

**The Need for Rational Land Use Decisions in Massachusetts: Recommending  
Massachusetts Adopt the Rhode Island Land Use Regulatory Framework**

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## **Abstract**

Massachusetts laws instructing cities and towns to adopt a master plan does not require zoning to be in accordance with a plan. The lack of planning required for making land use decisions in Massachusetts results in unnecessary and wasteful litigation costs for municipalities, residents, neighborhood organizations, and developers. The resulting unpredictability and inconsistency can be solved through mandating land use decisions be tied to a plan, which would in effect require such decisions to be based on data, community input, and goals and policies adopted by the local legislature. This thesis provides recommendations for Massachusetts to create a land use regulatory framework that is based on rational decision-making which draws from a literature review of journal articles, professional planners, the American Planning Association, case law, and general law from multiple states. As a late adopter, Massachusetts can learn from other states' successes and failures to create model comprehensive planning legislation that provides the transparency, accountability, and rationality for land use planning that is currently missing in the Commonwealth.

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# 1. Introduction

Land use decisions in the United States are generally made at the local governmental level. As municipalities began to grow in population and industry at a rapid rate in the 20<sup>th</sup> century, localities began regulating the use of land in the form of zoning and subdivision regulations<sup>1</sup>. As farms were subdivided into neighborhoods, and cars and trains replaced walking and horse and carriage modes of transportation, public officials quickly recognized the need for efficient planning for public infrastructure such as water, sewer, roads, and schools<sup>2</sup>. Without federal or statewide legislation regulating the process to plan for growth, or to divide and develop land, many local land use decisions were litigated based on the question of whether government had the power to restrict the use of land and structures on private property<sup>3</sup>.

Following case law that determined government's police powers include the power to regulate land for health, safety, and welfare, the federal government provided guidance to states to enable their localities with the power to adopt comprehensive plans and zoning ordinances in the form of the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act<sup>4</sup>. These model acts suggested by the U.S. Department of Commerce were flawed in that they did not require cities to make land use decisions based on the plans they adopted<sup>5</sup>. The land use reform movement that began in the mid-20<sup>th</sup> century included several states that mandated that each locality adopt a comprehensive plan and make land use decisions, including zoning and subdivisions, consistent with their plan, providing the basis for rational land use decision-making

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<sup>1</sup> Hirt, *Zoned in the USA The Origins and Implications of American Land-Use Regulation*.

<sup>2</sup> Kent Jr., *The Urban General Plan*.

<sup>3</sup> Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation."

<sup>4</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)

<sup>5</sup> U.S. Department of Commerce, *A Standard City Planning Enabling Act*.

and what is commonly referred to as the “consistency doctrine”<sup>6</sup>. While more than half the states have moved on from the 1920s federal guidance on zoning and planning, Massachusetts has not, resulting in a land use regulatory framework that is chaotic, unpredictable, non-transparent, and irrational<sup>7</sup>.

This thesis demonstrates that the existing Massachusetts land use laws create ad-hoc, irrational decision making. It then examines Rhode Island’s land use regulatory framework as the model to which Massachusetts should look to. This thesis proceeds to explain why the arguments against mandating comprehensive planning are themselves irrational, and concludes with recommendations for Massachusetts to successfully mandate meaningful comprehensive planning and the consistency doctrine. This thesis focuses on Massachusetts because the Commonwealth fails to require cities and towns to take even modest steps toward rational land use decision making. Rhode Island is selected as the model because its legislation is exceptional, it borders Massachusetts, containing similar environmental and coastal features as well as regional economic opportunities and constraints, and its cities and towns were developed during the same colonial time period. This thesis concludes with recommendations as to how Massachusetts can emerge as the leader in comprehensive land use planning.

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<sup>6</sup> Buchsbaum and Smith, *State & Regional Comprehensive Planning Implementing New Methods for Growth Management*.

<sup>7</sup> Curtin and Witten, “Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Spaces.”

## 2. Literature Review

This chapter first examines the history of zoning and comprehensive planning in the United States to provide context for as to why it is important to tether a zoning ordinance to a comprehensive plan. It then proceeds to examine peer reviewed literature, government publications, guidance from the American Planning Association, and publications from practicing planners on the role of the comprehensive plan in land use decisions. This thesis focuses on recommending Massachusetts adopt the Rhode Island statutory requirements for comprehensive planning, zoning, and land development and subdivision review. However, the literature review will extend beyond the confines of Massachusetts and Rhode Island to examine the evolution of different planning requirements in other states, which led to Rhode Island's adoption of planning and consistency mandates in 1988.

### **The Rise of Zoning and the Need for a Plan**

To understand why zoning should follow a comprehensive plan it is important to understand the origin of zoning in the United States. New York City adopted the country's first zoning resolution in 1916<sup>8</sup>. In 1915, the 42-story Equitable Building was built in Manhattan, casting a seven-acre shadow over neighboring properties. Increased immigration led to the need for additional housing, and technological advances such as steel framed buildings and elevators contributed to the rise in demand for zoning regulations to limit the height and bulk of buildings, setbacks, open space, and location of industries and specific uses within the boundary of certain districts<sup>9</sup>.

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<sup>8</sup> "Planning History," NYC.gov, December 18, 2021, [www1.nyc.gov/site/planning/about/city-planning-history.page](http://www1.nyc.gov/site/planning/about/city-planning-history.page)

<sup>9</sup> Id.



In the 1920's, zoning regulations were increasingly adopted by municipalities throughout the United States and subsequently litigated in court for their constitutionality<sup>10</sup>. In 1922, the village of Euclid, Ohio enacted a zoning ordinance which restricted the uses, lot area, size, and height of buildings that could be built in different areas throughout the village<sup>11</sup>. In 1926, the ordinance was challenged by the plaintiff on the grounds the zoning ordinance was unconstitutional because it deprived landowners their Fourteenth Amendment rights of liberty and property with due process of law<sup>12</sup>. The U.S. Supreme Court decided the zoning ordinance was a constitutional use of police power asserted by the municipality for the public welfare. Using the analogy of a pig in a parlor (instead of a barnyard), Justice Sutherland's opinion clarified local governments can restrict uses on certain parcels to protect health, safety, and welfare<sup>13</sup>. The high court also exercised judicial deference, deciding if the validity of the legislative classification for zoning purposes are fairly debatable, the local legislature's judgement must be allowed to control<sup>14</sup>.

### **Federal Government Provides Guidance on Zoning, Planning, Comprehensive Plans**

As a result of increased zoning ordinances and challenges to their constitutionality, Department of Commerce Secretary Herbert Hoover formed an advisory committee on zoning to publish the Standard Zoning Enabling Act in 1924. At this time, 11 states passed zoning enabling acts, and by the end of 1923, 218 municipalities adopted zoning ordinances<sup>15</sup>. If the model act was adopted by a state legislature it would enable the legislative body of cities and towns to

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<sup>10</sup>U.S. Department of Commerce, *A Standard Zoning Enabling Act*

<sup>11</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> U.S. Department of Commerce, *A Standard Zoning Enabling Act*

adopt zoning regulations for the purpose of promoting health, safety, morals, or the general welfare of the community. Federal government guidance as well as the Supreme Court's decision in *Euclid v. Ambler* resulted in government's unquestionable authority to restrict building location, height, size, coverage, and use.

The Department of Commerce established the need for zoning regulations to be tied to a comprehensive plan in Section 3 of the Standard Zoning Enabling Act by mandating that such regulations "shall be made in accordance with a comprehensive plan", but failed to define the term "comprehensive plan" in a meaningful way. The publication's footnotes explain a comprehensive plan is intended to "prevent haphazard or piecemeal zoning", but states "no zoning should be done without such a comprehensive study." Conflating the term "plan" with a "study" reduces the significance of tethering zoning regulation to a comprehensive plan and dangerously allows cities the ability to enact zoning changes without first adopting a plan. By 1928, twenty-nine different states adopted a version of the Standard State Zoning Enabling Act<sup>16</sup>.

The Department of Commerce followed the Standard Zoning Enabling Act with the Standard City Planning Enabling Act of 1928 which, if adopted by a state legislature, would enable a city or town to establish a planning commission with the purpose of formulating a comprehensive plan, advise the legislative and executive branches of local government, as well as the public to promote conformance of land development with the plan. The act states the master plan shall be made with the purpose of guiding harmonious development of the municipality to promote health, safety, morals, order, convenience, prosperity, and general welfare. The guidance provides examples of what the plan should address, including an efficient

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<sup>16</sup> U.S. Department of Commerce, *A Standard City Planning Enabling Act*.

economy, adequate provision for traffic, light, air, good civic design, and public utilities for present and future needs. Procedurally, the model legislation allows for planning commissions to adopt a plan as a whole or by individual resolutions for each part of the plan, and requires a public hearing and public notice.

Through an analysis of unpublished materials of the advisory committee, planner Stuart Meck argues the “in accordance with a plan” language of the Standard Zoning Enabling Act intended cities to prepare a comprehensive plan in preparation of zoning ordinances. Enacting a comprehensive plan prior to preparing a zoning ordinance is important because it creates rational basis. That is, should such ordinances be challenged in court, the plan can be used to rationalize zoning decisions<sup>17</sup>. Meck also analyzed writings by active planning and zoning consultants at the time of the adoption of the Standard Zoning Enabling Act. Chief among them was Harland Bartholomew, who delivered a paper at the 1928 National Conference on City Planning arguing existing land use, new buildings expected to be erected, lot heights and widths, population, and topography studies should all be conducted in advance of the preparation of a zoning ordinance. Bartholomew stated:

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

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<sup>17</sup> Meck, “The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute.”

neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan...<sup>18</sup>

Bartholomew's insight on the need for zoning to follow a plan was delivered in 1928. Almost one hundred years later, multiple states, including Massachusetts, have yet to adopt his rational basis decision making process for land use decisions.

### **The Two Approaches to Land Use**

Land use decisions in the United States are made at the local government level. The 10<sup>th</sup> Amendment of the U.S. Constitution leaves all powers not delegated to the federal government to the states. States in turn enable their local governments with the power to enact ordinances to regulate for the health, safety, and welfare in their jurisdiction. There are two state approaches to land use control<sup>19</sup>. One approach is to require planning by mandating each city and town adopt a comprehensive plan that is consistent both within itself and with statewide goals. In the second approach, the state enables cities and towns to create comprehensive plans and adopt zoning ordinances, but does not require their zoning to be consistent with the plan or with statewide planning goals. Rhode Island's land use regulations follow the former, mandating comprehensive planning, while its neighbor, Massachusetts follows the latter.

