of councils. The incentive is there to prepare the Statements because each local authority is part of the Metro Board. The dispute settlement mechanisms require arbitration.
25. The core function of *Metro Vancouver* is to provide water and sewerage. This is an historical merging of these utilities but strengthens the importance of the organization. It also has functions of regional planning, air-quality management through industrial permits, and management of regional parks. As it has the utilities and planning function, it is well staffed with over 1,400 employees.
26. In 2008, the “Sustainability Framework” of *Metro Vancouver* provided the principles for its provision of utilities integrated with the planning function. What is unique is that the Board of the transportation authority (TransLink) is appointed by the *Metro Vancouver* Board, assuring integration of transportation with planning. TransLink is required to offer *Metro Vancouver* an opportunity to comment on its strategic plans and *Metro Vancouver* is required to obtain TransLink’s acceptance of its *Regional Growth Strategy*.
27. It is apparent that a metropolitan commission can accomplish metropolitan strategic planning. However, as has proven the case in many places, a conflict arises between local and regional interests making laws or policies that override local planning schemes the only

means of implementation that eventually leads to Ministerial intervention due to inaction or disagreement. The collaborative model of metropolitan planning evidenced in Vancouver is a democratic system with local government constituents that vote on regional issues and therefore, when a regional plan is approved, it is one of consensus, not one that is imposed. When there is a requirement as well that amendments to local schemes be approved by the metropolitan board, the need to be consistent with a regional plans is imbedded. It is also the case that as a metropolitan commission succeeds, it is given greater powers by consensus in terms of environmental and social issues. This movement towards cooperation and consensus and away from schemes that are only regulatory and impose State control is a fundamental feature of modern European<sup>16</sup> and North American planning.

#### **Best Practice for Metropolitan Commission**

The Metro Vancouver model is the most effective metropolitan commission because it relies on consensus and each local council has a role to play in its functions leading to a corresponding recognition for regional planning.

#### *Informal Planning Associations*

28. Co-operative regional associations exist informally in all countries. They are often made up of local council representatives, citizen groups, and lobby interests. They have no formal status and are not recognised in the land use process.

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<sup>16</sup> Analysed in: L. Albrechts, Shifts in strategic spatial planning? Some evidence from Europe and Australia, 38 *Environment and Planning A* 1149 (2006)

29. The *San Diego Association of Governments* (SANDAG) is a collaborative, voluntary collaboration of local and county governments that began informally in the 1980's. It has been since given a legislative structure and powers as its effectiveness has been proven.<sup>17</sup> It now has power in relation to regional transit planning and transit capital project development and has prepared a regional plan: *Regional Comprehensive Plan of 2004*.
30. In the United States, zoning ordinances formally create Citizen Advisory Committees that are appointed by the mayor to provide advice on projects or are given actual powers<sup>18</sup> to conduct design reviews, evaluate historic preservation issues, and review requests for rezoning. In many places, interest groups have been given formal recognition in local governments and their views sought.<sup>19</sup>

#### **Best Practice for Voluntary Associations**

Give informal associations formal recognition and, where their effectiveness is proven, a greater role in decision-making.

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<sup>17</sup> Set out in E.G. Hill, *SANDAG: An Assessment of its Role in the San Diego Region*, San Diego: Legislative Analyst's Office (2006).

<sup>18</sup> For example, Clearwater, Florida, *Community Development Code*, 1999, Art 4, Div. 1. See other uses of such Boards in: K. Callahan, The Utilization and Effectiveness of Citizen Advisory Committees in the Budget Process of Local Governments, 14 *Journal of Public Budgeting, Accounting & Financial Management*, 295 (2002).

<sup>19</sup> M. J. White, *American Neighborhoods and Residential Differentiation*, New York: Russell Sage Pub, 1987, p. 5. As an example, City of Bend, Oregon, Resolution 1, *Recognition of Neighborhood Associations*.

### *Consolidating State Policies*

31. The United Kingdom had 25 Planning Policy Statements that exceeded 1,300 pages in total. The *National Planning Policy Framework* of 2012 reduced the statements to one document of 58 pages. In the Foreword to the Framework, Minister Clark made these observations:

In part, people have been put off from getting involved because planning policy itself has become so elaborate and forbidding—the preserve of specialists, rather than people in communities. This National Planning Policy Framework changes that. By replacing over a thousand pages of national policy with around fifty, written simply and clearly, we are allowing people and communities back into planning.

32. The reduction received considerable criticism because it was argued that the content of previous policies were lost in the brevity.<sup>20</sup> The effectiveness of the Framework was only achieved by a change in emphasis in the planning process that departed from regional spatial planning to reliance on local plans and an orientation around a presumption of sustainable development.
33. The *Planning Policy Wales* does not have the same orientation as that of the UK *National Planning Policy Framework* but represents a reduction down to 200 pages and has been considered a success.<sup>21</sup> A consolidation of planning policies is always possible but a reduction such as that of the *National Planning Policy Framework* is only feasible if there is a move away from state intervention in local government.

#### **Best Practice for Consolidating State Policies**

Combine policies into one document as much as possible and reduce its size.

<sup>20</sup> A good review of criticisms is in: House of Commons, Communities and Local Government Committee, *National Planning Policy Framework, Eighth Report of Session 2010-12*, London: SOL, (2011).

<sup>21</sup> K. Kelly, T. Stirling, *Welsh Housing Policy: Where Next?*, York: Joseph Rountree Foundation, Ref. 2707, (2011).

### *Evaluation of Regional Policies*

34. The desire to cooperate when there is state imposition on local government must, to some degree, depend on the effectiveness of the imposition in reaching planning goals.
35. In Ontario, where governance is controlled by state or regional policies overriding local plans, there is a policy for evaluation and monitoring of regional policies, thereby continuing to justify the governance structure. The *Provincial Policy Statement* of 2005 provides indicators to match each policy goal. For example, the state goal of providing a range of housing types to meet population expansion is measured by the number of local plans that in fact establish targets for the provision of multiple housing types. A review of the *Statement*<sup>22</sup> suggested amendments to fulfil the goals after surveying stakeholders and local authorities.

#### **Best Practice for Measuring Policies**

Create specific indicators to measure the success of policies and have periodic reviews of the fulfilment of the expressed goals.

### *Alternative State and Regional Structures*

36. In France, regional plans are limited to major spatial priorities for growth. There are no general region plans. The *Schémas de cohérence territoriale* are created cooperatively (with local governments) for only those major priorities that are under examination for the medium and long-term. The emphasis is on autonomy of local areas

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<sup>22</sup> Report No. 1 of the Planning and Economic Development Committee Regional Council Meeting of January 27, 2011, *Review of Provincial Policy Statement 2005*.

and interference only in respect of those issues that are truly regional.

37. As a matter of historical development and the relationship of the Länder to the Federal Government, regional governance in Germany has multiple forms. In one study,<sup>23</sup> for example, it was found that in one region (Rhine-Main), there was a myriad of both public and private regional associations operating at different capacities and geographic scales and embracing cooperative forms with no legislative authorisation. Berlin-Brandenburg, for example, is a non-statutory regional planning association, while Stuttgart is an elected statutory authority. The lesson is that having regional control should not prevent other forms of regional arrangement and governance formed cooperatively or on an ad-hoc basis, meaning that a single form is not necessary.

#### **Best Practice for Regional Governance**

Regional governance is relevant when it is needed for particular purposes but the range of informal and formal structures can be mixed.

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<sup>23</sup> Hoyler, M., Freytag, T. & Mager, C., Advantageous Fragmentation? Reimagining Metropolitan Governance and Spatial Planning in Rhine-Main, 32 *Built Environment* 124 (2006).



## The Form and Substance of the Plan

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### *Merging of Policies and Plans*

38. The notion of the “comprehensive plan” in the United States is that it is a policy document that sets out all of the planning considerations in non-legal language and then leads to a zoning ordinance to implement the plan. There are essentially no policies external to the comprehensive plan.
39. As one example, the *St Clair, Minnesota Comprehensive Plan Clarity 20/20* is similar to the Sydney Metropolitan Strategy *City of Cities* plan setting out population trends, demographics, economic development, community visions arising from participation, predominant land uses, and other aspects that indicate the future of the area. At the end is a reference to the local zoning ordinance being connected to this plan. The two therefore are separate but interlinked. The details of such a comprehensive plan are discussed below.
40. The *Standard State Zoning Enabling Act* in use in many parts of the US or other State legislation that authorizes zoning, provides that the zoning ordinance (the implementing plan) be “in accordance with the comprehensive plan.” In one key decision, *Udell v. Haas*<sup>24</sup>, the New York Court of Appeals stated that “one of the key factors” to be used by the courts in determining whether zoning is “in accordance with a comprehensive plan” is whether forethought has been given to the community’s land use problems. The court stated:

Where a community, after a careful and deliberate review of ‘the present and reasonably foreseeable needs of the community’, adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served.

