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Planning Ahead: Consistency with a Comprehensive Land Use Plan Yields Consistent Results for Municipalities

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COMMENTS

Planning Ahead: Consistency with a Comprehensive Land Use Plan Yields Consistent Results for Municipalities

I. Introduction

Few areas of constitutional law have caused as much confusion among the lower courts as the Supreme Court's decisions on land use regulation.[1] The Court's interpretation of the Fifth Amendment has resulted in the adoption and abandonment of a constantly evolving series of tests that have become increasingly difficult for courts and local regulatory bodies to apply.[2] In particular, the Takings Clause has played a variety of roles in the past century, from guarantor of private investment to endorser of ongoing regulation.[3] Generally, the Takings Clause applies when a governmental body physically invades or completely condemns a landowner's property,[4] but in the absence of a physical invasion or condemnation, a state regulation of private property may affect the land so significantly that it becomes a "regulatory taking" which also triggers Fifth Amendment protection.[5] Whether a challenged taking is physical or regulatory, the Supreme Court's review of takings challenges is unlikely to yield any beneficial bright-line tests for physical or regulatory takings in the foreseeable future.[6]

Instead of bright-line precedent governing the taking of property with or without compensation, the Supreme Court has remained dedicated to ad hoc analysis based on the circumstances present in each case.[7] Because of the flexible nature of the circumstances in each case, factors in the Court's ad hoc

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1. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561-62 (1984).

2. *See id.* at 562.

3. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, Inc., 535 U.S. 302 (2002); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

5. *Mahon*, 260 U.S. at 415.

6. *See* Rose, *supra* note 1, at 562.

7. *See* Kelo v. City of New London, 545 U.S. 469, 483 (2005) ("For more than a century, [the Court's] public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."); *Tahoe-Sierra*, 535 U.S. at 336 ("Accordingly, [the courts] . . . eschew[] any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (internal quotation marks omitted) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring))).

analysis have proven difficult to consistently define when reviewing local government decisions.[8] Two examples make this point clear. First, in the field of physical takings, the "public use" restriction[9] placed on private property takings was recently analyzed by the Court and specifically limited to the facts of the case.[10] Second, with regard to regulatory takings, the Court has at times examined a landowner's "investment-backed expectations" in determining whether a regulation constituted a taking of his property.[11] Neither of these standards provides substantial guidance for lower courts considering similar issues.

This comment examines the difficulty local governments face in drafting ordinances regulating land use that meet the nebulous criteria of Supreme Court takings jurisprudence. The following parts of this comment suggest that state courts and legislatures, through their treatment of the relationship between local comprehensive planning legislation and zoning ordinances, play an important role in establishing certainty for local regulators under Supreme Court takings law standards. In particular, this comment argues that by requiring zoning ordinances to remain consistent with the local government's comprehensive land use plan, state courts can ensure more predictable outcomes under constitutional challenges and provide certainty for private landowners.

Part II of this comment describes the historical development of Supreme Court takings jurisprudence and the current tests the Court applies to challenges brought by landowners. Part III describes the two major approaches taken by state legislatures in setting a required level of consistency between local zoning ordinances and local comprehensive land use plans. Part IV details particular aspects of takings law that cause significant uncertainty among lower courts deciding such cases. Part IV also examines the effectiveness of the two major legislative approaches to zoning and their impact on certainty under takings law. Part V argues that the adoption of the mandatory consistency approach improves practical aspects of local land use regulation and other areas of constitutional law. This comment concludes in part VI.

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8. *See* John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465, 467 (1983).

9. *See* U.S. CONST. amend. V.

10. *Kelo*, 545 U.S. at 487 ("[T]he hypothetical cases posited by petitioners can be confronted if and when they arise.").