### **What is a Comprehensive Plan?**

A comprehensive plan is a physical document-including text, maps, goals, and objectives-designed to provide a basis for rational decision making for the long-term physical

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<sup>18</sup> Bartholomew, "What Is Comprehensive Zoning."

<sup>19</sup> Salkin, "From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls."

development of the municipality<sup>20</sup>. The plan is the official statement of a municipal legislative body which sets forth its major policies concerning desirable future physical development<sup>21</sup>. In states that require planning, the enabling legislation describes each element included in a comprehensive plan, the number of years looking forward the document must plan for, and designates a time period for how frequently the plan needs to be updated. In states without legislation mandating a plan, a municipality may create one, but consistency is not mandated by law. All local comprehensive plans (not including state or regional plans) are adopted by the legislative body of a local government.

While the required content of a comprehensive plan is specific to each state's comprehensive planning legislation, elements commonly required include land use, transportation, economic development, housing, and natural resource identification and conservation. The State of Rhode Island's Comprehensive Planning and Land Use Act requires plans to include twelve elements, to utilize a minimum of a 20-year planning timeframe in its consideration of forecasts, goals, and policies, and to be updated every ten years.

The plan itself is a statement of policies. It is general by design, and although it can be modified, it signifies commitment. A plan must be stated in writing and adopted by the council as permanent, as city planner and author T.J. Kent argued, "a so-called flexible plan is no plan at all"<sup>22</sup>. All decisions by the municipality should act to carry out the plan, based on the stated policy goals. Massachusetts is the modern example of a flexible plan, lacking planning

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<sup>20</sup> R.I. Gen Laws § 45-22.2-5. Formulation of comprehensive plans by cities and towns.

<sup>21</sup> Kent Jr., *The Urban General Plan*.

<sup>22</sup> Kent Jr., *The Urban General Plan*.

consistency requirements, carrying no weight in court, and serving only as an advisory document<sup>23</sup>.

Cities and towns are responsible for land use planning and decision making given both the respective states' reluctance to interfere with local decision making and the federal government's adherence to Federalist principles. In light of this responsibility, residents expect local government to be able to provide for the coordination of intensive development arising from the municipality's obligation to fulfill needs for services and facilities such as roads, sewer, and water infrastructure. The comprehensive plan provides the blueprint for development and is the vehicle through which competing land uses and the needs of the community are balanced<sup>24</sup>.

### **The Emergence of the Mandatory Comprehensive Planning System**

As cities in the United States grew rapidly during the early 20<sup>th</sup> century, the rise in population, use of the automobile, and government subsidized subdivisions led to rapid development and suburbanization<sup>25</sup>. Population declined in US cities during the mid-twentieth century as downtowns became decentralized<sup>26</sup>. The construction of the interstate highway system in the 1950's enabled people to live further from the city while enjoying the benefits of downtown employment and entertainment opportunities through a short drive.

During the change in development patterns in the U.S. from compact cities to sprawling suburban neighborhoods in the mid twentieth century, planning comprehensively for new roads, housing, and public infrastructure, while protecting important agricultural land became more

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<sup>23</sup> Id.

<sup>24</sup> Curtin Jr., "Ramapo's Impact on the Comprehensive Plan."

<sup>25</sup> Cronon, *Nature's Metropolis*.

<sup>26</sup> Rae, *City Urbanism and Its End*.

important than ever<sup>27</sup>. Legislation mandating all cities and towns in a state adopt a comprehensive plan came to be called a “growth management system” as it originated from a concern from the environmental community focused on protecting natural resources<sup>28</sup>. In the 1970s, Vermont (1970), California (1972), Florida (1972), and Oregon (1973) all began to adopt comprehensive planning requirements and standards, outlining the roles and responsibilities of the state, regional, and local government in land use decisions<sup>29</sup>. This is considered the first wave of growth management acts in which states created statewide plans, enabled or required local governments to adopt comprehensive plans, and established the consistency doctrine. Hawaii established the Hawaii State Plan, which created a statewide planning commission which designated all land in the state for certain use in 1961, but later adopted more local planning in 1978<sup>30</sup>.

The Consistency Doctrine is the most important element of a state’s land use regulatory system<sup>31</sup>. Consistency between a city’s locally adopted plan and statewide planning goals is known as vertical consistency, while horizontal consistency refers to each element in a specific comprehensive plan (housing, economic development, transportation, etc.) being consistent with one another. Statewide planning legislation establishes these consistencies which are the backbone of quality planning. Mandating consistency requires cities, counties, and states to move towards the same goals, and provides clarity to all stakeholders in land use decisions.

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<sup>27</sup> Buchsbaum and Smith, *State & Regional Comprehensive Planning Implementing New Methods for Growth Management*.

<sup>28</sup> Buchsbaum and Smith, *State & Regional Comprehensive Planning*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Mandelker, “The Role of the Local Comprehensive Plan in Land Use Regulation.”

While the first wave of comprehensive planning land use revolutions originated from and was fueled by the concern to protect important natural resources, support for economic development triggered the second wave of comprehensive planning legislation enacted by Maine (1988), Rhode Island (1988), Georgia (1989), and Maryland (1992)<sup>32</sup>. In fact, in Oregon it was the economic development goal that saved the law from being repealed in 1982<sup>33</sup>.

### **How and Why States Adopt Mandatory Comprehensive Planning**

Each parcel of land's use and the location and type of structures allowed or prohibited on said land, are determined by local legislatures through zoning ordinances. These zoning decisions affect where people live, work, shop, and eat. Drafting statewide legislation to adopt a rational basis for making land use decisions incorporates a plethora of stakeholders seeking the right to build on, conserve, sub-divide, and regulate land. The land use regulatory framework requiring the adoption of a comprehensive plan works with the dominant forms of municipal government including a council-manager and mayoral forms of government<sup>34</sup>.

States that have adopted legislation mandating comprehensive planning have done so as a result of influence and lobbying of the governor or state legislator<sup>35</sup>. Vermont, Maryland, Georgia, Florida, Oregon, Hawaii, and Washington benefited from governors that strongly supported mandatory planning legislation, while in Rhode Island, Maine, and New Jersey, legislators were the key to garnering the necessary support from all stakeholders<sup>36</sup>.

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<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Kent, JR, *The Urban General Plan*

<sup>35</sup> DeGrove, *Planning Policy and Politics*

<sup>36</sup> DeGrove, "The Emergence of State Planning and Growth Management Systems: An Overview."



A review of how each state adopted mandatory comprehensive planning reveal two significant reasons for success. One path to successfully adopting comprehensive planning legislation has been establishing a growth management, comprehensive planning, or land use commission with membership from each stakeholder tasked with developing recommendations for a statewide land use framework<sup>37</sup>. Major stakeholders involved in lobbying the statehouse to craft statewide planning legislation include developers, homebuilders, local government officials, environmental groups, agriculture groups, and banking and financial groups. While this process takes time--often one to two years before consensus is reached--the legislation has proved more successful in the statehouse when experts from each industry have been brought to the table in support of the final product<sup>38</sup>.

The second path states employed in adopting comprehensive planning legislation occurred when hesitant stakeholders who do not want the state to update its land use regulations perceive there is enough public and political support to pass some sort of legislation so that nonparticipation is more of a risk than becoming part of the process<sup>39</sup>.

### **The Comprehensive Plan and Private Property Rights**

The protection of private property rights may be cited as a reason for opposing regulations that require development plans be consistent with a locally adopted comprehensive plan. The consensus among practitioners and academics suggests that land development regulations do not contradict constitutional rights or impose additional limits on private property rights<sup>40</sup>. More to the point, land use regulations based upon a comprehensive plan are far less

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

likely to be arbitrarily adopted or imposed where the very nature of the consistency doctrine precludes adoption or imposition of irrational regulations. When a state requires a comprehensive plan be adopted, it requires cities to develop goals based on data collection, studies, and research, eliminating the opportunity for arbitrary decisions. In fact, Maine developers supported comprehensive planning legislation requiring local governments adopt plans that are consistent with statewide goals as a means to protect property rights and the ability to build housing after sixty 60 local governments adopted building moratoria prior to the state's land use reform<sup>41</sup>.

Tellingly, the Rhode Island Comprehensive Planning and Land Use Act of 1988 specifically states a goal of the legislation is to promote a better economic climate, increase job opportunities, and to promote the production of year-round housing<sup>42</sup>. When land development regulations are required to be consistent with a comprehensive plan, they establish a uniform procedure for all land development projects so that all cities and towns in a state have similar rules that reflect the requirements of the state, providing transparency and protection of private property rights. Under mandatory comprehensive planning legislation, a municipality is bound to make decisions based on consistency with their legislatively adopted comprehensive plan; this alone is intended to provide protection to private property owners from arbitrary decisions.

### **The Consistency Doctrine**

The lack of a nationally defined comprehensive plan has resulted in each state drawing different conclusions as to what document zoning should be consistent with. Some states determine that a zoning map is comprehensive, and therefore land use decisions that conform to

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<sup>41</sup> Id.

<sup>42</sup> R.I. Gen. Laws § 45-22.2-3. Legislative findings and intent – Statement of goals.

a zoning map are considered valid. Practicing planners, land use lawyers, and academics alike have argued for the rational planning of communities to be based upon an independently adopted comprehensive plan. Charles Haar had long made the argument for a consistency requirement between zoning and a comprehensive plan, arguing that zoning without planning lacks coherence and discipline<sup>43</sup>.

Every day local governments make decisions on finance, roads, water and sewer utilities, schools, and the construction of new buildings. In light of these day-to-day determinations in the field of land use, Haar argued that it is vital that there be a unifying plan providing scope and perspective. He further argues that zoning by itself is arbitrary and can be dangerous as a self-contained activity that tyrannizes individual property owners as opposed to a means to a broader end. His argument follows that because the legislative power to zone is so significant, it should be governed by clearly defined rules and standards to prevent the exercise of such a power from operating in an arbitrary and discriminatory fashion. If zoning is constrained to being a tool to implement a broader comprehensive plan, it will ensure that the legislative act truly protects health, safety and welfare.