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<sup>24</sup> 21 N.Y.2d 463, 470 (1968).

41. The effect is that all policies, citizen participation, and long range planning is in the comprehensive plan and the zoning ordinance, as one part of the planning scheme, gives effect to this plan. This has the consequence of allowing a policy document (the Comprehensive Plan) to have legislative force and to restrict a planning scheme to what is necessary to enforce the policy.
42. This concept is also prevalent in Canada where, for example, the Official Plan under the *Ontario Planning Act* (R.S.O. 1990, Ch.P.13) consists of one document that contains all of the planning options, the policies that are relevant, and also the land use standards and restrictions. A zoning by-law is then passed that must comply with the Official Plan: the by-law contains the regulatory provisions and it is the Official Plan that is the focus of attention in plan making. The *Toronto Official Plan* of 2002 (as amended) has five chapters. The first chapter outlines the structure of the plan, the second the goals for the City (i.e. vital neighbourhoods), the third is what is necessary to accomplish these goals, the fourth is the land use designations and policies and the fifth is the development criteria.
43. As mentioned, this is also the system in Germany where the spatial plan reflects State and National policy and the local plan carries out the regulatory needs of the spatial plan but does not itself attempt to describe the goals and policies that are relevant. It is also the system in Scandinavia where the comprehensive plan is not binding but dictates the development plan that is the regulatory provision, which must strictly accord with the comprehensive plan.<sup>25</sup>
44. This system creates a direct link between the plan that is produced by the municipality with its relevant policies and the regulatory provisions that are only the reflection of the plan. It differs from those systems

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<sup>25</sup> See the BSR Interreg III B Project, *Promoting Spatial Development by Creating Common Mindscapes*, for Sweden, Finland, Norway.

where the zoning ordinance or planning scheme is the sole legal instrument (as in Australia) and instead fully expresses the intention of the scheme and the results of the planning process.

#### **Best Practice for Plan Formation**

Best practice is to have one plan that consists of two parts: the comprehensive plan that sets out planning goals and details of the locality and relevant policies, and a scheme just to carry out the regulatory requirements.

#### *Expressing Goals in Plan Making*

45. In the United States, many zoning ordinances (the regulatory provisions that reflect the comprehensive plan) explain in narrative form the reason for the zone and the goals that are to be achieved, drawing from a summary of the comprehensive plan or elaborating on specifics for particular districts. This is in addition to the details for the area in the comprehensive plan. This has the advantage of explaining the purpose of the zoning and the goals for each area when the zoning ordinance is read. An example is in the Little Rock, Arkansas zoning ordinance:

The West Little Rock District is a stable area with much of the land developed. The current zoning patterns in most cases have been established for many years. The plan does not anticipate dramatic changes in the future are not anticipated. This district is unique in that an incorporated community, Cammack Village, is located within its boundaries. The plan does show land use classifications in this area to represent the existing use pattern, though the City has no land use or zoning authority in Cammack Village.

46. Another approach to explaining the zoning controls is in the Netherlands (through the *Vijfde Nota* plan) to show maps with layers oriented to flows, such as traffic flows, ecological flows, water flows, and infrastructure networks. This is to give a better picture of the spatial orientation that underlies the choices made and the goals

enunciated. It also contains alternative scenarios in mapping form that allows an understanding of what is possible and the effect of different alternatives.

**Best Practice for Expressing Goals in Planning Scheme**

Best practice is to explain the goals for the area in a narrative form and to include illustrative maps to indicate what the zone is like and how it operates.

*Inclusion of Sustainability in Plan Making*

47. The UK *Planning Policy Statement No. 1* provided for the delivery of sustainable development. It had as its focus the provision of sustainability in plan making as well as in decisions relating to development control. It gave a detailed definition of sustainability and related the concept of sustainability to social cohesion and personal well-being, thereby expanding the range of relevant considerations to any planning issue that touched on quality of life matters. The Policy Statement also included issues relating to the environment and climate change. What is significant is that it contained perhaps the most detailed enunciation in any document of the principles relating to sustainable development:

- (i) Recognise the needs and broader interests of the community to secure a better quality of life for the community as a whole.
- (ii) Ensure that plans are drawn up over appropriate time scales, and do not focus on the short term or ignore longer term impacts and the needs of communities in the future. Planning authorities should consider both whether policies have short term benefits which may have long term costs, but also whether short term detriments (which are capable of being mitigated) may be offset by longer term benefits which are realistically achievable.
- (iii) Not impose disproportionate costs, in terms of environmental and social impacts, or by unnecessarily constraining otherwise beneficial economic or social development.

- (iv) Have regard to the resources likely to be available for implementation and the costs likely to be incurred, and be realistic about what can be implemented over the period of the plan.
- (v) Take account of the range of effects (both negative and positive) on the environment, as well as the positive effects of development in terms of economic benefits and social well being. Effects should be properly identified and assessed through the sustainability appraisal process, taking account of the current quality of the environment in the area and any existing environmental issues relevant to the plan.
- (vi) Ensure that plans and policies are properly based on analysis and evidence. Where the outcome of that analysis and evidence remains uncertain, makers should exercise and demonstrate soundly based judgement, taking account of the other principles set out in this paragraph. Where justifiable on the basis of the evidence available, a precautionary approach to proposals for development may be necessary.
- (vii) Take full account of the need for transparency, information and participation.
- (viii) Recognise that the impact of proposed development may adversely affect people who do not benefit directly. Local planning authorities can use planning conditions or obligations to ameliorate such impacts.

48. This Policy Statement was replaced in March 2012 by the *National Planning Policy Framework* and for the purpose of simplifying the Policy Statements, this definition was replaced by more general words that divided sustainability into three **functional** parts: an economic role, a social role, and an environmental role. This shortened version is:

**an economic role** – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;

**a social role** – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and

**an environmental role** – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy.

49. The overall definition of sustainability is given as: "...development that meets the needs of the present without compromising the ability of future generations to meet their own needs."
50. In Portland Oregon's, Bureau of Planning and Sustainability, a sustainability expert is assigned to each district to advise and provide

that component of the planning process to local councils. Although this Bureau has other responsibilities, the concept of a liaison from a sustainability bureau with the district planning process is a way to relieve the plan making process from being too specific about sustainability.

51. In the United States, only limited steps have been taken to include sustainability in plan making. In Florida, for instance, there is a requirement that a comprehensive plan take into account some sustainability measures such as discouraging urban sprawl and supporting energy efficient development patterns and reducing greenhouse emissions by land use.<sup>26</sup>
  
52. The difficulty is that all attempts, although aiming at the same goals, change the emphasis and meaning of sustainability for its particular purpose. As well, these definitions are vague and not able to be measured. The most precise definition relies on the “Natural Step” measures of sustainability<sup>27</sup> that provide that all development and activities have to be measured against these four conditions:
  - nature is not subject to systematically increasing concentrations of substances extracted from the Earth's crust;
  - nature is not subject to systematically increasing concentrations of substances produced as a byproduct of society ;
  - nature is not subject to systematically increasing degradation by physical means;
  - people are not subject to conditions that systematically undermine their capacity to meet their needs.
  
53. The Natural Step criteria are in use in plan making in Sweden (where it was developed) for 70 cities and towns and it is used in Whistler, British Columbia (*Whistler 2020 – Moving Towards a Sustainable*

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<sup>26</sup> FLA. STAT. ANN. § 163.3177(6)(a) (West Supp. 2009). Other attempts are discussed at P. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 *William & Mary Environmental L. & Pol’y Review* 1 (2009).

<sup>27</sup> See: S. James, T. Lahti, *The Natural Step for Communities: How Cities and Towns can change to Sustainable Practice*, British Columbia: New Society, 2004.

*Future*). It is the only system that creates an evidenced based, working definition of sustainability.

**Best Practice for Inclusion of Sustainability in Plan Making**

Best practice is to establish a functional definition of sustainability in the legislation and to provide an expert to local authorities for reaching sustainability goals in a plan.

*Strategic Environmental Assessment at Plan Making Stage*

54. The assessment of a plan at the plan making stage by a Strategic Environmental Assessment (SEA) is traceable to the 1969 US *National Environmental Policy Act*. However, the purpose and scope of an SEA in plan making has not been consistent internationally. The EU has a Directive<sup>28</sup> that an SEA is automatically required for plans and programmes prepared for certain sensitive industries, such as waste water management and tourism, and also for land use plans (Art. 3 (b) 2), for specific projects listed in Annexes I and II of another Directive,<sup>29</sup> which indicate projects of EU importance. The same applies to the adoption of plans and programmes liable to affect specific sites protected by another Directive.<sup>30</sup> Other plans and programmes, which set the framework for future development consents of projects, will be subject to assessment if an examination according to the criteria laid down in Annex II to the Directive shows that they are liable to have significant effects on the environment.