11. *Palazzolo*, 533 U.S. 606; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

II. The History of Takings Jurisprudence

The authors of the Takings Clause assumed that government has the ability to take private property through its power of eminent domain.[12] The Takings Clause places conditions on that power by requiring that the property be taken only for public use and that the government compensate the owner.[13] From its inception, the Takings Clause has protected landowners in situations in which the government permanently condemned or physically occupied a landowner's property.[14] As currently interpreted, the Takings Clause also protects owners whose property is not physically taken but is regulated to such an extent that the court will consider it a taking, thereby triggering protection under the Fifth Amendment.[15] This part examines both physical and regulatory takings law history, specifically discussing how the Supreme Court has shaped its takings doctrine concerning two issues: (1) when a regulation goes far enough to be considered a taking and (2) when a physical taking is considered to be for "public use." An understanding of the Court's historical approach to these two situations is essential for state governments who wish to develop land use regulation policy that will stand favorably against constitutional challenges.

A. Regulatory Takings History

Before 1922, states were free to impose regulations on private property so long as the Court could find authority under the state's police power. This, in turn, required a determination that the regulation was necessary to abate a public nuisance.[16] If the Court identified a public nuisance on the property in question, the state's police power automatically permitted the government to regulate the property without considering harm to the owner.[17] The U.S. Supreme Court gradually replaced such a broad interpretation of the police power in land use regulation cases in favor of the view that when a "regulation goes too far it will be recognized as a taking."[18] The following is a history of the Supreme Court's transition from rigid, nuisance-based deference to a

12. Brown v. Legal Found., 538 U.S. 216, 231-32 (2003).

13. *Id.*

14. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).

15. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

16. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a city ordinance that prohibited brick manufacturing and did not require compensation, despite its detrimental effect on the value of a brick manufacturer's property); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a statute prohibiting the manufacture of alcoholic beverages that did not require the state to compensate a brewer whose property was made almost worthless).

17. *Hadacheck*, 239 U.S. at 410.

18. *Mahon*, 260 U.S. at 415.

system of ad hoc standards that provides more flexibility in protecting landowners from regulatory takings.[19]

1. Pennsylvania Coal Co. v. Mahon*: The Birth of Regulatory Takings*

The Court first considered deviating from its nuisance-based policy in *Pennsylvania Coal Co. v. Mahon*,[20] in which the Court finally considered the issue of land use regulations' effects on property value under a Takings Clause analysis. In *Mahon*, a coal mining company challenged a state law effectively prohibiting the company from mining certain coal deposits deemed necessary to support the surface, thereby constituting a potential nuisance to owners of the surface property.[21] The majority opinion authored by Justice Holmes balanced the public benefits of the statute against the private injury suffered by the owner, concluding that the regulation had gone "too far" and required compensation under the Takings Clause.[22] The opinion failed to establish a clear test for determining when the balance tipped in the landowner's favor and thus required compensation. Instead, the Court merely declared that the distinction between regulation that involved valid use of the police power to abate a nuisance without compensation and regulation that involved a taking requiring compensation was a question of degree.[23] Thus, the *Mahon* Court's analysis under the Takings Clause opened the door for future regulatory challenges by ruling that it was possible to find a taking even when the regulation was originally justified by a public nuisance.[24]

2. Village of Euclid v. Ambler Realty Co.*: Upholding Zoning Ordinances*

Four years after it decided *Mahon*, the Supreme Court harkened back to its policy of deferring to local government's land use regulation when it upheld a zoning ordinance in *Village of Euclid v. Ambler Realty Co.*[25] The city implemented a typical zoning plan forming districts and restricting land use to certain purposes within each district.[26] The plaintiff owned land in a district

19. The analysis of takings law history and development in Part II is not a comprehensive account. It does not include cases that involve an elimination of all economically viable use of property, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which called for a per se taking in such situations. Regulations that deprive an owner of all viable use of his property are beyond the scope of this comment.

20. *Mahon*, 260 U.S. 393.

21. *Id.* at 412.

22. *Id.* at 415.

23. *Id.* at 416.

24. *Id.*

25. 272 U.S. 365 (1926).