Land use and planning law professor Brian Ohm summarizes the importance of the link between a consistency requirement and rational decision-making stating:

The primary legal justification for acting in accordance with the plan was to legitimize local government decision making by articulating the public policy

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<sup>43</sup> Haar, "In Accordance with a Comprehensive Plan."

reasons (the rational basis) for the decision as a hedge against arbitrary and capricious action<sup>44</sup>.

The classic example of a zoning ordinance being accused of tyranny or being capricious is objection to a zoning restriction on the grounds that it violates the due process clause of the Fourteenth Amendment and the Fifth Amendment's prohibition against governmental "taking of private property without just compensation"<sup>45</sup>. A taking results when no reasonable use of the property remains. The court will also assess a regulation based on the rational basis test. That is, the court will determine whether the ordinance is a valid use of the police power vested in the municipality's legislature by assessing if the ordinance is rationally related to health, safety, and welfare. The "in accordance" language of planning legislation, becomes significant when a zoning ordinance is challenged as unconstitutional. This is because the court must assess the reasonability of an element of the zoning ordinance being challenged based on its relation to health, safety, and welfare. The court will do this by looking at a community's comprehensive plan to determine if that zoning ordinance is consistent with the legislatively adopted comprehensive plan. If it is, it will be upheld, and if it is not, it will be determined to be an irrational decision. Finally, the court will determine if the ordinance in question implements the policies of the plan.

Rational decision making is the primacy of Haar's argument, but he also advocates for the consistency doctrine to improve long-term planning<sup>46</sup>. A forward-looking comprehensive plan reminds legislatures of long-term goals of the community, adopted by the legislature,

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<sup>44</sup> Ohm, "Analyzing Action/Plan Consistency."

<sup>45</sup> Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation."

<sup>46</sup> Haar, "In Accordance with a Comprehensive Plan."

through community input. Such a plan provides insurance against pressure for short term special treatment or unsustainable development patterns. An effective consistency requirement not only mandates zoning be in conformance with the plan, but also that consistency be determined in all land use decisions, including variances, conditional use permits, subdivisions and other administrative planning procedures<sup>47</sup>.

The argument for legislation requiring comprehensive planning continued in the 1970s by Daniel Mandelker. Mandelker was reacting to growth of the environmentalism movement, increased suburbanization of American cities, and concern for the provision of low-income housing, which put pressure on states to adopt new land use regulatory statutes. In 1973, states such as Oregon started requiring local plans to be in accordance with statewide planning goals<sup>48</sup>. Mandelker argued that the requirement for local comprehensive plans to be consistent with statewide planning goals can resolve the problems created by conflicting pressures on state and regional needs for housing, environmental protection, and growth management from urban to rural land<sup>49</sup>.

### **The Legal Status of the Plan**

As state courts litigated the role of the comprehensive plan in new planning legislation it became clear that the significance of a comprehensive plan is in its legal status. Mandelker argued that for effective implementation of a mandatory planning requirement, courts must give presumptive weight to the policies of the comprehensive plan as they are applied in land use control administration<sup>50</sup>. Mandelker considered the judicial decisions that recognized the

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<sup>47</sup> Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation."

<sup>48</sup> Adler, *Oregon Plans*.

<sup>49</sup> Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation."

<sup>50</sup> *Id.*

comprehensive plan as the document from which all land use decisions are made as a legal recognition of the planning process<sup>51</sup>.

To prevent arbitrary comprehensive planning, Mandelker argued for a limit on the number of times a municipality can amend its comprehensive plan<sup>52</sup>. Out of fear that a comprehensive plan would be changed to be consistent with a requested zone change, Mandelker advised that a comprehensive plan should be amended only when a policy is going to be changed. Rhode Island adopted such a rule, limiting the number of comprehensive plan amendments to 4 times per calendar year<sup>53</sup>.

### **How Consistency is Determined**

Each state's planning consistency legislation lists different findings of facts necessary for an adjudicative or legislative body to find a land use decision to be consistent with a plan. The determination of the consistency of a land use regulation or development application is ultimately vested with the final decision-making authority which can be the planning board for a subdivision or the legislative branch for a zone change. In most municipalities, each land use decision is accompanied by a staff report from a planning department providing the facts necessary for the determining body to make a decision about consistency which creates a record for a legal defense if a decision is appealed. Staff reports are an essential component of the consistency determination<sup>54</sup>. The staff report should be more than a statement of consistency and

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup>R.I. Gen. Laws § 45-22.2-8. Preparation, adoption, and amendments of comprehensive plans.

<sup>54</sup> Ohm, "Analyzing Action/Plan Consistency."

should specifically identify how the land use petition in question furthers the goals, policies, and objectives of the plan<sup>55</sup>.

To prevent conflicts within a plan, some states require plans to be both horizontally and vertically consistent. Despite the horizontal consistency requirement, applying the comprehensive plan to a specific development plan may bring to light conflicting policies<sup>56</sup>. A comprehensive plan is a legislatively adopted document, and as a result enjoys deference by the courts. Courts in some states have raised the bar for cities and towns to do more than simply state whether or not a land use decision is consistent with the plan. *In Atkinson v. City of Charlotte*, the city approved a zoning amendment stating “This petition is found to be consistent with adopted policies and to be reasonable and in the public interest<sup>57</sup>”. After being appealed, the court reversed Charlotte’s determination stating that their approval didn’t “include an ‘explanation’ as to why the amendment is reasonable and in the public interest under the plain meaning of that term<sup>58</sup>”.

In *Napa Citizens for Honest Government v. Napa County Board of Supervisors* the court found the city’s consistency statement with the county’s general plan merely cited goals and policies from the plan without addressing the adverse impacts of the proposed development<sup>59</sup>. These examples from North Carolina and California demonstrate the ability of the consistency requirement to prevent ad hoc and arbitrary decision making by government boards and commissions.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Atkinson v. City of Charlotte*, 760 S.E.2d 395, 396 (N.C. Ct. App. 2014).

<sup>58</sup> *Id.*

<sup>59</sup> *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 91 Cal. App. 4th 342 (2001).

## American Planning Association Model

Recognizing the need for a new model for planning and zoning legislation, the American Planning Association published *Growing Smart*, a legislative guidebook with model statutes for planning and land development review processes in 2002. The guidebook's research found the states that initiated reform were those that wanted to protect significant natural resources, especially coastal areas, address affordable housing, link regulation and capital investment with planning, address unpredictability in land development projects or zoning ordinances, or address a mismatch between development and infrastructure<sup>60</sup>.

The American Planning Association guidebook provides model legislation for states who use the plan as an advisory-only role in land use decisions as opposed to mandating a plan, but finds that "it is likely that such a mandate will result in better plans as well as better implementation"<sup>61</sup>. The advisory committee on the guidebook also stated on the question of whether comprehensive planning should be mandated by statute:

Planning is essential and should be required at all levels of government where land-use decisions will be made<sup>62</sup>.

The preceding literature review reveals the broad consensus among academics, practicing planners, and the American Planning Association on the importance of comprehensive planning to serve as a legally binding constitution to provide for a rational basis in land use decisions such as zoning, which should be used as one regulatory tool to implement the comprehensive plan.

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<sup>60</sup> Meck, "Growing Smart Legislative Guidebook."

<sup>61</sup> Id. Page 7-66.

<sup>62</sup> Id. Page 7-65.



### **3. The Massachusetts Model**

Massachusetts General Law instructing cities and towns to adopt a master plan does not require zoning to be in accordance with a plan. The law merely requires city and town officials to take existing land use into consideration prior to making a decision<sup>63</sup>. Massachusetts courts have regularly ruled that zoning ordinances need not be in accordance with a plan and that a plan has no legal status<sup>64</sup>. Without a plan serving as the constitution from which land use decisions are made, land use regulation is inherently arbitrary. A decision is considered arbitrary if it is a willful and unreasonable action without consideration or in disregard of facts or law<sup>65</sup>. The following chapter details the existing land use regulatory framework in Massachusetts, the legal precedent the Massachusetts courts have set on the role of the comprehensive plan in land use decisions, and the subsequent problems that arise as a result of this framework.

#### **Massachusetts General Law on Zoning and Planning**

The regulatory powers of cities and towns in Massachusetts regarding zoning and planning are found in Massachusetts General Laws Chapter 40. The Zoning Act defines zoning as:

ordinances and by-laws adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers

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<sup>63</sup> Mass. Gen. Laws 41, § 81D.

<sup>64</sup> Curtin and Witten, “Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Spaces.”

<sup>65</sup> Black’s Law Dictionary.

of cities and towns to protect the health, safety and general welfare of their present and future inhabitants<sup>66</sup>.

The Zoning Act was adopted in 1920 and updated in 1933, 1955, and 1975. In 1975, Mass Act 808, § 2A was adopted which outlines the purposes of the Zoning Act. The Act states zoning may be adopted:

to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning commission.

A valid zoning regulation in Massachusetts is therefore any ordinance or by-law, adopted through the process outlined in Chapter 40 A, to protect the health, safety and general welfare. The land use regulation need not be based on a master plan, as Mass Act 808 acknowledges a master plan for a community or regional comprehensive plan may not even exist.

The only method of preventing zoning decisions from going awry in Massachusetts lies in the power of courts to strike down a regulation if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare<sup>67</sup>.” An ordinance that is clearly arbitrary is unconstitutional because it violates the due process clause of the 14<sup>th</sup> Amendment of the US Constitution which states no state shall “deprive any person of life, liberty, or property without due process of law.” If the municipal regulation is fairly

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<sup>66</sup> Mass. Gen. Laws 40A, §3.

<sup>67</sup> Bobrowski, *Handbook of Massachusetts Land Use and Planning Law*.

debatable, the court will give deference to the local decision<sup>68</sup>. Deference to the local legislative body on fairly debatable land use regulations is common in all states. Massachusetts courts explain the reasoning behind such deference as:

the fact that the question is debatable does not empower a court to substitute its judgement for that of the legislative body...Zoning has always been treated as a local matter and much weight must be accorded to the judgement of the local legislative body, since it is familiar with the local conditions<sup>69</sup>.