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28 2001/42/EC9 (Strategic Environmental Assessment)

29 85/337/EEC.

30 92/43/EEC (art. 6, 7)

55. The European Union Directive for an SEA applies "upstream" to certain public *plans*, while the long-standing EIA Directive<sup>31</sup> that calls for environmental assessment of development applies "downstream" to public and private *projects*. The objectives of the SEA are expressed in terms of "sustainable development," whereas the aims of the EIA are purely environmental. The SEA requires the competent authorities to be consulted at the screening stage of the plan and requires an assessment of reasonable alternatives.
56. The relationship between the SEA and the EIA is not completely clear. An assessment<sup>32</sup> of the SEA process in 2009 found that there was confusion as to which project needed an EIA and which an SEA. It was concluded as to the relevance of an SEA for designated projects in a plan (p. 9:)

A majority of MS [Member States] particularly mentioned the contribution of the SEA to an improved organisation and structure of the whole planning procedure, regarding this as a positive element. In particular, the formal requirements of consultation with environmental authorities and the public have led to increased transparency in the planning procedures.

57. The Denmark *Planning Act*<sup>33</sup> requires that significant projects must be *pre-identified* in the plan for an EIA, thus combining the SEA with the EIA. It states:

§11g. Projects that are likely to have significant effects on the environment shall not be initiated before guidelines are produced in the municipal plan on the location and design of the project with an accompanying environmental impact assessment,

58. This is in keeping with the EU Directive on EIA Screening of 2011.<sup>34</sup> That Directive requires Member States to identify certain named projects in advance to be assessed but the Directive also incorporates

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<sup>31</sup> *Proceedings of the Conference for the 25th Anniversary of the EIA Directive* (November 2010, Leuven, Belgium)

<sup>32</sup> Commission of the European Communities: *On the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC)*, Brussels, 23.7.2009 COM(2009) 378 final.

<sup>33</sup> Consolidated Act No. 812 of 21 June 2007

<sup>34</sup> 2011/92/EU



the more ad-hoc test of whether the project is likely to have significant effects on the environment. It is clear that this remains a complicated process.

59. A German evaluation of the SEA process<sup>35</sup> indicated that it is useful at the plan making stage because it is necessary to understand cumulative impacts as an EIA is only suitable for single projects, it focuses a plan making authority on what areas are vulnerable, it provides a wider forum for citizen participation than just the planning process, it encourages the consideration of sustainability issues, and it encourages consideration of land use alternatives that cannot be considered at the EIA stage.

**Best Practice for SEA in Plan Making**

An SEA should be performed at the plan making stage and to the extent possible (without limiting the power of the EPA), the plan should identify areas of land or specific projects that will be, when development permission is sought, be subject to an EIA.

*Provision of Transportation Infrastructure*

60. In the United States, transportation planning is decentralized to state departments of planning. The Federal Government in the *Safe Accountable Efficient Transportation: a Legacy for Users Act of 2005* provides innovative methods to obtain private funding by setting up State Infrastructure Banks and gives the States freedom to create their own infrastructure strategy. The infrastructure choices are not linked to land use planning. In the Netherlands, the Dutch *Infrastructure Act*

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<sup>35</sup> Joint Paper of 18 Central European Countries (CADSES), *Best Practice Handbook for Strategic Environmental Assessment (SEA); 'isoteia' model*, July 2006.

gives the Ministry in charge of transportation and public works authority that overrides land use plans, although there is support for intertwining the two by having the infrastructure tender process proceed along side the planning process.<sup>36</sup>

61. The *Association of Metropolitan Planning Organizations* prepared a report<sup>37</sup> on the best practices for integrating infrastructure in plan making. The starting point for the projects that had some degree of success was explicit recognition of the need to link infrastructure choices with the plan. The process of recognition was initiated by meetings between metropolitan planners and transport planners, which examined the region and the effects of land use choices on transportation planning. It reported that the *Southern California Association of Governments* “Creative Liveable Spaces” project that followed those meetings provided that spatial planning include a component of transportation planning by producing maps, growth forecasts, job statistics, information on environmentally-sensitive areas, and transportation plans in the land use plan. In Atlanta, Georgia, the *Atlanta Regional Commission* provided funds to local authorities to conduct specific studies to integrate land use and transportation.
  
62. Some of the integration has been accomplished by the “smart growth” movement that is a development strategy for municipal growth based on creating walkable neighbourhoods that offer a range of housing opportunities and mixed land uses. The smart growth strategy is underpinned by the principles of New Urbanism. The Federal Highway Administration in 2010 produced the *Livability in Transportation Guidebook*<sup>38</sup> that adopts smart growth principles and provides case examples of how transportation can be incorporated into land use

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36 The extent of the intertwining is discussed in: J. Arts, F. van Lamoen, Before EIA: Defining the Scope of Infrastructure Projects in the Netherlands, 7 *Journal of Environmental Assessment and Management* 51 (2005). That work is further explored in S. Lanferink, J. Arts, *Government Strategies for Market Involvement in Road Infrastructure Planning: An International Overview*, Paper delivered Changing Roles Conference, Noordwijk aan Zee, Netherlands, October 2009.

37 MPO, *Noteworthy MPO Practice in Transportation-Land Use Integration*, Final Report, 2004.

38 FHWA-HEP-10-028

decisions. The first example given is Charlotte, North Carolina as to which it is explained:

Over an intensive 9-month period, a series of transit/land use alternatives were tested for each of the five corridors identified in the CCW vision. An extensive public outreach process fostered community understanding and consensus around the recommended plan, which called for phased implementation of various transit technologies along the five corridors. Partnerships, such as those with the Charlotte Area Transit System (CATS) and other municipal government agencies, and initiatives, such as the South Corridor Infrastructure Program (SCIP), helped encourage ownership across departments. These efforts helped broaden the perspective of each department's role and involvement in integrated transportation and land use projects.

63. All of the other case studies set out in the Guidebook included some form of joint “visioning” of the problems and possible collaborative solutions that included public participation. The method suggested is that the transportation agency should be the primary agency that consults with the public and the local authorities work with the agency in a collaborative design process that leads to concept plans that can be tested. The land use plan then becomes by definition and name, an “Integrated Transport and Land Use Plan.” For example, the Charlotte Plan is called: *The 2025 Integrated Land Use and Transit Plan*.
64. The State of Maine formalised the integration by entering into an agreement with the Federal Highway Administration for the preparation of a strategic “transportation-land use plan.” It lists the responsibilities of the three actors: a Town Response Panel made up of representatives of local government, the State Department of Transport, and a steering committee. It documents the purpose of the plan, the roles and responsibilities, and sets the foundation for implementation.
65. The Pennsylvania and New Jersey Departments of Transport in 2008 produced the *Smart Transportation Guidebook* that reflects the Federal Guidebook and proposes a multi-discipline team, a public communication plan, a full description of needs and objectives, and testing of alternatives.

66. Inclusion of transportation in the planning process is inevitable because of the rubric of sustainability. The OECD, as early as 1994, initiated the *Environmentally Sustainable Project* that included transportation as an aspect of sustainability. The United Nations Centre for Regional Development conference in 1995 produced the *Aichi Statement* that the integrated approach to planning and transport is to be linked to sustainability. All further documents of the OECD have listed transportation and land use as cornerstones of sustainability.
67. The best practice is to elevate the integration of land use and transportation as an aspect of sustainability and set that out in legislation. A joint steering committee must be established to work together and produce a guidebook for local planning that sets up community participation and intertwining of both transportation and planning.

**Best Practice for Transportation Linked to Plan Making**

The legislation should add that transportation linked to the plan is one of the components of sustainability. A Guidebook should be produced to assist local governments to integrate transportation and that should be produced collaboratively.

*Climate Change Adaptation in Plan Making*

68. A study by the Canadian *Environmental Assessment Agency*<sup>39</sup> in relation to a climate adaption guide found that: “The assumption within the Guide that the inclusion of climate change does not result in

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<sup>39</sup> Canadian Environmental Agency, *Valuation of the ClimAdapt Guide to Incorporating Climate Change into the Environmental Impact Assessment Process*, 2002.

fundamental modifications to the EIA process was supported in all case studies in this study.” Climate change can therefore be part of an EIA or an SEA; in fact, the need for adaptation measures for areas that are vulnerable because of climate change (sea-level rise, drought) are a necessary part of the SEA or EIA process. The OECD has developed policy guidance for incorporation of adaptation issues into plan making.<sup>40</sup> It states (p.135) that:

The local level is important for mainstreaming climate change adaptation for three reasons. First, climate change impacts are manifested locally, affecting local livelihood activities. Second, vulnerability and adaptive capacity are determined by local conditions. Third, adaptation activities are often best observed at the local level.