26. *Id.* at 379-80.

that was no longer zoned for use in an industrial capacity and claimed that the deprivation of his ability to use his land for industrial purposes was a due process and equal protection violation.[27] The *Euclid* Court reverted to its pre-*Mahon* position and held that when the state used its police power validly to prevent a public nuisance at the expense of restricting land use, the state was not required to compensate the owner.[28]

3. Penn Central Transportation Co. v. City of New York*: The Balancing Test*

Over the next fifty years, the Supreme Court analyzed regulatory takings challenges under the pre-*Mahon* nuisance standard, determining that a state may regulate without compensation those land uses the Court found to be obnoxious to the public.[29] In *Penn Central Transportation Co. v. City of New York*, however, the Court added to the *Mahon* rule, holding that a land use regulation could go "too far" and thus require "just compensation."[30] Penn Central owned Grand Central Station in New York City and had applied to the city for a building permit to construct a fifty-five-story tower on top of the station.[31] The city agency in charge of the application denied Penn Central's request, because construction of the tower violated the city's landmark preservation ordinance which considered the station a landmark.[32] Penn Central claimed that the preservation ordinance's restriction as applied to its property was a regulatory taking requiring compensation.[33]

Justice Brennan's majority opinion found that *Penn Central* was not a case in which the regulation went so far as to be labeled a taking, but formulated a new regulatory takings test in the process.[34] To analyze an alleged regulatory taking, the Court listed three factors for balancing public benefits with private injury.[35] The factors were: (1) the economic impact on the owner; (2) the "character of the governmental action"; and (3) the extent to which the regulation interfered with the owner's "distinct investment-backed expectations."[36]

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27. *Id.* at 384.
28. *Id.* at 388-89.
29. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); *see also* Miller v. Schoene, 276 U.S. 272 (1928).
30. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
31. *Id.* at 115-17.
32. *Id.* at 117.
33. *Id.* at 119.
34. *Id.* at 138.
35. *Id.* at 124.
36. *Id.*

In crafting this test, the *Penn Central* Court failed to clearly define the term "investment-backed expectations." Justice Brennan, however, relied heavily on this factor to find that no taking existed in this case because Penn Central was still able to earn a reasonable return from its property by doing what it had always done — operating passenger trains.[37] By confining its analysis of the owner's current investment-income expectations instead of future income expectations, the Court added a specific standard to determine when a regulation went "too far," causing a private injury that outweighed the public benefit.

The *Penn Central* factors are still used in a large number of regulatory takings cases. In particular, the "investment-backed expectations" factor has been heavily relied upon despite causing significant debate when a government actor restricts a landowner's desired use of his property.[38] Subsequent Supreme Court case law has elaborated on this factor,[39] but for a number of reasons discussed later,[40] the "investment-backed expectations" factor has not served as a precise measure for balancing a regulation's public benefit against a private injury.

4. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*: Temporary Regulatory Takings*

After *Penn Central*, the next significant contribution to ad hoc regulatory takings law was Justice Rehnquist's opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[41] Following a devastating flood, the county enacted a moratorium forbidding all construction and improvements at the plaintiff's campground.[42] The Supreme Court was asked to determine whether, if the ordinance constituted a taking, the county was required to compensate the church for the period of time between the enacting of the ordinance and the judicial determination that a taking had occurred.[43] The Court ruled that if a taking had occurred, then the period of

37. *Id.* at 129.

38. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

39. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), held that a zoning ordinance is a taking if it fails to "substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Id.* at 260. This appears to be a modification of the "investment-backed expectations" factor, because the language focuses on the value of the owner's land after the regulation is enacted rather than his expectations beforehand.

40. *See infra* Part IV.

41. 482 U.S. 304 (1987).

42. *Id.* at 307.