The constitutionality of zoning in Massachusetts was upheld in Massachusetts courts in 1920, six years before zoning was upheld nationwide in the landmark US Supreme Court Case *Euclid V. Ambler Realty Co.* While the power to zone is clearly constitutional, the Massachusetts legislature's failure to condition this power based on planning and rationality leaves one of the least limitable powers of government vulnerable to abuse by local legislatures. Existing general and case law in Massachusetts do not require broad municipal zoning power to be based on any plan, resulting in no incentive for Massachusetts localities to practice long-term planning or develop a comprehensive plan. Because zoning is not mandated to be in accordance with long-term plans, land use decisions in Massachusetts are inherently arbitrary, ad-hoc, and susceptible to politics and short-term decision making which is contrary to best-planning practices.

### **Massachusetts Case Law as a Result of the Regulatory Framework**

Without state legislation requiring zoning to be in accordance with a plan, the resulting Massachusetts land use regulatory framework is chaos. Cities and towns are free to zone as they

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<sup>68</sup> *Sturges v. Town of Chilmark*, 380 Mass. 246, 256 (1980).

<sup>69</sup> *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 116-117 (1955).

please, making decisions inconsistent with their comprehensive plans (if one has been updated), bargaining away their police powers, and rezoning to the highest bidders<sup>70</sup>. The following case law is the result of the archaic land use scheme in Massachusetts whereby comprehensive planning has no legal meaning.

Rando v North Attleboro (1998)

In *Rando v Town of North Attleborough*, property owners challenged the validity of a zoning change of 37 acres of land from residential use to commercial use<sup>71</sup>. Property owners claimed the zoning change was contract zoning and that the town failed to follow its master plan. A Massachusetts appeals court ruled the rezoning did not constitute impermissible spot or contract zoning, affirming that the town took the “master zoning plan into account<sup>72</sup>.” The trial judge found the zoning change was a “valid exercise of local zoning power<sup>73</sup>.”

The plaintiff argued that because the developer agreed to pay \$260,000 to the town’s general fund rather than specifically earmarking the funds for a specific project cost incurred as a result of the proposed development, the vote to rezone the parcel was an invalid exercise of zoning power. The plaintiff also argued that the payment from the developer to the town was an extraneous consideration whereby the town contracted away its police powers.

Despite the \$260,000 payment from the developer to the city as a condition to the zoning amendment, the court’s decision found that the rezoning was “not improperly influenced to act

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<sup>70</sup> Curtin and Witten, “Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Spaces.”

<sup>71</sup> *Rando v. Town of North Attleborough*, 44 Mass.App.Ct. 603 (1998)

<sup>72</sup> *Rando v. Town of North Attleborough*, 44 Mass.App.Ct. 603 (1998)

<sup>73</sup> *Id.*

on behalf of the developer rather than in the best interests of the town<sup>74</sup>.” *Rando* raises many questions. Is this not a payment to a local government in exchange for a favorable zoning decision? Was the vote truly on the merits of the land use plan, goals, and policies of the town? How could the vote to rezone a parcel not be influenced by a cash payment from the developer? Will other cities and towns require or expect developers to provide a gift to the city as a condition of a zoning amendment?

The legal-basis for this decision rests on the presupposition that the intent of the gift from the developer to the city was to mitigate the impact of the development on the community. Upon further consideration, however, because the sum of money was arbitrarily calculated by the developer and deposited into the town’s general fund, the legal teeth to this condition are dull or nonexistent. There is no legal mechanism in place to force the town to spend its general funds on mitigating impacts from a particular development.

If the land use decision in *Rando* was not based on a monetary gift, perhaps it was based on the town’s master plan which includes elements of economic development, transportation, and conservation among other goals, policies, and objectives? This is the case in about half the states, but not in Massachusetts. The court’s decision elaborates “Neither the master plan itself nor the law requires that zoning be in strict accordance with a master plan<sup>75</sup>.” In fact, the court further diminishes any value of a master plan stating “it ‘should not be construed as a ‘blueprint’ for the entire town,” that a “‘blueprint’ does not provide flexibility,’ and that it was not the intent of the planning board, in drafting the master plan, ‘to produce a rigidly structured document’<sup>76</sup>.”

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<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

Additionally, the court's assessment only reviewed the land use decision with respect to a "master zoning plan" which is simply one element of what should be a comprehensive document. A plan that is comprehensive is one that takes into account zoning among other elements such as transportation, economic development, housing, open space, recreation, and capital improvement projects.

*Rando* reveals many problems with the land use regulatory framework in Massachusetts. Firstly, zoning can be changed in exchange for a gift of an amount arbitrarily calculated by the developer. Secondly, a zoning decision does not have to be consistent with the town's master plan, which is problematic because it eliminates any incentive for a municipality to plan comprehensively. Finally, because zoning does not have to be consistent with a plan, the bar for information needed to make a zone change is so low that the court states "the most that can be thought required is an analysis by town officials of land use planning considerations<sup>77</sup>."

Zoning regulation is one of the least limitable police powers. In Massachusetts, the only legal requirement for zoning decisions is that they be preceded by town officials "considering" land use planning. Adopting or amending land use regulations through a singular and myopic lens is inconsistent with best planning practices and importantly ignores the intent of zoning, which is a tool to guide the orderly growth and development of a municipality in a manner consistent with the needs of residents, economic development, natural resource preservation, transportation, and public infrastructure.

#### Durand v IDC Bellingham (2003)

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<sup>77</sup> *Rando v. Town of North Attleborough*, 44 Mass.App.Ct. 603 (1998)

If it was unclear in 1998 from *Rando v Town of North Attleborough* if zoning decisions are for sale in Massachusetts, the Supreme Court of Massachusetts made it clear they are in 2003. In *Durand v IDC Bellingham, LLC*. the court affirmed that an \$8,000,000 donation from a rezoning applicant to the town did not invalidate a rezoning, even though the money was not related to the mitigation costs of the proposed development<sup>78</sup>.

In this case, a parcel in Bellingham that was rezoned by the town to allow a powerplant was challenged by local residents as illegal contract or spot zoning. The zoning amendment was voted down by the town in 1995 but was approved two years later in 1997. The only circumstance that changed between 1995 and 1997 was that the utility company requesting the rezoning promised to gift the town eight million dollars if the town agreed to change the zoning. While the land court judge said the gift was “offensive to public policy,” the majority of the supreme court of Massachusetts concluded the rezoning did not violate state law and was therefore a valid exercise of legislative police power. The Massachusetts Supreme Judicial Court determined that because the monetary gift was voluntary and not a condition set by the town it did not void the zoning change.

A zoning regulation enjoys a strong presumption of validity. That is, a zoning change will only ever be undone if a plaintiff successfully demonstrates “by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety... or general welfare<sup>79</sup>.” The standard to overturn a zoning ordinance in Massachusetts is high, as the plaintiff “must prove facts which compel a conclusion that the

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<sup>78</sup> *Durand v IDC Bellingham, LLC* 440 Mass. 45, 793 N.E.2d 359 (2003)

<sup>79</sup> *Johnson v. Edgartown*, 425 Mass. 117, 121, 680 N.E.2d 37 (1997)

question of the validity of the ordinance is not even fairly debatable<sup>80</sup>.” Not only are cities and towns in Massachusetts not required to make land use decisions based on planning, but they are also not required to then protect their decisions from being overturned in the court system through the presumption of validity. This creates a recipe for disaster. There are no general laws by the state of Massachusetts that would compel the judicial branch to require cities and towns to make land use decisions in accordance with a plan. As a result, zoning decisions such as *Durand* reveal that the zoning of a parcel of land in Massachusetts can be sold for \$8,000,000 and objectors have no recourse as according to the state’s highest court, the sale was “a valid exercise of legislative police power<sup>81</sup>.”

The court’s decision in *Durand* made no mention regarding the consistency of the land use decision with a comprehensive plan or whether the decision to allow a power plant furthered the policies and objectives of transportation, energy, economic development, or resource preservation. Rather, the courts only assessed whether the town followed the procedural requirements of a zone change. This is unsurprising because Massachusetts General Law and case law created a framework that strengthens and encourages the practice of arbitrary decision-making for land use decisions.

#### National Amusements v City of Boston (1990)

The City of Boston’s attempt to rezone the use of a parcel from business to residential to prevent a new business from competition with established businesses demonstrates gaps in the Massachusetts planning framework that enable cities and towns to rezone parcels without sufficient planning analysis. In *National Amusements v the City of Boston*, the Boston Zoning

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<sup>80</sup> *Durand v. IDC Bellingham, LLC* 440 Mass. 45, 793 N.E.2d 359 (2003)

<sup>81</sup> *Id.*



Commission attempted to amend the zoning ordinance in order to prevent a developer from building a shopping center by-right. As stated in the decision by the Appeals Court of Massachusetts, “What is striking about the record is the absence of analysis of land use planning considerations by municipal authority before the decision to change the zoning was taken<sup>82</sup>,” the zone change was clearly out of spite, not based on land use considerations. The planning arm of the City of Boston, Boston Redevelopment Authority (BRA), “produced no information, for example concerning access to educational facilities, recreational facilities, or public safety services should the locus be used for residential purposes...some thought would ordinarily be given to air quality in connection with residential use, but the subject was not discussed<sup>83</sup>.”

The court discussed the need for planning considerations of education, recreation, public safety, and air quality to be analyzed before a land use decision is made, but stops short of mandating this planning prior to a land use regulation in *National Amusements v City of Boston*. It is therefore up to the Massachusetts legislature to mandate such a requirement that Justice Kass mentions in his decision, “Zone changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable<sup>84</sup>.” States such as Rhode Island agree—and have mandated all zone changes be made based on planning objectives—or in other words, consistent with their comprehensive plans.

Boston’s history of upholding arbitrary rezoning in the courts is the precise reason why Massachusetts needs to overhaul its land use regulatory framework. Until a new framework is

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<sup>82</sup> *National Amusements, INC. v. City of Boston*, 29 Mass.App.Ct. 305, 560 N.E.2d 138) (1990)

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

established, cities such as Boston will continue to rezone property arbitrarily. Sometimes the courts will uphold arbitrary decisions (see *Rando v Town of North Attleboro*) and other times courts will strike them down (see *National Amusements v City of Boston*). The lack of planning required for making land use decisions in Massachusetts results in unnecessary and wasteful litigation costs for cities, residents, neighborhood organizations, and developers. The resulting unpredictability and inconsistency in land use decisions can be solved through mandatory comprehensive planning, which would in effect require such decisions to be based on data, community input, and goals and policies adopted by the local legislature. Once a local plan is adopted, decisions to rezone can be assessed up against the plan.