69. A recent assessment of adaptation efforts in the United Kingdom highlighted this viewpoint:

Adaptation is not an objective or process that should be considered in isolation. Adaptation is one part of broader decision making, for example it is an integral part of sustainable development, land use planning, resource and risk management, and environmental sustainability.<sup>41</sup>

70. There are instances where land use planning has been used as the primary means of adaptation.<sup>42</sup> In Faenza, Italy, for example, an incentive program has been created for developers in specific “bio-neighborhoods.” In Stuttgart, Germany, the “Climate Atlas” that indicates particular vulnerabilities is referenced in a “Climate Booklet” that, in turn, informs the Building Code that regulates development and requires climate impacts to be considered.
71. There are two ways that adaptation can be absorbed into planning regimes. The first is where the system is being amended or developed.

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40 OECD, *Policy Guidance on Integrating Climate Change Adaptation into Development Co-operation*, 2009.

41 N. Ranger, et al, *Adaptation in the UK: A Decision-Making Process*, Grantham Research Institute for Climate Change and the Environment and The Center for Climate Change Economics and Policy, 2010, p. 6.

42 Case studies are set out in a cooperative local government adaptation portal: *Green and Blue Space : Adaptation for Urban Areas and Eco-Towns*, <http://www.grabs-eu.org/>, last accessed 19 April 2012.

An example is Ho Chi Minh City,<sup>43</sup> where it is recognized that the impact of sea-level rise will affect the built environment and reduce the areas that are available for housing of the growing population. This is significant in HCMC as 50% of suburban districts are in flood-prone areas or areas where long-term development is not indicated. As the use of planning is relatively new in HCMC, a form of planning was not entrenched and lent itself to a “Green Agenda” that could be introduced without modifications and made sea-level rise a relevant development consideration. As a consequence, detailed arrangements for adaptation are made for all development.

72. The second is the integration of National and state Adaptation strategies. The Appendix to the UNFCCC Annotated Guidelines for the preparation of *National Adaptation Programmes for Action*<sup>44</sup> emphasises the need for integration of these Programmes into existing development plans and therefore into the land use process. A model is expressed as to the manner in which this might occur in relation to development control, by reference to the *South Pacific Regional Environment Program*. The model is:<sup>45</sup>

1. For each development proposal, determine if modifications are necessary following an analysis of:
  - a. the effects of climate change on the proposal itself;
  - b. the effects of the proposal on key ecosystems, resources and environments that are sensitive to climate change; and
  - c. the effects of the proposal on the ability of communities to cope with climate change impacts.
2. Develop options for how the proposal may be modified in light of this analysis.
3. Evaluate the modification options.
4. Integrate approved modifications into a revised development proposal.”

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43 R. Eckert, C. Voigt, T.T. Kein, Developing Guidelines for Energy and Climate Efficient Urban Structures a New Planning Instrument for Adapting Ho Chi Minh City to the Impacts of Climate Change, in First Urban Research Symposium: *Cities and Climate Change: Responding to an Urgent Agenda*, France.

44 Conference of Parties, Marrakesh, 7th Meeting 2001, Decision 28/CP.7., FCCC/CP/2001/13/Add.4.

45 Appendix B, p. 27.

73. A further method arises from the positive link between sustainable development and adaptation.<sup>46</sup> Sustainable development has the consequence of increasing the resilience of communities to climate change and the wider goals of social benefits that accrue. Sustainability as a concept has the capacity to recognize adaptation and disaster reduction. In any event, sustainability is an aspect of land use planning and therefore contains many of the goals of adaptation.

**Best Practice for Climate Change Adaptation in Plan Making**

Climate change adaptation measures should be considered as part of the plan making process and legislation should require that vulnerable areas be identified and adaptive solutions expressed.

*Public Participation in Plan Making*

74. The right of the public to participate in planning is not confined to the opportunity to be heard in respect of the content of the proposed plan. It includes other factors, such as the need to educate the participating public in the plan and to address concerns at the early, conceptual stages. Theoretically, it includes the fullest participation possible and a planning theory around this concept called “communicative planning”<sup>47</sup> has developed calling for balancing power interests and making a citizen’s role as important as that of the plan making authority.

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46 Discussed in J. Ayers, D. Dodman, Climate Change Adaptation and Development I: the State of the Debate, 10 *Progress in Development Studies* 161 (2010).

47 As one example of the literature: R. Brand, F. Gaffikin, Collaborative Planning in an Uncollaborative World, 6 *Planning Theory* 282 (2007). Collaborative Planning has been criticised as becoming the servant of neoliberal ideas and interest groups: M. Purcell, Resisting Neoliberalization: Communicative Planning or Counter-Hegemonic Movements? 8 *Planning Theory* 140. (2009).

75. One complete form of participation is referred to in the United States as “ballot box zoning.” All re-planning and rezoning are determined by a popular vote at a referendum. The US Supreme Court has upheld the legality of this method of amendment to a zoning ordinance<sup>48</sup> and it has become more popular.
76. The UK *Localism Act 2011* provides that citizens by referendum can decide to enter into the market as developers of community assets (“Community Right to Build”) and that a referendum can to be held to approve a neighbourhood plan. A recognised neighbourhood forum (21 citizens or group of councillors) can propose a “Neighbourhood Development Plan” for development that is desired and a Neighbourhood Development Order can be made that allows that development without a permit. The Neighbourhood Development Plan is thus a citizen-led land use plan that is approved by referendum and becomes law as part of the general Development Plan, granting development permission for projects desired by the community. The effectiveness of these plans has yet to be evaluated, although many are under way (e.g. Sudbury Town, Milton Keynes).
77. In the EU, the standards for participation are derived from the 1998 *Aarhus Convention*: “The United Nations Economic Commission for Europe on Public Participation in Decision Making and Access to Justice in Environmental Matters.” However, there is some doubt as to whether the rights in the Convention apply to plan making as it is written (Article 6) to apply to decisions regarding permission of a specific activity. A ruling has been made that it may apply where the plan is specific about an activity.<sup>49</sup>

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48 *City of Eastlake v Forest City Enterprises, Inc*, 426 U.S. 668 (1976)

49 The Aarhus Convention Compliance Committee case 2005/11 – Belgium

(<http://www.unece.org/env/pp/compliance/C2005-11/>). Case studies are found in European Network of Environmental Law Organisations, *Implementation of the Aarhus Convention in EU Member States: Case Study Collection*, 2006.



78. The *Aarhus Convention* provides for fundamental rights in relation to environmental decisions, such as early participation in decision-making (Art. 6(3)). These rights are aspects of what has been called “environmental justice” and are not specific but are generally aimed towards increased participation. An example is the *Community Local Environment Awareness Raising* project in Scotland<sup>50</sup> that listed these steps for full participation (ICT refers to using computer based technology):

- A wider range of publicity including innovative use of ICT;
- Neighbour notification over a wider area for major developments;
- Community forums to permit improved community involvement;
- Opportunities for earlier community involvement in planning
- Full feedback to the public on relevant factors taken into account in planning decisions
- Role of community planning in producing integrated planning and provision for local communities;
- Enhanced use of ICT generally;
- Different procedures for different sizes of developments (eg bad neighbour developments)
- Adoption of harmonised deadlines for making representations and ensuring that these are very clearly stated on public notices
- Use of simpler language in planning documents

79. The US Housing and Urban Development Department (HUD) requires the creation of a “Citizen Participation Plan”<sup>51</sup> as a condition for providing essential community development block grants. As a consequence, cities have developed these plans along similar lines. The requirements of HUD are:

Provides for and encourages citizen participation with particular emphasis on participation by persons of low and moderate income who are residents of slum and blight areas and of areas in which Community Development Block Grant (CDBG) funds are proposed to be used;

Provides citizens with reasonable and timely access to local meetings, information, and records relating to ins proposed and actual use of CDBG funds including program income;

Provides for technical assistance to groups representative of persons of low and moderate income that request such assistance in developing proposals with the level and type of assistance to be determined by the applicant;

Provides for public hearings to obtain citizen views and to respond to proposals and questions at all stages of the community development program, including at least the development of needs, the review of proposed activities, and review of program performance, which hearings shall be held

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<sup>50</sup> Scottish Executive Development Department, *Your Place, Your Plan*, March 2003

<sup>51</sup> Section 104(a)(2) of the *Housing and Community Development Act* and by regulations at 24 CFR 570.486(a)(6).

after adequate notice at times and locations convenient to potential or actual beneficiaries, and with accommodation for the disabled;  
 Provides for timely written answers to written complaints and grievances, within 15 working days where practical; and  
 Identifies how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of non-English speaking residents can be reasonably expected to participate.