43. *Id.* at 306-07.

time governing the taking was compensable.[44] Justice Rehnquist reasoned that the prescribed remedy covered a period of time beginning with the regulatory event that imposed the conditions amounting to a taking rather than the formal judicial declaration that a taking had occurred.[45] Such a remedy existed even if the regulation had since ceased.[46]

The *First English* holding suggested that the Takings Clause is remedial, rather than prohibitive, in nature.[47] In other words, the Takings Clause does not forbid the government from taking private property, but merely provides the owner with a remedy in such a case. Although the *First English* majority distinguished compensable temporary takings from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," the imaginary line between a taking determined on the facts and a "normal delay" poses ambiguity.[48]

5. Palazzolo v. Rhode Island*: Clarifying the Role of Investment-Backed Expectations*

In *Palazzolo v. Rhode Island*,[49] the Supreme Court returned to the "investment-backed expectations" factor, altering this already confused aspect of takings determinations. In *Palazzolo*, the landowner brought a takings challenge based on a state coastal wetlands regulation prohibiting construction on his land.[50] Notably, the owner received title to his property after the regulation was enacted — a fact that worked to automatically bar the takings claim, according to the state.[51] Although the Court refused to find a taking, it refuted the state's argument.[52] In his majority opinion, Justice Kennedy noted that takings jurisprudence had established that some regulations "are unreasonable and do not become less so through passage of time or title."[53]

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44. *Id.*
45. *Id.* at 319.
46. *Id.*
47. *Id.* at 315.
48. *Id.* at 321. The *First English* concept of allowing a landowner to recover compensation from a government actor based on prior regulation is known as "inverse condemnation" and subjects a multitude of temporary regulations to a possible compensation requirement. *Id.* at 318. Further, the issue of compensation for a temporary regulation subjects a broader range of municipal ordinances, including those that are only designed to *delay* a particular use of land, to scrutiny under the Takings Clause. *See id.*
49. 533 U.S. 606 (2001).
50. *Id.* at 611.
51. *Id.* at 614.
52. *Id.* at 627.
53. *Id.*

Based on *Palazzolo*, a property owner's "investment-backed expectations" will not be literally construed against him based on regulations in force at the time the owner took title to the property. In other words, the Court will not bar a takings claim simply because the owner had notice of a regulation's application to his property at the time he received the property.[54] As a result, the *Palazzolo* "investment-backed expectations" holding eliminated any hope that courts could rely on such a concept as a bright-line test in ruling on regulatory takings.

6. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, Inc.*: Temporary Takings Under the* Penn Central *Balancing Test*

Confirming the Court's adherence to ad hoc balancing, Justice Stevens's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, Inc.*[55] lessened the scope of the Supreme Court's only per se regulatory takings test to date.[56] This test, developed in *Lucas v. South Carolina Coastal Council*, created a per se takings rule to apply when an owner is deprived of all viable economical use of his property.[57] In *Tahoe-Sierra*, the Court addressed the issue of whether a temporary moratorium on construction and development should constitute a per se taking.[58] The Court held that temporary regulations cannot result in a per se taking but must instead be analyzed under the *Penn Central* factors.[59] Consequently, the number of takings challenges that can be determined based on a per se rule are extremely limited, and the *Penn Central* factors, and all of the debate and uncertainty surrounding them, are the chief means for deciding regulatory takings.[60]

As a result of the above cases, regulatory takings doctrine currently requires an ad hoc analysis under the *Penn Central* factors to determine whether a regulation has gone too far, therefore requiring just compensation. The exception to the use of ad hoc analysis arises when an owner is deprived of all economical use of his property, thereby invoking a per se taking under *Lucas*. Additionally, in the case of temporary regulations, ad hoc analysis under *Penn Central*, and not a per se taking, is always appropriate in determining whether Fifth Amendment protection applies.

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54. *Id.*
55. 535 U.S. 302 (2002).
56. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
57. *Id.*
58. *Tahoe-Sierra*, 535 U.S. at 306.
59. *Id.* at 337.
60. *See id.*

B. Physical Takings History

Courts must not only decide whether a regulation has gone too far and has, thus, become a taking, but also whether a physical invasion or condemnation of private property satisfies the Fifth Amendment's "public use" requirement. The Supreme Court's jurisprudence on physical takings is less complex than its regulatory takings history because of the Court's presumption that a physical invasion of property is more onerous than mere regulation of use; therefore, the Court does not balance factors to find that a "taking" has occurred.[61] The following two cases represent the Supreme Court's approach to the government's physical invasion or condemnation of a landowner's property.