### **Additional Problems: Housing, Subdivision, and Vested Rights**

#### The Anti-Snob Zoning Act

Because Massachusetts has no meaningful comprehensive planning requirement, the problem of locating and making available affordable housing, among other needs of the city or town, is magnified. Instead of requiring cities and towns to plan for housing comprehensively — by adopting housing goals and policies to meet a required amount of affordable housing in tandem with economic development, natural resource preservation, and public infrastructure — Massachusetts adopted the Anti-Snob Zoning Act which allows “any developer who agrees to limit their profit to an amount set by a subsidizing agency to request a waiver from any and all locally adopted rules, regulations or ordinances<sup>85</sup>.” As a result of this act, in communities where 10% of their housing stock is not considered affordable, housing policy is prioritized above all other municipal ordinances which have been adopted for proper natural resource preservation or

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<sup>85</sup> Witten, “Affordable Housing—At What Price?”

public infrastructure to protect health, safety and welfare. The statute's history is steeped in racist politics and was adopted by the Legislature as punishment to suburban support for court ordered integration of the Boston Public Schools<sup>86</sup>.

Communities seeking a comprehensive permit for an affordable housing development have a limited ability to impose reasonable restrictions that apply to all other developments in their community, including height, bulk, width, setbacks, density, and other traditional health, safety and aesthetic requirements<sup>87</sup>. Ignoring rules and processes adopted by the local government's legislature to prioritize one issue is the antithesis of sound comprehensive land use planning. Land use planning must be done holistically. Without a long-term plan and providing a mandatory opportunity to articulate goals, objectives, and priorities for the future, land use planning becomes a poll of the moment, generating solutions focused on one issue in a vacuum and creating problems for one interest group at the expense of another<sup>88</sup>. The Anti-Snob Zoning Act along with no meaningful comprehensive planning requirement makes land development practices in Massachusetts even more unpredictable and arbitrary.

### Approval Not Required

The Massachusetts Subdivision Control Law requires cities and towns to authorize land to be subdivided without going through a locally adopted subdivision review process or public hearing if each newly created parcel is on an existing road and meets minimum frontage requirements in the zoning ordinance<sup>89</sup> (the so-called "Approval Not Required" process). This provision allows lots along an existing road to be infinitely created, so long as the frontage

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<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Mass. Gen. Laws c 41 §§ 81K-81GG, the Subdivision Control Law

requirement is met. The Subdivision Control Law forces local planning boards to authorize the creation of new residential lots, even in the event they conflict with a town's comprehensive plan, should one exist, or if not, municipal policies or common sense. Subdivision regulations should further the goals and policies of a city or town, not contradict them. Subdivisions require the installment of municipal services such as water and sewer infrastructure and impact police and fire departments as well as school systems<sup>90</sup>. Exempting certain subdivisions from a full review process to examine the development's consistency with the character of the neighborhood, impact on population density, and the necessary public infrastructure to support such sprawl, leaves local governments powerless when attempting to plan for orderly development.

### Early Vesting

Despite no incentive to adopt a comprehensive plan in Massachusetts, cities and towns that do practice long-term planning—and attempt to update their zoning to conform to their plans—often face a flurry of applications from property owners to “freeze” their current zoning and vest their development rights under the existing zoning laws<sup>91</sup>. This “freeze” is allowed because the Massachusetts vesting statutes allow for very early vesting rights. If a zoning ordinance is anticipated to reduce the amount of development allowed on a parcel, change a use, or apply increased requirements as a prerequisite to development, a landowner in Massachusetts can file a preliminary plan with the city or town and have the zoning ordinance “freeze,” or vest all of the land shown on the submitted plan, pursuant to the existing zoning at the timing of

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<sup>90</sup> Russell, “Massachusetts Land-Use Laws—Time for a Change.”

<sup>91</sup> Id.

filing<sup>92</sup>. The very early vesting statute in Massachusetts results in a significant number of properties that can easily become preexisting non-conforming to zoning changes, eliminating the effectiveness of any new planning and land use policy<sup>93</sup>. A land use-lawyer and planning consultant in Massachusetts summarized the dysfunction caused by early vesting:

As soon as it becomes clear that a community intends to change its zoning regulations to be consistent with its master plan, property owners rush to file development applications because section 6 allows them to protect their rights by "freezing" the existing zoning. Sometimes these property owners even feel obligated to propose development they otherwise would not have proposed, just to freeze their zoning<sup>94</sup>.

Other states, such as Rhode Island, require a substantially complete application to be submitted prior to the enactment of the new zoning ordinance for rights to be considered vested<sup>95</sup>. In Rhode Island, a substantially complete application requires more thought, planning, and investment by a landowner than a single preliminary plan. In California, a late vesting state, development rights are not vested until the developer has either obtained a building permit or entered into a development agreement with the local government<sup>96</sup>. Rhode Island and California's vesting statutes ensure that any changes in land use regulation are not rendered inapplicable due to the ability to "freeze" old zoning.

## **Conclusion**

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<sup>92</sup> Mass. Gen. Laws c.40A, s.6

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> R.I. Gen. Laws § 45-24-44

<sup>96</sup> *Avco Community Developers, Inc. v South Coast Reg'l Comm'n*, 17 C3d 785, 793, (1976).

Massachusetts statutory and case law in regard to planning, subdivisions, housing and land development, results in a highly dysfunctional land use framework<sup>97</sup>. The absence of meaningful planning and consistency requirements coupled with the archaic Anti-Snob Zoning legislation<sup>98</sup> and early vesting statute create a land use environment ripe for uncomprehensive and arbitrary decision-making. As the implications for zoning regulations illustrate, in Massachusetts there is no consistency, predictability, or rationality governing one of the most powerful police powers. The result is a framework in which all stakeholders lose.

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<sup>97</sup> Russell, “Massachusetts Land-Use Laws—Time for a Change.” While Joel Russel’s writing is 19 years old, the issues that arise from the early vesting statutes in Massachusetts are increasing as a result of House Bill 5250 signed into law in 2021, also known as “Housing Choice Law”. The law reduces the quantum of vote required for legislative bodies to approve specified categories of local zoning and the issuance of specified special use permits, and mandates “by-right” multi-family housing districts in close proximity to public transportation.

<sup>98</sup>Witten, “Adult Supervision Required: The Commonwealth of Massachusetts’ Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act.”

## 4. A Different Model: Rhode Island Land Use Law

Until Rhode Island adopted the Comprehensive Planning and Land Use Act in 1988, it was in bad company with Massachusetts and other so called “non plan” states<sup>99</sup>. Comprehensive planning was not required and ad hoc decision making relating to land use was both legal and the norm.

This all changed, dramatically, in 1988. The Act requires all cities and towns to adopt a comprehensive plan. In addition, the plans must conform to statewide goals and be updated every 10 years. All municipal land use decisions are required to be in conformance with the plan. The Comprehensive Planning Act was followed by the Zoning Enabling Act in 1991, and the Land Development and Subdivision Review Enabling act in 1992, completing the trinity of one of the most robust planning regulatory frameworks in the country. This chapter discusses the alternative to the non-plan state regulatory scheme in Massachusetts, explaining the factors that led to Rhode Island’s model, the existing legislation, and the case law that followed the model legislation.

### **The Rhode Island Land Use Regulatory Framework**

A brief summary of the Rhode Island Comprehensive Planning and Land Use Act:

- Cities and towns shall create comprehensive plans that include all subjects outlined in the law.
- The plan must utilize a 20-year time frame when considering forecasts, goals and policies.

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<sup>99</sup> R.I. Gen. Laws § 45-22.2-1-12.

- Planning boards or commissions have the sole responsibility to prepare a comprehensive plan. It must include public participation and a minimum of one public hearing.
- Planning boards or commissions must submit the plan or amendment to the legislative body.
- The legislature must conduct one public hearing before adoption.
- Once a city adopts, it is transmitted to the Chief of Rhode Island Statewide Planning for review. The ordinance shall not become effective until it is approved by the State of Rhode Island Planning Council.
- The comprehensive plan cannot be amended more than 4 times in one calendar year
- Prior to the adoption of, or amendment to, a comprehensive plan, notice shall be given of the public hearing by publication of notice in a newspaper of general circulation within the city or town at least once each week for three (3) successive weeks prior to the date of the hearing.
- The Plan must contain the following elements, often referred to as the “mandatory elements”
  1. Goals and policies
  2. Maps
  3. Natural resource identification and conservation
  4. Open space and outdoor recreation identification and protection
  5. Historical and cultural resources identification and protection
  6. Housing
  7. Economic development
  8. Services and facilities



9. Transportation
10. Natural hazards
11. Land use
12. Implementation program<sup>100</sup>

Municipal comprehensive plans are submitted to the Rhode Island Division of Statewide Planning and are approved if found to be consistent with the State Guide Plan. The Rhode Island State Guide Plan is not a single document but a collection of plans on transportation, housing, economic development, energy, and natural resources among others. The multiple elements of the State Guide Plan are separately published and was established by Rhode Island General Law. Goals and policies of the State Guide Plan are adopted by the State Planning Council. The State Guide Plan is implemented to solve statewide problems that cannot be solved by cities and towns individually and require planning at a state-wide level<sup>101</sup>.

### **Rhode Island's Path to Planning**

How did Rhode Island adopt one of the most comprehensive land use regulatory frameworks in the country? First, they had the benefit of seeing the legislation in action of states who required planning and consistency, such as California, Oregon, and Florida in the 1960s and 1970s. Second, and most importantly, they had a champion in the statehouse with a background in landscape architecture who brought all parties together to craft a solution that passed both the house and senate of the state legislature with veto-proof support. As the smallest state by land area, and the second most densely populated state in the country, Rhode Island had no choice but

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<sup>100</sup> R.I. Gen Laws § 45-22.2-1-12.

<sup>101</sup> R.I. Gen. Laws § 42-11-10.

to create a model system for rational land use decision making when facing the challenges of the need for affordable housing, economic development, and environmental protection.