80. The State of Washington is a good example of an expansive view of citizen participation and provides a mandate for public participation in growth management plans as follows:<sup>52</sup>

Each county and city that is required or chooses to plan ... shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision ... declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order.

81. The degree to which these concepts actually create effective participation is unclear. In a study<sup>53</sup> of mandates for public participation in plan making, including the Washington requirements, it was found that they have a positive but not statistically significant effect on the degree of participation. It was found that it does have the consequential effect of increasing staff involvement in the process and, as that is increased along with the benefits of consultants retained to help with the process, participation increased.
82. The degree of participation and the forms it can take are open-ended. For instance,<sup>54</sup> in considering a redevelopment of an industrial site to a residential zoning in Finland, role playing was employed so it was

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52 Revised Code of Washington, Section 36.70A.140.

53 S.D. Brody, D.R. Godschalk, R. J. Bundy, Mandating Citizen Participation in Plan Making: Six Strategic Planning Choices, 69 *APA Journal* 246 (2003).

54 Set out in O. Ozer-Kempainen, et. al., *Participatory Urban Planning: Best Practices (PUP) Land Use Workshops – Ideas and Policies Seminar Report – Brownfield Policy Improvement Taskforce*, University of Oulu, Finland, 2010.

possible to experience the new development from the point of view of, among others, a teenager, environmental activist, and a housewife. As well, a “fantasy” stage was employed to conceive of utopian solutions.

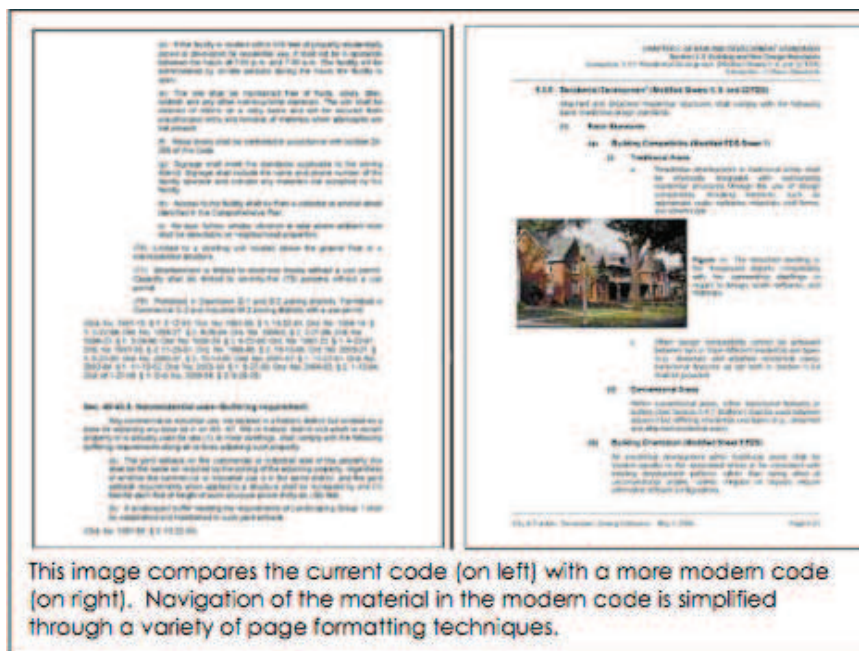
83. It appears important to at least state the goals and extent of participation. In the South African *National Environmental Management Act*,<sup>55</sup> the goals of “environmental justice” are provided (section 2(4)(f)):

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

84. As the forms of consultation are wide, it may be useful to explain in detail the extent of consultation that has taken place as part of the plan-making process and to set that out in the plan. For instance, the City of Vancouver has an extensive participation model (based on the *CityPlan Community Visions Terms of Reference for Community Participation*) prior to making the plan including the need for recruiting a community liaison group to provide input into the proposals for a plan. At the completion of the plan, the extent of consultation was published and the steps are worthy of examination (see Appendix A to this Paper).
85. A key to consultation is making the proposals clear to those participating. There are many methods to do this including an improvement in the format of the scheme. One example is suggested by the City of Portsmouth, Virginia’s, *Zoning Ordinance Revision Key Issues Report* (2008) as:

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<sup>55</sup> 107 of 1998.



### Best Practice for Citizen Participation in Plan Making

Express a general objective for participation in the legislation, require the development of a community participation plan in the legislation, and produce guidelines (including formatting guidelines), and require that the participation guidelines be followed. Set out in the completed plan the consultation that has taken place.

### Best Practice for Regulatory Instruments

86. The most significant problem with a system of development control is that decision makers do not know the intention of the plan makers except by interpretation of the regulatory instrument and policies. As the regulatory instrument is fundamentally one of restriction and control, it is not a fulsome explanation of the basis of planning for a locality.

87. The best practice is to provide as much information for the decision makers as possible as to the reason for the regulatory controls and the vision for the area and its interrelationship with the region. The only means to do this is to make the planning process and its outcomes part of decision-making. In the US, Canada and most of Europe this is accomplished by giving the strategic, spatial plan primacy and making the regulatory controls the consequence of the plan and not the basis for the plan.
88. If the plan has primacy, it is possible for a decision maker to refer to the vision, policies and goals for an area in making a decision and, more importantly, to see the regulatory provisions as only enforcing the plan and not as constituting the plan. The effect of this system is that there is greater participation in the formation of the plan itself, the extent of that participation is included in the plan so it is perceived as a community plan, there is more development as of right as the purpose of an area is understood, and concentration can be given to areas that need further planning.
89. The 1987 *Planning and Building Act* in Sweden is a good example of this emphasis on plan making being the lead process with the development of a Comprehensive Plan. The Comprehensive Plan indicates the strategies and policies for the entire municipality and must accord with national goals. It is not binding but forms the basis for all decision making. The Detailed Development Plans regulate the use of land according to the dictates of the Comprehensive Plan and emphasis is on areas to be developed in the future.
90. The essence of this practice and that in the United States and Canada is to take the emphasis away from ad-hoc decisions and to make the strategic planning document the process that is the basis for all future development. In the United States, that strategic, spatial plan is binding because the zoning ordinance must be made in accordance with that plan. As it has this force, it is used to pull together all policy

strands, leaving the zoning ordinance as only a means to carry out the plan and not an end in itself.

91. Another advantage of including the comprehensive plan as the pre-condition of the regulatory schemes is that a system that embraces a comprehensive plan for local governments makes it easier to integrate with a regional or metropolitan strategic plan, as that form of planning is then understood. In addition, it is an appropriate instrument to incorporate sustainability principles that cannot be expressed in a regulatory instrument.
92. A comprehensive plan that is undertaken with wide community participation should have at least the following aspects (this is based on the Comprehensive Plan for the City of Greensboro, North Carolina,<sup>56</sup> often given as an exemplary plan):

#### Vision Statement

##### Basic Concepts

*Area Types:* Areas that are distinguished by broad patterns

*Factors for Change:* conditions and influences that will cause change

*Growth Scenarios:* A conceptual depiction of future conditions and development patterns

*Preliminary Concepts*

##### Land Use

*Map of existing Land Use*

*Community Character*

*Sustainability*

*Comparison of Vision to Trend in Growth*

*Growth Strategy*

##### Community Character

*Parks Open Space and Natural Resources*

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<sup>56</sup> *Connections 2025 Plan Document*: <http://www.greensboro-nc.gov/index.aspx?page=1732>

*Man-Made Environment* (historic and scenic places)  
Housing and Neighbourhoods  
*Policies for Existing Neighborhoods*  
*Housing Density*  
Economic Development  
*Goals and Policies to Enhance Economic Development*  
Transportation  
*Goals and Policies to Enhance Transportation Issues*  
Community Services and Infrastructure  
Action Plan for Implementation

93. The Zoning Ordinance is then amended systematically to accord with this plan but it is the plan that creates the reason for and the purpose of the regulatory plan, thereby allowing decision makers to understand the development proposal in light of the broader plan requirements which govern the granting of permits.

**Best Practice for Regulatory Instruments**

The regulatory form should have two components: a comprehensive plan that includes all policies and the basis for the plan and a planning scheme that has its function as regulating the conclusions in the comprehensive plan.