Rhode Island faced economic stagnation in the early 1980's which resulted in demand for a consensus among planning, government, and land development stakeholders to reform the existing land use framework<sup>102</sup>. The first attempt at creating a new growth management comprehensive planning system was led by the Rhode Island director of Statewide Planning in the 1970s. His proposal was modeled after the American Law Institute-American Bar Association Model State Land Development Code. There was a wave of statewide planning reform throughout the country to address the gaps, confusion, and lack of rational decision making as a result of the Standard Zoning and Standard City Planning enabling acts adopted in the early 20<sup>th</sup> century. Rhode Island attempted to join the land use reform movement, but the legislation fell short as a result of opposition from developers, small homebuilders, and local zoning boards<sup>103</sup>.

An economic resurgence in the 1980s led to the issuance of 24,000 building permits for residential development in Rhode Island<sup>104</sup>. Real or perceived, the state experienced the loss of open space, higher taxes to pay for new infrastructure as a result of new development, and rising housing costs<sup>105</sup>. All parties including developers, environmentalists, local governments, and concerned citizens found the existing land development process and regulatory framework inadequate for managing the pressures from such rapid growth<sup>106</sup>.

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<sup>102</sup> DeGrove, *Planning Policy and Politics Smart Growth and the States*.

<sup>103</sup> DeGrove, *Planning Policy and Politics*.

<sup>104</sup> Horlzman, "The Land-Use Commission Delivers a Landmark Bill."

<sup>105</sup> DeGrove, *Planning Policy and Politics*.

<sup>106</sup> Id.

Developers seemingly became open to reforming the planning framework because towns began adopting large-lot zoning and moratoriums on building to prevent growth<sup>107</sup>. Citizens were unhappy with the negative impacts on growth and environmentalist organizations such as Save the Bay were expanding their activism from restoring water quality to protecting the larger bay area<sup>108</sup>. The state legislature responded to the pressure to address the loss of open space, public access to the coast, and the rising housing costs in 1986 by the creation of a Land Use Commission (LUC)<sup>109</sup>. The Land Use commission was proposed and chaired by State Representative Bob Weygand. Rep. Weygand was a landscape architect and former chair of the East Providence Planning Board and therefore had a deep understanding of land use planning and the existing land development process<sup>110</sup>.

The LUC was composed of 23 members appointed by the governor, lieutenant governor, senate majority leader, house speaker and included state legislatures, membership from environmental, development, real estate, and local government interest groups<sup>111</sup>. The LUC held 35 public hearings and reached a consensus on the need for a comprehensive local plan, the need for zoning to be consistent with those plans, for special attention in the plans to environmental resources, and for documenting infrastructure needs and services as development occurred<sup>112</sup>.

The consensus drawn from the LUC passed the house and senate thereafter and became law in 1988<sup>113</sup>. Once planning was required for all cities and towns, the State Legislature followed the Planning Act with the Zoning Enabling Act of 1991 and the Land Development and

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<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

Subdivision Review Enabling Act of 1992. The timing of these acts demonstrates the strength and rationality of the Rhode Island model. The legislature knew that the first step in a rational decision-making process is to adopt a plan, then enable cities and towns to zone based on those plans, and approve or deny land development and subdivision projects based on consistency with zoning and plans. The Rhode Island model corrected what the Department of Commerce got wrong in the 1920s when they adopted the Zoning Enabling Act prior to the City Planning Enabling Act: it conflated zoning with comprehensive planning and sent states down a path of irrational decision making that Massachusetts has never corrected.

### **Rhode Island Zoning Enabling Act**

Zoning ordinances adopted independently of a plan rather than as a means to an end may tyrannize property owners<sup>114</sup>. A plan sets goals after which zoning is one tool used to reach that goal. If there is no goal, the government's power to restrict uses and intensity cannot be challenged in a meaningful way because there are no criteria the zoning needs to meet other than the broadest of standards which is to protect the health, safety, and welfare of the community. To prevent such ad hoc decision-making, Rhode Island's zoning ordinance requires a statement in any zoning ordinance or zoning amendment that the zoning is consistent with the plan. In other words, the community is required to state on the record, in writing in the ordinance, that their decision is consistent with their comprehensive plan and therefore is a valid use of their police power.

A zoning ordinance adopted or amended pursuant to this chapter shall include a statement that the zoning ordinance is consistent with the comprehensive plan of

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<sup>114</sup> Haar, "In Accordance with a Comprehensive Plan."

the city or town adopted pursuant to chapter 22.2 of this title, or as otherwise provided below and shall provide that in the instance of uncertainty in the construction or application of any section of the ordinance, the ordinance shall be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable elements of the comprehensive plan. Section 45-24-34(a) of the Zoning Enabling Act.

This is the strength of the Rhode Island framework that is noticeably absent from Massachusetts law and is the root of Massachusetts's chaotic land use decision making framework.

The Rhode Island courts have correctly distinguished a Comprehensive Plan from Zoning. The distinction between zoning and a plan is important because it demonstrates how a zoning ordinance is arbitrary if not made in conformance with a plan.

A central goal of comprehensive planning, as articulated by the General Assembly, is to encourage cities and towns to plan for orderly growth and development and the appropriate use of land, as well as for the protection and management of land and natural resources. See § 45-22.2-3. In contrast, municipal zoning regulations are necessary "to establish and enforce standards and procedures for the proper management and protection of land, air, and water as natural resources, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses." Section 45-24-29(b)(3) (emphases added)<sup>115</sup>.

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<sup>115</sup> *West v. McDonald*, 18 A.3d 526 (2011)

## Case Law: The Legislation in Practice

Prior to 1988, Rhode Island viewed the comprehensive plan as merely a guideline for land use decisions<sup>116</sup>. In *Mesolella v City of Providence*, the plaintiff proposed to build multi-family housing units in the City of Providence that complied with the City's R-3 zoning district. The City Council passed a zoning amendment to change the plaintiff's property to a R-1 zone which did not permit multifamily housing. A real estate expert witness for the plaintiff testified that:

no formula, scheme or plan followed in this change, and that it was changed specifically to eliminate a multi-family use on those two particular lots<sup>117</sup>.

In regard to the plans the city was making their decisions on, the Director of Planning and Urban Development for the City of Providence testified:

that although this plan had not been adopted by the city council, it had been adopted by the city planning commission in 1964. He also stated that the plan is a mere guideline that need not be followed by the city council.

The director was right, as the existing precedent in Rhode Island at the time was that "The comprehensive-plan requirement does not mean that zoning amendments must conform to a municipality's master plan<sup>118</sup>." Rhode Island courts defined the phrase comprehensive plan as a "scheme or formula of zoning that reasonably relates the regulation and restriction of land uses and the establishment of districts therefor to the health, safety, and welfare of the public and thus

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<sup>116</sup> Ruggiero, "The Rhode Island Comprehensive Planning and Land Use Regulation Act."

<sup>117</sup> *Mesolella v. City of Providence, R.I.*, 439 A.2d at 1375 (1982)

<sup>118</sup> *Sweetman v. Town of Cumberland*, 117 R.I. at 147-48, 364 A.2d at 1287 (1976)

to the police power<sup>119</sup>.” Therefore, if zoning is related to the protection of health, safety, or welfare then the amendment is valid. The court ultimately found Providence’s zoning amendment was not related to the public health, safety, or welfare, but the lack of consistency required between the zone change and the city’s comprehensive plan and the poor definition of a comprehensive plan resulted in an affordable housing development being stalled for years and tens of thousands of dollars of litigation costs. This is a consistent feature of the non-plan state regulatory framework; deference to the municipalities police powers but in doing so, allowing cities and towns to regulate land use without any tethering to a comprehensive plan.

*Mesolella v City of Providence* is analogous to *National Amusements v. the City of Boston* where the City of Boston arbitrarily amended its zoning ordinance until a court’s reversal. But the Massachusetts Appeals Court, in upholding the Land Court decision that overturned Boston’s efforts, did so on other grounds (finding that the City committed a “spot zoning” violation) rather than conclude that adopting zoning changes without linkage to a comprehensive plan was inherently arbitrary. When no planning is required, cities do not adopt or update plans, as evidenced by the City of Providence making decisions in 1978 based on a plan adopted by the city planning commission in 1964. When consistency between regulations and planning is not required, cities may lawfully conduct ad-hoc and irrational decision making.

### **The New Precedent:**

#### Narragansett v West Greenwich

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<sup>119</sup> *Mesolella v. City of Providence, R.I.*, 439 A.2d at 1375 (1982)

Following 1988, Rhode Island case law has consistently upheld the consistency doctrine established in the Rhode Island Comprehensive Planning and Land Use Act<sup>120</sup>. The first case the courts reviewed regarding the law came in 1994 in *Town of E. Greenwich v. Narragansett Elec. Co*<sup>121</sup>. The town argued that amendments made to their comprehensive plan did not interfere with a utility company's right to operate transmission facilities under preemptive provisions of Rhode Island general law. The town argued:

the amendments to its comprehensive plan are neither ordinances nor regulations and have no impact...the town asserts that the comprehensive plan is simply a long-range statement of planning goals which is not self-executing in nature, but requires some further public action to implement it, such as zoning or other regulatory ordinances<sup>122</sup>.

The Rhode Island Supreme Court disagreed, holding

We believe a comprehensive plan is not simply the innocuous general-policy statement the town contends it is. Instead, the comprehensive plan, comprised of 'text, maps, illustrations, or other media of communication,' establishes a binding framework or blueprint that dictates town and city promulgation of conforming zoning and planning ordinances...As a consequence, the town is legally compelled to enact or to amend its zoning ordinance in conformity with these amendments<sup>123</sup>.

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<sup>120</sup> Ruggiero, "A Practical Guide to Land Use Law in Rhode Island."

<sup>121</sup> Ruggiero, "A Practical Guide to Land Use Law in Rhode Island."

<sup>122</sup> *Town of East Greenwich v. Narragansett Elec. Co*, R.I., 651 A.2d 725 (1994)

<sup>123</sup> *Id.*



While the legislation was already clear, the courts correctly interpreted the intent of the law in affirming the comprehensive plan is a blueprint and is in fact the binding framework from which land use regulations are made. In Massachusetts's *Rando v North Attleborough*, the Court's come to the opposite conclusion in their interpretation of a comprehensive plan, stating "the masterplan itself provides that it 'should not be construed as a 'blueprint' for the entire town'<sup>124</sup>." Now, in Rhode Island, any citizen can look to a city or town's comprehensive plan's goals and objectives, and know the locality has established a basis for rational decision making regarding the long-term physical development of the municipality.

#### Town of Richmond v State of Rhode Island

The State of Rhode Island planned to construct a visitor center by the Department of Environmental Management (DEM) which was inconsistent with the Town of Exeter and Richmond's comprehensive plans. The towns sought a declaration from the court that the state was required to comply with the town's zoning ordinance, comprehensive plan, and subdivision regulations. The State argued they were immune from both the municipality's comprehensive plan and zoning ordinances because both towns' comprehensive plans expired. The case was decided by the Rhode Island Supreme Court in April of 2020. The decision interpreted both the Comprehensive Planning and Land Use Act and the Zoning Enabling Act to find:

when the state seeks to pursue a project in a municipality, it must first gain approval by the State Planning Council *solely* on the issue of whether the state's proposed project complies with the municipality's comprehensive plan...Such a

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<sup>124</sup> *Rando v. Town of North Attleborough*, 44 Mass.App.Ct. 603 (1998)

procedure is only required, per the Act, where a municipality has an approved comprehensive plan *at the time the state begins the project*<sup>125</sup>.

Because the Town of Richmond had a State approved Comprehensive Plan when the State informed the town of its plans for the project, the Court determined the State is required to obtain approval of comprehensive plan consistency. Furthermore, if the project is found to be consistent with the Comprehensive Plan, the State is then required to appear before the Town's Zoning Board to obtain any zoning relief necessary for the project.

the Zoning Enabling Act does not carve out an exemption from its application process for state agencies, nor does it carve out an exception for state agencies with regard to judicial enforcement...Therefore, the state and its agencies are required to act in conformity with a municipality's zoning procedures<sup>126</sup>.

*Richmond v State of Rhode Island* demonstrates the value Rhode Island places on local comprehensive planning, setting the precedent that statewide agencies must conform to local comprehensive plans and zoning ordinances. Oregon has a similar requirement where actions by State agencies must be consistent with locally adopted comprehensive plans that are acknowledged by the State<sup>127</sup>. Cities or counties in Oregon review a state agency's proposal and

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<sup>125</sup> *Town of Exeter v State of Rhode Island* (2020). This opinion is subject to formal revision before publication in the Rhode Island Reporter.

<sup>126</sup> *Id.*

<sup>127</sup> Oregon Revised Statutes §197.180. State agency planning responsibilities.

provide a land use compatibility statement (LUCS)<sup>128</sup>. Florida’s growth management legislation also requires state and regional agencies to cooperate with local land development regulations<sup>129</sup>.

The legal weight enjoyed by a city’s comprehensive plan that is approved by the State creates an incentive for local governments to keep their plans up-to-date. The rational decision-making process is held intact only when plans carry significant legal weight with respect to land use decisions.

### West v. McDonald

In a case where a neighborhood was designated as “Low Density Residential” in the East Providence Comprehensive Plan and where the petitioner’s development would exceed the density allowed in such an area, the Planning Board denied the application as not consistent with the city’s comprehensive plan. The case went to the Rhode Island Supreme Court to decide if a development can be denied if it conforms to a locality’s zoning regulations, but not to the comprehensive plan.

While the State requires zoning to conform to the comprehensive plan, the trial justice found that East Providence’s zoning ordinance was not inconsistent with their comprehensive plan, “because the Comprehensive Plan’s density requirement is in addition to-not inconsistent with- the dimensional requirements of zoning<sup>130</sup>.”

The petitioner argued “the comprehensive plan does not carry the weight of a statute, ordinance, or regulation, and, therefore, that those higher standards do not control.” The court

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<sup>128</sup> Id.

<sup>129</sup> Florida Statutes §163.3204. Cooperation by state and regional agencies.

<sup>130</sup> *West v. McDonald*, R.I., 18 A.3d 526 (2011)

disagreed, ruling that a proposal's inconsistency with a comprehensive plan trumps a proposal's consistency with zoning.

We must, therefore, conclude that there was no error in the denial of the application for a subdivision that did not comply with the comprehensive plan. To secure approval for his proposed development, it was West's burden to comply with the municipality's subdivision regulations, its comprehensive plan, and its zoning code<sup>131</sup>.

As a result of this ruling, the State of Rhode Island General Assembly amended the Rhode Island Comprehensive Planning and Land Use Act in 2011 to specifically state the procedure if a zoning ordinance is in conflict with an adopted comprehensive plan,

In instances where the zoning ordinance is in conflict with an adopted comprehensive plan, the zoning ordinance in effect at the time of the comprehensive plan adoption shall direct municipal land use decisions until such time as the zoning ordinance is amended to achieve consistency with the comprehensive plan and its implementation schedule<sup>132</sup>.

*West. V McDonald* demonstrates how consistent Rhode Island has been on valuing the Comprehensive Plan in land use decisions and the tremendous legal weight the statute affords the planning process. So much so, that a plan complied with the zoning regulations, but the city's Planning Board, Zoning Board of Appeals, Trial Court, Superior Court, and Rhode Island

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<sup>131</sup> Id.

<sup>132</sup> R.I. Gen. Laws § 45-22.2-13. Compliance and implementation.

Supreme Court all ruled that because a subdivision was not consistent with the Comprehensive Plan, the Planning Board had the right to deny the petitioner's request.

The General Assembly's amendment to the Act does not diminish the legal weight to the comprehensive plan, but instead incentivizes local governments to ensure consistency between their zoning and their comprehensive plan, or risk their zoning taking precedent over their plan in the event of a discrepancy. The Act's new language provides more transparency to all stakeholders, as readers of a zoning ordinance in any Rhode Island locality can expect the requirements to be consistent with the locally adopted plan.

## **Conclusion**

Rhode Island truly plans comprehensively, as each subdivision, zone change, or land development project in every municipality across the state is required to be found consistent with transportation, economic development, housing, natural resource conservation, open space, recreation, historical, and cultural goals and policies—the required mandatory elements of the plan<sup>133</sup>. The Ocean State serves as the model land use regulatory framework because its legislation mandating plans and enforcement of the consistency doctrine creates an environment where long-term planning is mandated and ad-hoc decision making is prohibited.

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<sup>133</sup> R.I. Gen. Laws § 45-22.2-6. Required content of a comprehensive plan.

## 5. Arguments Against Mandatory Comprehensive

### Planning

#### The Comprehensive Plan Invites Arbitrary and Discriminatory Municipal Practices

The Minnesota Supreme Court's decision in *RDNT LLC v City of Bloomington* held that a planning board that denies a subdivision application based on its inconsistency with a comprehensive plan "elevates the plan to the level of legally controlling zoning law<sup>134</sup>." The Court stated that

Such a result affords the Board unbounded discretion in examining a subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan. Using the Comprehensive plan as a tool for specific zoning decisions invites, rather than minimizes, arbitrary and discriminatory municipal practices<sup>135</sup>.

The Court's conclusion that a planning board has unbounded discretion in examining a subdivision application is unfortunate if not simply wrong. Under a requirement where zoning and planning must comply with a comprehensive plan, the planning board is bound by the plan. Just because there is debate among planners and the community on land use issues as to whether an ordinance or land development project is consistent with a comprehensive plan does not mean arbitrary decision-making is being made. In fact, public debate and discussion on conformance to

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<sup>134</sup> *RDNT, LLC v. City of Bloomington*, MN 861 N.W.2d 71, (2015).

<sup>135</sup> *Id.*

the locally adopted plan means the land use process based on rational decision making is working properly.

The Minnesota Court's claim that linking zoning and land use decisions to a comprehensive plan invites arbitrary and discriminatory decision-making is also incorrect. The consistency doctrine protects all parties involved in land-use planning by tethering regulations and land use decisions to a comprehensive plan: a document of goals and objectives adopted by the legislature and formulated by public hearings and data collection. Without a consistency requirement, property owners, renters, and neighbors have no predictable goal and objective on which decisions will be based on. Land use decisions not tied to a plan may be made at a whim, in a vacuum, on a specific parcel, without regard to city-wide land use, transportation, housing, open space, or preservation goals.

The Court's apparent but unfounded concern that a plan may be elevated to the level of "legally controlling zoning law" conflates a plan and a zoning ordinance. Under the consistency doctrine, the plan (a statement of goals and objectives) is not raised to a "legally controlling zoning law" but is the basis for the legally controlling zoning law. If zoning is inconsistent with the plan for a community it should be void ab initio. The consistency doctrine is a protection of property rights and a provision for more transparency in land use decision-making, not an overstep of the role of a comprehensive plan. If a legislature and unelected boards are not bound by a comprehensive plan, ad-hoc and arbitrary land use decisions may be made.

### **Comprehensive Plan Goals Can be too Specific or Vague**

A criticism of comprehensive planning during Oregon's adoption of a statewide mandate for all cities and towns to adopt a comprehensive plan was that:

If the...goals adopted by [LCDC] are too specific and technical, the commission will be accused of usurpation. If the goals are stated too generally, they will be meaningless because virtually any local planning decision could be interpreted as meeting loose state requirements<sup>136</sup>.

This is a criticism of a specific comprehensive plan, but not of the architecture of a state wide land use system. Under a mandatory comprehensive planning regulatory framework that enforces a consistency doctrine, the state mandates what each community needs to inventory, assess, and consider in their long-term plan; the state does not require the city create general or specific goals. A disagreement on the content of a plan is a policy debate for the local legislature who adopts and amends a plan. A statewide mandate requiring a plan will not eliminate policy debates, nor should it.

Because a city will be bound by their plan, there is an incentive for the locality to make the most appropriate plan for their needs. If a goal is too vague or specific, communities have the ability to amend their plans. The number of times a plan can be amended is limited to prevent abuse<sup>137</sup>.

### **Comprehensive Plans Should Only be a Guideline**

The argument against requiring consistency between land use decisions and a comprehensive plan was made in the *Rando v. Town of North Attleborough*. The court agreed that a master plan should be merely a guideline because a blueprint is too rigid, and that the “plan is not cast in concrete<sup>138</sup>.” States who have reformed their land use regulations understood that land uses,

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<sup>136</sup> Adler, *Oregon Plans*.

<sup>137</sup> R.I. Gen. Laws § 45-22.2-8. Preparation, adoption, and amendments of comprehensive plans.