## Development Control

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### *As-of-Right Development and Development Control*

94. The United States planning system, as mentioned, grew out of the New York Zoning Ordinance of 1916, which was concerned primarily with the effect of shadowing from large buildings. It employed a set of standards similar to a building code. From that concept, development was allowed “as of right” if the building complied with the code. It was realised in 1961 that conformity with building codes led to areas without diversity and the zoning ordinance was amended that year to create 37 “Special Districts” that offered flexibility, especially if low income housing was provided or other benefits were supplied, such as theatres.
95. A development “as of right” system exists for most uses in all cities in the United States and it can be said that the tradition of “as of right development” prevails. For example, in the Cambridge, Massachusetts Zoning Ordinance, almost all uses are as of right. There is, however, a significant change taking place towards development control in most zoning ordinances in the form of special permits that approximates a system of development control.
96. In the United States, “variances” are the main form of development control. All zoning ordinances can be the subject of a variance without the need for a formal amendment process that amounts to a rezoning. There are two types of variances to zoning. The first is referred to as a “Use Variance.” As an example, the Summit, New Jersey *Development Regulations* provide that an application can be made to the “Zoning Board of Adjustment” for variation to “a use or principal structure in a district restricted against such use or principal structure.” The other type of variation is in terms of building standards such as height and open space and is accordingly called an “Area Variance” or a “Minor Variance.”



97. A Use Variance is effectively a rezoning. It is a necessary safety valve where the zoning system is relatively rigid and prescriptive. In Canada, the lack of development permission or use variance led to a system of zoning amendments that, because there was no workload relating to development permissions, could be completed in two or three months.
98. Many tests for use variances have emerged. In the New York *Town Law*, it was provided that there was a variance possible "[w]here there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of [local] ordinances" provided that "the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." In 2006, this was amended to add more specific criteria as:<sup>57</sup>

No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,

- (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the alleged hardship has not been self-created.

#### **Best Practice for 'As of Use' Rights**

"As of use" or permitted development is not a trend and is diminishing in favour of development control. However, use variances, to be granted under specific conditions, allow for changes to be made in the zoning without the need for a formal amendment.

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57 § 267-b.2

### *Development Control and Localism*

99. In the United States, there is a clear move in the direction of relaxation of the zoning ordinance and the use of special permits, which amount to a system of development control.<sup>58</sup> This is implicit recognition that the system of area variances and special permits is a de facto system of development control. As a result, where the concept of development control is in conflict with the importance of the comprehensive plan, the importance of the comprehensive plan in some States has been diminished. In Wisconsin for example, a 2010 amendment to the planning laws<sup>59</sup> provides that, instead of the zoning ordinance having to be in strict compliance with the comprehensive plan, the term “consistent with the comprehensive plan” only means “furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan.”
100. These changes have been said to reflect disenchantment with regional government using “smart growth” methods to curb urban sprawl<sup>60</sup> and a return to the primacy of local control through planning permissions. The same perhaps can be seen in Canada.<sup>61</sup> In Ontario,<sup>62</sup> the development control system carried out by zoning amendments and minor variances was formalised into a system of development control in 2006 and provided for one application for a zoning amendment, variance or development permission. Local authorities were able to make Development Permit By-Laws.

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58 There is a great range of difference that has emerged in the degree of importance of the comprehensive plans and the use of exemptions: Pendall, R. Puentes, R. & Martin, J., *From Traditional to Reformed: A Review of the Land Use Regulations in the Nation's 50 Largest Metropolitan Areas*, Washington, DC: The Brookings Institution, Metropolitan Policy Program, (2006).

59 2009 Wisconsin Act 372

60 An extensive rebuttal to Smart Growth critics decided on balance that it was still an effective means to control sprawl: T. Litman, , *Evaluating Criticisms of Smart Growth*, British Columbia: Victoria Transport Policy Institute, 2012.

61 J.L. Grant, Theory and Practice in Planning the Suburbs: Challenges to Implementing New Urbanism, Smart Growth, and Sustainability Principles, 10 *Planning Theory and Practice* 11 (2009).

62 Ontario *Planning and Conservation Land Statute Law Amendment Act, 2006*.

101. In Europe and Asia, the system of development control and appeals is uniform. For instance, a refusal of the *Demande de permis de construire* in France leads to an appeal. Contrary to the trend in Europe, the Dutch *Spatial Planning Act* in 2008 provided that there should be greater compliance with a strategic land use plan (plan-led development) and less reliance, as before, on development control (developer-led). The 2008 Act allowed one exemption: a “project decision,” that permitted a particular development proposal but the local authority had to amend the planning scheme to include that decision within a year or it could not charge any fees for the application (that was considered a major discouragement). A detailed study<sup>63</sup> raised the question of whether the previous Dutch system that was relied on by developers and the public (the “planning culture”) would be changed by the amendments in the 2008 Act. It concluded that the movement from flexibility to more detailed control was ineffectual in making effective changes to the planning system because of the planning culture in the Netherlands. The system was still developer-led and, after the financial crises, an amendment was made to the Act so that the planning scheme had to be amended for a project decision within ten years and not one. The study stated: “Planning law is not only institutionalised in local practices: local practices are also formalised and institutionalised into planning law.”
102. The radical changes in the UK *Localism Act 2011* did not change the tenets of development control but decentralised decision making to local neighbourhoods. The only significant change is in the *National Planning Policy Framework* that provides (section 15):

Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay. All plans should be based upon and reflect the presumption in favour of sustainable development, with clear policies that will guide how the presumption should be applied locally.

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<sup>63</sup> E. Buitelaar, M. Galle, N. Sorel, Plan-led Systems in Development Practices: An Empirical Analysis of the (lack of) Institutionalisation of Planning Law, 43 *Environment and Planning A* 928 (2011).

103. The *Localism Act 2011* essentially leaves the process of development control intact. This is in spite of the UK development control system always under constant criticism for being slow and impeding the market economy.<sup>64</sup> The new Act amends the *Town and Country Planning Act 1970*, which establishes development control, only to a limited extent. The effect is that, although plan making has been returned to a local level, the plan when made is only one relevant consideration that is taken into account in decision-making. The Government *Consultation Paper on the Neighbourhood Planning Regulations* of October 2011 stated:

We do not propose to prescribe exactly how the local authority should make key decisions – for example whether by delegated officer, a full meeting of the Full Council or via the Council’s Executive, or whether there must be a majority vote at those council meetings in order for the decision to be valid. We believe this is for local planning authorities to decide.

104. The Florida *Community Planning Act*<sup>65</sup> provides that local authorities make decisions with minimal intervention of the State. However, as the plans are created by local governments, varied amendments to the zoning ordinances are permitted, which amounts to a system of development control: standard amendments for land under 10 acres are expedited, area variances are easily granted. The shift is decentralisation of decision-making but not in the system of development control (through amendments).

105. The trend is to make plan making authorities the decision-making authorities, as this creates a direct link between the making of the plan and also the decisions under the plan. If there is a regional authority, it is for a specific purpose that is not necessarily related to normal regional boundaries. In Brazil,<sup>66</sup> as an example, in addition to local authorities, there is an emphasis on new “microaxes” of development,

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<sup>64</sup> The range of problems are discussed in: P. Booth, A Deliberately Slow System? The Origins and Nature of the Current Discourse on Development Control, 17 *Planning Perspectives* 309 (2002).

<sup>65</sup> *Florida Community Local Government Comprehensive Planning and Land Development Regulation Act* (HB 7207).

<sup>66</sup> Farret, R., Urban and Regional Planning in Brazil: The Role of the Federal Government’ 147 *DISP* 8 (2001).

being those areas that have an economic link rather than one based on geography or historic classifications. As well, the government is identifying strategic municipalities that will have specific rules for urban management with a loss of political autonomy to meet the economic goals. In other Latin American countries,<sup>67</sup> decision-making is most often in the hands of local governments but case studies report success with various authorities that grow out of the political culture, such as the *Democratic Municipal Council of Cuqu'o* in Mexico where citizens choose between public investments in local authorities.

106. Decentralisation may be occurring for two reasons. The first is the emergence of economically driven land use plans that are a consequence of the World Bank LED (Local Economic Development) incentives for local government, and this is responsible for a range of local plans in Bulgaria, Lithuania, Poland, Russia, Slovakia, the Balkans, Columbia, Peru, and Yemen.<sup>68</sup> The second reason has been labeled the “new political culture”<sup>69</sup> and is a consequence of the local sustainability concerns of higher educated citizens seeking a greater role in decisions. As a consequence, it is observable that regional authorities or municipal commissions are now being established largely for particular purposes, such as integrating land use with transport as with the *California Regional Transportation Planning Agencies* or the *North Central Pennsylvania Regional Planning and Development Commission*. They are few new authorities that have emerged and the movement increases towards localism.