<sup>138</sup> *Rando v. Town of North Attleborough*, 44 Mass.App.Ct. 603 (1998)



technology, and economies change, and as a result, land use maps may need to be updated more frequently than every ten years. To solve this problem of a plan being “cast in concrete”, Rhode Island’s comprehensive planning legislation allows a plan to be amended up to four times a year. An amendment to a plan in Rhode Island also reengages the public by requiring a public hearing, prior to which notice of the hearing shall be advertised for three consecutive weeks<sup>139</sup>.

A plan should have an element of rigidity. A plan that holds legal weight provides clarity to property owners, renters, developers, and users of recreational space. All stakeholders can rest assured their property and the property they abut will not be rezoned at a whim or without taking into account the long-term plan of the community. If the plan is simply a guideline, it becomes a moving target, and no predictability of future regulations of private property exist<sup>140</sup>.

### **Cities Can Not Afford the Cost of Comprehensive Plans**

A concern raised by cities and towns in states who adopted mandatory comprehensive planning was if they could handle the administrative, technical, and administrative burden of comprehensive planning if the mandate was unfunded<sup>141</sup>. Cities and towns often engage consultants to help with the creation of a comprehensive plan, as it requires a significant amount of data collection, writing, mapping, and community engagement which require costs in the form of time and material. The financial burden is a justified concern, but it should not be a barrier that prevents rational decision making. Plans do not need to be extravagant cost-draining

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<sup>139</sup> R.I. Gen. Laws § 45-22.2-8. Preparation, adoption, and amendments of comprehensive plans.

<sup>140</sup> R.I. Gen. Laws § 45-22.2-8. Preparation, adoption, and amendments of comprehensive plans.

<sup>141</sup> Adler, Oregon Plans.

documents, they need only provide the goals and objectives necessary for rational decision making<sup>142</sup>.

Public education, roads, and utilities are administratively burdensome and require financial support. Planning for the long-term growth of a community should also be considered a necessity of local government. The expense of the creation of a comprehensive plan is incurred once every ten years. A state mandate for comprehensive planning is a requirement for communities to think long term about the land use of their community and their ability to provide public infrastructure and services to existing and new development and should not be perceived as a burdensome or unrealistic expectation of local government.

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<sup>142</sup> R.I. Gen. Laws § 45-22.2-3. Legislative findings and intent — Statement of goals.

## 6. Recommendations for Massachusetts

Massachusetts' regulatory framework allows for arbitrary land use decision-making. To solve this problem, Massachusetts needs to adopt statewide legislation mandating consistency between zoning, land development, and subdivisions with the comprehensive plan. The consistency doctrine will incentivize communities to adopt comprehensive plans. This chapter first explains why Massachusetts has not reformed their planning legislation and what reform needs to be made to have a rational basis for land development in the Commonwealth.

### Why Wont Massachusetts Reform?

There have been multiple efforts to reform the statewide planning framework in Massachusetts. In 1990 the Massachusetts Special Commission on Growth and Change released their report following 18 months and 50 meetings which included public hearings across the state<sup>143</sup>. The Commission's report recommended Massachusetts adopt a statewide and regional growth policy requiring local governments adopt comprehensive plans consistent with regional and state plans, and a requirement that land use regulations be consistent with local plans<sup>144</sup>. A similar panel was assembled by the State in 1977, making similar recommendations, which were never implemented<sup>145</sup>.

The 1977 and 1990 planning reform problems and recommendations were not new to Massachusetts. A Boston Globe columnist argued in 1975 that "somewhere along the line it is to be hoped that it will dawn on everyone that land use planning is simply a skillful, sensible,

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<sup>143</sup> Dabilis, "Panel Finds Planning Lack Leads to Economic Chaos."

<sup>144</sup> Buchsbaum and Smith, *State & Regional Comprehensive Planning Implementing New Methods for Growth Management*.

<sup>145</sup> Dabilis, "Panel Finds Planning Lack Leads to Economic Chaos."

beneficial way to deal with growth<sup>146</sup>.” The benefits of master planning have been apparent to Massachusetts residents as far back as 1958, when a resident argued in the Boston Globe that

circumstances have too often prevented sufficient long-range planning of a community as a whole...a good master plan leaves the reader with understanding of his town’s personality... He is also left with an outline picture of its probable development and an idea of what action would be advisable and when. In the comprehensive picture that a master plan presents lies its greatest value<sup>147</sup>.

Reasons for the lack of action on the 1990 recommendations include the state’s declined economic climate in 1991, resulting in no political will to enact legislation that may have been opposed by the building community, despite clear benefits in a more transparent development process<sup>148</sup>. In 2003, an attempt was made at reform under a bill named the “Massachusetts Land Use Reform Act,” created by the Zoning Reform Working Group which consisted of a statewide coalition of planning boards to require consistency between zoning and town by-laws. This movement faced criticism from the Home Builders Association who argued the legislation would result in less housing<sup>149</sup>.

The most recent advances to overhauling the Massachusetts Land Use regulatory framework came in 2010 with the proposal of the “Comprehensive Land Use Reform and Partnerships Act” and in 2016 with “An Act Promoting the Planning and Development of Sustainable Communities.” Both efforts failed in the State House. Boston Globe archives reveal

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<sup>146</sup> Menzies, “Land-Use Planning Un-American?”

<sup>147</sup> Dudley, “Master Plans for Suburbia.”

<sup>148</sup> Buchsbaum and Smith, *State & Regional Comprehensive Planning Implementing New Methods for Growth Management*.

<sup>149</sup> Shartin, “Local Planners Push for Wider Authority Bill Would Update State Zoning Laws.”

the reason the state's land use laws have not been reformed is because of differences among planners, environmentalists, affordable housing advocates, and developers<sup>150</sup>.

The Massachusetts Planning Association, MassAudubon, and Livable Streets all make the argument that Massachusetts has the weakest and most outdated land-use laws<sup>151</sup>. Previous failures to reform the land use environment should not deter future efforts, as the need is as large as ever. In fact, each state that successfully reformed their land use regulatory framework did so only after failed attempts. The strongest and most applauded regulatory frameworks by the American Planning Association, Oregon and Rhode Island, had efforts that failed before a meaningful reform bill passed their respective state legislatures<sup>152</sup>.

## **Recommendations**

### 1. Adopt a Meaningful Comprehensive Planning Mandate

Section 81D of Massachusetts General Law should be amended to require local legislatures to adopt a master plan that serves as the binding element for the adoption of land use regulations; for the master plan to be based on a twenty year forward looking time-frame; to be updated every ten years, and for the plan's required elements to be consistent within each other. The local legislature should be required to hold a public hearing prior to the adoption of the plan.

### 2. Mandate Consistency

Given the chaos of the Massachusetts land use framework, the solution is for zoning, subdivisions, and land development projects to be required to be consistent with the locality's

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<sup>150</sup> Laidler, "Planners Push Land-Use Bill as Clock Ticks."

<sup>151</sup> Staff Writer, Staff Writer, "Our View: Time to Update Massachusetts Land Use Laws."

<sup>152</sup> DeGrove, *Planning Policy and Politics Smart Growth and the States*.

comprehensive plan. All local government zoning by-laws and ordinances should include a statement of consistency with the locally adopted comprehensive plan. Additionally, all comprehensive plans should be consistent with regional plans.

### 3. Implement a timeframe

A three-to-five-year timeframe should be established by which all localities should have a comprehensive plan adopted consistent with their regional plans. Zoning should then be consistent with these plans on a similar timeframe. Localities who have not recently updated their comprehensive plan and who's zoning is not consistent with their plans will need this time to collect data, engage the community, and update their plans.

### 4. Provide Funding:

Should Massachusetts adopt a stronger plan mandate and consistency requirement, they must provide funding to communities. Comprehensive planning is no small task as it includes public meetings, surveys, and a sincere collection of data and ideas from the community on a 20-year vision for their community. Some cities and towns seek the aid of consultants who specialize in such planning, while others are capable of creating a plan in-house. Either way, the once-in-ten-year project requires funds to pay for additional staff time, materials, data collection, software, and community engagement to provide a quality product to the legislative body for amendment and adoption. When the State of Rhode Island provided funding to municipalities to adopt a comprehensive plan, all cities and towns adopted a comprehensive plan, the only locality that did not was the Narragansett Tribe.

To ensure consistent updates every ten years, continued funding should be provided to localities to undertake a plan update. Some Rhode Island cities and towns have not consistently

updated their comprehensive plans every ten years. The recourse for not updating the plan in the original text of the Rhode Island Comprehensive Planning and Land Use Act was that the state would write a plan and impose it on the municipality. This section of the Act which has since been removed was never enforced because of the limited capacity of Statewide Planning. Municipalities may have ignored making decisions consistent with a plan they didn't adopt, creating a potential for litigation on every land use decision.

The most significant repercussions for a community in Rhode Island who does not update their comprehensive plan is that the plan becomes "expired" after ten years. After which, the State does not have to conform to the municipality's comprehensive plan.

Massachusetts can ensure communities consistently update their plans by providing funding for comprehensive planning. It is in the town's best interest to adopt goals and policies for long term planning that provide a basis for rational decision making. The town would also be protected from State agencies implementing projects in their locality which are inconsistent with the town's comprehensive plan. If towns have the funding to do so, as demonstrated in Rhode Island, they will adopt a plan. If the state then requires decisions to be consistent with that plan, the courts will have the ability to hold cities, developers, and all stakeholders to the plan.

### **Conclusion**

Comprehensive planning is intended to provide transparency and a basis for rational decision making. The largest impediment to adopting a meaningful comprehensive plan mandate and consistency doctrine in Massachusetts has been from the development community. In learning from other states who encountered a similar obstacle, it was Governor Tom McCall in Oregon, and Representative Bob Weygand in Rhode Island who made updating their state's land use

regulatory framework a personal mission and number one priority. A land use regulatory overhaul in Massachusetts will only come through political leadership shepherding a consensus driven bill that includes support from the development, environmental, planning, and housing communities. Massachusetts' natural resources, land, and their potential uses are too scarce for the 351 municipalities to continue making ad-hoc decisions not tied to a long-term comprehensive plan. Looking forward, Massachusetts has the benefit of learning from other states, especially its neighbor in Rhode Island, to be the new standard in comprehensive planning. A 1968 trial court decision in New York put it well, "Thus, the mandate of the Village Law (§ 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll<sup>153</sup>."

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<sup>153</sup> *Udell v. Haas*, 21 N.Y. 2d 463, 469 (1968)



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