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67 C. Irazabal, *Revisiting Urban Planning in Latin America and the Caribbean*, UN Habitat, Global Report on Human Settlements, 2009,

68 Local Government and Public Service Reform Initiative (Open Society Forum of George Soros), S. Capkova (ed), *Local Government and Economic Development*, Bulgaria, 2005.

69 Analysed in this regard in: R. Paterson, D. Saha, *The Role of the 'New' Political Culture in Predicting City Sustainability Efforts*, Working Paper Series (2010), University of Texas at Austin.

### **Best Practice in Development Control**

If development control is an aspect of the planning culture, it will not be effectively changed. However, the trend is towards local decision-making and not towards regional or new authorities making decisions.

#### *Models of Decision Making*

107. In most States, any Use Variance or Area Variance is a matter for the Zoning Board of Adjustment that makes decisions as to variances, as well as deciding appeals from permit refusals. The Board is appointed in some States by the council or elected in others by local government constituents and, although considered a necessary safety valve to prevent the rigid operation of zoning laws,<sup>70</sup> has the effect of removing development control powers from the local authority.
108. It is clear that the Zoning Board carries out a quasi-judicial role. As a consequence, when a council appoints the Board, difficulties arise in respect of claims of political influence.<sup>71</sup> Consequently, the Zoning Board is given limited jurisdiction and there is often a distribution of decision-making powers: a small scale subdivision may go to council, a larger one to the locally appointed Planning and Zoning Commission, all zoning amendments to the Council, and variances left to the Zoning Board of Adjustment.
109. Another issue with an independent decision making body is one of trust in the decision makers who are not elected. The *San Francisco Bay Conservation and Development Commission* has a policy that provides:

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<sup>70</sup> As stated by Justice Cardozo as early as 1927 in *People v. Walsh*, 244 N.Y. 280, 290 (1927)

<sup>71</sup> Discussed in: R. Sampson, Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between, 39 *The Urban Lawyer* 877 (2006).

It is Commission policy that Commissioners and their alternates avoid discussion of permit application matters with individuals or groups on any side of an issue outside of the formal public hearing process and record. If such discussions or contacts occur, at a public meeting the Commission member involved will disclose the name or names of those involved and the substance of the contact. An opportunity will then be provided for rebuttal of the information disclosed. This policy does not preclude: (1) discussions by Commissioners who represent the federal government who do not vote on permits and have to discuss permit application matters in the course of their federal duties; (2) discussions between Commissioners and with the Commission's staff; and (3) discussions carried on by Commissioners whose other public duties cause them to hold such discussions to carry out their responsibilities, although these discussions must be disclosed to the Commission.

110. The most significant difficulty arising from an independent decision making authority, such as a Zoning Board of Adjustment, is separating out the local authority plan making from the development control decision-making: the decisions of the independent authority for development or for a variance have a long term effect on the local area. It has been argued strongly<sup>72</sup> that the emergence of this split in the United States is not because of the efficacy of separate decision-making but is a matter of culture and history and it is not useful to compare different regimes.
111. The cultural difference can be seen in the French planning law system where the plan is not a framework or policy but rather is precise as to land uses and development. As there is no amendment possible except by a full amendment of the plan, the emphasis in development control is not on obtaining permission for the land use but rather for the physical development. Development control in French planning becomes merely a check whether the proposal fulfills the requirements of the plan and not whether it is appropriate for the locality.<sup>73</sup>

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72 P. Booth, *The Cultural Dimension in Comparative Research: Making Sense of Development Control in France*, 1 *European Planning Studies* 217 (1992).

73 P. Booth, *Planning by Consent: The Origins and Nature of British Development Control*, London: Routledge, 2003, p.6.

112. There is, therefore, no perfect model for decision-making in development control. It has been said:<sup>74</sup>

The unwanted effects of these diverse responses are equally diverse. Emphasis certainty as the key attribute of a system of control and you find that the subterfuges used to surmount constraints threatens the very legitimacy of the system. Elevate flexibility as the touchstone of the effective planning systems and you may find yourself enmeshed in impenetrable ambiguities which do not serve anyone very well.

#### **Best Practice in Decision-Making**

There is no form of decision-making authority that is to be preferred over any other. However, legislation should provide that there should be an absence of political influence by restricting discussions that can be had outside the formal process.

#### *Development Control and Delay*

113. The most significant issue for development control is its effect on the housing supply. The UK *Barker Review of Housing Supply* in 2004 and *Land Use Planning* in 2006 indicated that delays in the development control process directly affect housing supply. A thorough study of the UK system<sup>75</sup> determined that the delay varies depending on the local authority but the effect arises because “development control is a lengthy process with a considerable degree of variability and uncertainty over how long it will take.”
114. One of the significant causes of delay is the myriad of policies that must be understood and applied to make an application in a development control system. The task of the UK *National Planning Policy Framework*, as mentioned, was to reduce 1300 pages of policy

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<sup>74</sup> Id at p. 8.

<sup>75</sup> M. Ball, Planning Delay and the Responsiveness of English Housing Supply, 38 *Urban Studies* 349 (2011).



statements into 58 pages of text. It accomplished this by establishing core planning principles *in general terms* that should guide development. For example, one core planning principle is that planning “not simply be about scrutiny, but instead be a creative exercise in finding ways to enhance and improve the places in which people live their lives.”

115. A method used in New York to decrease delay for major projects is to establish Special Districts for larger projects and to specify with great detail the standards to be applied and those that are discretionary and can be subject to negotiation or special permits. For example, the Special Hudson Yards District contains 91 sections of detailed requirements and 10 maps. It therefore places emphasis on planning prior to this large development opportunity and leaves open only some matters for a discretionary decision. It is essentially a local government created, guided master plan that reduces the amount of discretion and provides for special permits where necessary.
116. The Planning Officers’ Society in Wales circulated a *Handbook for Development Control Identifying Good and Best Practice* in 2005 that concentrated on efficient practices to avoid delay. A report for the Wales Audit Office in 2010<sup>76</sup> reported increased efficiency in adopting this systems approach and indicated this was successful in reducing delay in one case study.
117. The Department of Communities and Local Government in the UK issues guidance documents such as the *Guidance on the Pre-Application Process: Consultation* (2012). Guidance documents are a common characteristic of environmental assessment: the US EPA issues “Significant Guidance Documents” on almost all matters of concern and does so under rules for preparation of guidance documents of the President’s Office of Management and Budget called

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<sup>76</sup> K. Zokai, et. al., *Lean and Systems Thinking in the Public Sector in Wales*, Cardiff Business School, 2010.

“Final Bulletin for Agency Good Guidance Practices” that constitutes best practice in guidance statements.

#### **Best Practice to Avoid Delays**

A systems approach that has a checklist of all steps in the process would be useful as would a guidance document to avoid delays. In respect of large projects, a master plan should be created within the plan itself to reduce the amount of discretion. This should be a local government led initiative and not wait on the preparation of a plan by developers.

#### *Procedure on Application*

118. The Idaho *Local Land Use Planning Act*<sup>77</sup> is considered a leader in procedural protections for those seeking permits. It provides that any person can request to be heard on the determination of a permit. It also provides that:

The procedure established for the processing of applications by this chapter or by local ordinance shall include the option of mediation upon the written request of the applicant, an affected person, the zoning or planning and zoning commission or the governing board. Mediation may occur at any point during the decision-making process or after a final decision has been made. If mediation occurs after a final decision, any resolution of differences through mediation must be the subject of another public hearing before the decision-making body.

119. Vermont has an Environmental Court and a study<sup>78</sup> examined both mediation at the permit stage as well as in the Court. It was concluded:

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<sup>77</sup> ¶67-6510

<sup>78</sup> P. Field, M. Strassberg, K. Harvey, *Integrating Mediation in Land Use Decision Making*, Lincoln Institute of Land Policy (2009).

At all levels, there were high settlement rates for cases that were evaluated to be appropriate for mediation, due to a combination of factors including willingness of parties to engage in mediation and explore settlement options, the nature of a case and the number of settlement options that are possible.

120. Singapore offers the capacity for an “Outline Application” and allows the submission of a broad proposal to test the allowable land use, plot ratio, building height and form. A decision under the *Planning Act* is an “approval in principle” that does not give authorisation to develop but the final approval will be on other material provided after the outline permission. The same is contained in the *Planning, etc (Scotland) Act 2006*.
121. The City of Hillsboro, Oregon is one example of a local authority that has a detailed system of “concept development plan approval” that is a prelude to making a final application for large projects.<sup>79</sup> That approval is an approval in principle but is binding as to density and uses.

#### **Best Practice for Procedure on Application**

The best practice should be some procedure where there is a legislative mandate for discussion of the application after submission, mediation at the pre-approval stage, and an alternative chance for approval in principle to see if a final application is warranted.

#### *Inclusionary Conditions*

122. In the United States, conditions can be imposed or a variance allowed that offers a bonus in terms of density in return for the developer supplying affordable housing. This concept called “inclusionary zoning”

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<sup>79</sup> Zoning Ordinance No. 1945, Section 136 B(VII)(6)

is common; the Seattle Municipal Code provides:<sup>80</sup>

Bonus development" means floor area allowed in stories wholly or in part above the base height limit on condition that low-income housing be provided, or that a payment in lieu thereof be made, under this section.

123. Studies have concluded that inclusionary zoning has a positive effect on the delivery of affordable housing and does not impede development.<sup>81</sup>
124. Other zoning ordinances provide a bonus for a public entertainment facility or more open space than is required. The *Los Angeles City Code*<sup>82</sup> provides that every developer of commercial or industrial development must pay an "arts fee." The Arts and Cultural Facilities Trust Fund<sup>83</sup> provides that if facilities, services and community amenities for cultural and artistic purposes are provided in a development, then the developer will get a dollar for dollar contribution from the City.
125. It has been found, however, that unmanaged bonus allocations may not be effective. Providing open space in New York in return for a bonus has led to unusable spaces as developers minimized costs or made the areas uninviting.<sup>84</sup>
126. There are arguments against inclusionary zoning: the developers will pass on costs or the burden of public goods should not fall on only one group. It is, however, clear that inclusionary zoning is a useful tool as a condition imposed on development consent.

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80 SMC 23.48.011

81 N. Brunick, *The Impact of Inclusionary Zoning on Development*, Chicago: Business and Professional People for the Public Interest (BPI), (2003); V. Been, R. Meltzer, and J. Schuetz. *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston areas*, New York University: Furman Center for Real Estate and Urban Policy (2007).

82 ¶91.107.4.6

83 Established under the Los Angeles Municipal Administrative Code Article 21.

84 G. Smithsimon, Dispersing the Crowd: Bonus Plazas and the Creation of Public Space, 43 *Urban Affairs Review* 325 (2008).

**Best Practices for Inclusionary Zoning**

Legislative authority for inclusionary zoning should be given to local authorities and the effect monitored over time.

## Summary of Best Practices

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- In the legislation, set out the relative roles of the State, planning authorities, and local governments.
- In the legislation, provide a functional and detailed definition of “sustainability.”
- In the legislation, include the integration of land use and transportation as an aspect of sustainability.
- Consolidate all State Policies to an outline document similar to the UK *National Planning Policy Framework* that establishes goals, planning principles, and presumptions.
- In the legislation, establish a duty to cooperate in respect of matters of State significance.
- In the legislation, provide for the formation of a Metropolitan or Regional Commission consisting of a Chair from the State, representatives from each council and representatives appointed by council according to the population distribution.
- In the legislation, establish metropolitan or regional spatial plans approved by the relevant Commission and endorsed by the Minister as plans that become policy documents under the Act but are binding on all other public authorities.
- In guidelines, provide for specific indicators to measure the goals in the metropolitan or regional spatial plans.

- In the legislation, provide that the State can give priority funding to growth areas identified in an endorsed metropolitan or regional spatial plan.
- Change the nature of a local plan from a single, regulatory document to one that consists of two parts: the results of the planning process (the Comprehensive Plan) and a regulatory response to that process (the Regulatory Controls.)
- In regulations, require that the Comprehensive Plan contain essential elements that should be found in a spatial plan such as community vision and goals, planning history, people and population, housing and neighbourhoods, etc., and require that the scope and extent of citizen participation that was undertaken be set out in that Plan.
- In the regulations, provide that the Comprehensive Plan contain adaptation measures for areas that are at risk from climate change.
- In the regulations, provide that the Zoning Controls should set out goals and objectives in narrative form and should be accompanied by a map of existing land uses and a map of proposed land uses.
- In the regulations, provide for a Strategic Environment Assessment of the Comprehensive Plan and require it to indicate what areas or projects are to be subject to an Environmental Impact Assessment.
- In the legislation, provide that the Comprehensive Plan conform to State Policy.

- In the legislation, require that the Regulatory Controls conform to the Comprehensive Plan.
- In legislation, set out the objectives for citizen participation in the making of the Comprehensive Plan.
- In the regulations, set out the basic steps of citizen participation in the Comprehensive Plan (not the Regulatory Controls) and include recognition of registered community associations,
- Prepare guidelines as to the steps in citizen participation that must be taken.
- In the legislation, provide that a use variance and an area variance may be granted by the decision making authority without the need for formal amendment.
- In the legislation, provide that all members of any planning authority cannot discuss development applications unless there is full disclosure of those discussions.
- In the legislation, provide for approval in principle of a concept plan or development application.
- In the legislation, provide for developer initiated mediation of applications where the development is over a particular monetary amount.
- In the legislation, provide for inclusionary conditions as part of the condition power and inclusionary arrangements as part of a development agreement.



- Produce Guidelines of Best Practice to avoid delay in processing applications for development permission.

## Appendix A

**PARTICIPATION OVERVIEW**

Step	Outreach and Events – Both communities	WPG Statistics
1. Getting in Touch	<ul style="list-style-type: none"> <li>• Calls to and meetings with all community organizations; school PACs, associations, community centres, neighbourhood houses, seniors, youth, multicultural, church groups;</li> </ul>	30 meetings plus calls
	<ul style="list-style-type: none"> <li>• Recruiting of Community Liaison Group, which met at intervals throughout the process;</li> </ul>	39 members: range of demographics
	<ul style="list-style-type: none"> <li>• Newsletter #1: to all households, businesses and absentee owners, introducing program, advertising Visions Fairs; English and Chinese</li> </ul>	12,500 households+
	<ul style="list-style-type: none"> <li>• Press release, advertisements for Visions Fairs in local English Press, Chinese media interviews, school flyers; articles or ad in local newsletters</li> </ul>	✓
	<ul style="list-style-type: none"> <li>• Set up of community mail/e-mail list, web pages for both communities; and</li> </ul>	✓
	<ul style="list-style-type: none"> <li>• Mini-displays in community centres, community pool, and library.</li> </ul>	3
2. Creating Ideas	<ul style="list-style-type: none"> <li>• Vision Fair: Jan 2006, one “kick-off” weekend at West Point Grey Community Centre; interactive displays by City and community groups;</li> </ul>	About 800 attendees
	<ul style="list-style-type: none"> <li>• Creative workshops April-June 2006, developing ideas/options for draft Vision Directions: - main workshops: six-seven topics (4 -10 hours each), small group discussion where desired;</li> </ul>	353 attendees
	<ul style="list-style-type: none"> <li>- youth workshops at High Schools; and</li> </ul>	150 attendees
	<ul style="list-style-type: none"> <li>- business associations or BIA open houses.</li> </ul>	31 attendees
	<ul style="list-style-type: none"> <li>• Advertise for workshops twice in local press;; school flyers; posters, banners; articles or ad in local newsletters</li> </ul>	✓
	<ul style="list-style-type: none"> <li>• Mini-displays updated in community centres, community pool, and library;</li> </ul>	3
	<ul style="list-style-type: none"> <li>• Newsletter #2 to all households, businesses, absentee owners; update and reminder re program</li> </ul>	12,000 households+

Step	Outreach and Events – Both Communities	WPG Statistics
3. Choosing Directions	<ul style="list-style-type: none"> <li>• Choices Survey with draft Vision Directions: 84 pages               <ul style="list-style-type: none"> <li>- to all households (single family, secondary suites, ground oriented such as town homes, low and high rise apartments)</li> <li>- special mailing and follow up to random sample.</li> </ul> </li> </ul>	5,509 households+ - 32.4% return (general and random)
	<ul style="list-style-type: none"> <li>• Outreach to publicize and promote return of surveys:               <ul style="list-style-type: none"> <li>- calls, meetings with community organizations as in step 1</li> <li>- “meet and greet” at community and school events, information sessions,</li> <li>- youth fill-out sessions in elementary and secondary schools</li> </ul> </li> </ul>	30 meetings, sessions or events
	<ul style="list-style-type: none"> <li>• Press release; advertise in local press; school flyers; poster; banners; articles or ad in local newsletters and</li> </ul>	✓
	<ul style="list-style-type: none"> <li>• Mini-displays updated in libraries, community centres, community pool, and library</li> </ul>	3
4. Finalizing the Vision	<ul style="list-style-type: none"> <li>• Upcoming Newsletter #3: “Vision Approved” to all households, businesses, absentee owners summarizing adopted Community Visions; and</li> </ul>	5,509 households+
	<ul style="list-style-type: none"> <li>• Final Community Vision document: available on request and posted on community web pages.</li> </ul>	✓