1. Loretto v. Teleprompter Manhattan CATV Corp.*: Physical Taking Per Se Rule*

In *Loretto*, the Supreme Court reviewed a New York statute requiring landowners to permit the installation of equipment by cable television companies on the landowners' property.[62] The petitioner purchased a building with an existing cable line in place along the building's roof and exterior wall.[63] The landowner claimed that the statute allowing the cable company to install its equipment mandated a physical invasion of her property that qualified as a taking under the Fifth Amendment.[64] The Supreme Court agreed with the landowner and created the per se rule that all permanent physical invasions of property were considered takings under the Fifth Amendment.[65] Because the New York statute effected a taking, the Supreme Court required the state to pay at least a nominal amount of compensation.[66]

2. Kelo v. City of New London*: Defining the "Public Use" Requirement*

Under *Loretto*, all permanent physical invasions of property invoke the Takings Clause, but a physical invasion must also satisfy the Fifth Amendment's "public use" requirement. This requirement represents the most recent Takings Clause debate. In *Kelo v. City of New London*,[67] the Supreme Court interpreted "public use" broadly in holding that the city could use its power of eminent domain to acquire property that it planned to transfer, at

61. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).
62. *Id.* at 421.
63. *Id.* at 438.
64. *Id.* at 424.
65. *Id.* at 435-36.
66. *Id.* at 441.
67. 545 U.S. 469 (2005).

least in part, to private businesses.[68] The government had instituted a comprehensive development plan designed to "revitalize an economically distressed city" by attracting jobs, increasing tax revenue, and improving the city aesthetically.[69] After citing a number of cases that shared the Court's broad view, Justice Stevens, writing for the majority, argued that the definition of "public use" had long ago exceeded its literal constraints, and instead was interpreted to require that the government's interest in the property serve a "public purpose."[70] According to Stevens, even government projects that did not result in use by the public were still deemed to serve a "public purpose" if they presented a benefit to members of the public.[71]

Nevertheless, the *Kelo* Court stressed its reluctance to apply bright-line tests to takings challenges and insisted that its holding was limited to the facts presently before it.[72] Justice Stevens reasoned that classification of a governmental act as one that served a public purpose was a task for the legislature and, thus, deferred the public purpose determination served in *Kelo* to the legislature.[73] Because the city viewed the enactment of a comprehensive development plan as the best solution to its economic stress problem, the Court applied a rational basis review, refusing to interfere with New London's decision, because the plan's goal served a legitimate public purpose and the plan itself was rationally related to achieving it.[74]

In addition to granting general deference to local government decisions, Justice Stevens noted that the presence of a comprehensive plan served to define the public purpose and allowed the Court to simultaneously review the rights of all the owners affected.[75] In contrast, the use of eminent domain to transfer property from one private owner to another in the absence of a comprehensive plan "would certainly raise a suspicion that a private purpose was afoot."[76] Thus, the *Kelo* opinion set the precedent that local government can ensure greater deference to its regulatory scheme through the use of more comprehensive land use planning.

68. *Id.* at 488-90.
69. *Id.* at 472 (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004)).
70. *Id.* at 480-83.
71. *Id.* at 482-83.
72. *Id.* at 485-88.
73. *Id.* at 482-83.
74. *Id.* at 483.
75. *Id.*
76. *Id.* at 487.

III. The Relationship Between Zoning and Comprehensive Land Use Plans — Two Approaches

In *Village of Euclid v. Ambler Realty Co.*, discussed above, the Supreme Court implied that courts should review challenges of zoning ordinances, among other comprehensive land use plans, in a manner similar to other types of regulatory takings cases.[77] The *Euclid* Court held that the states' police powers give them the authority to divide land into exclusive zoning districts according to type of use, building height, and lot size and to establish different restrictions that apply to each district.[78]

Thus, a preliminary overview of *Euclid* land use regulation techniques available to state and local governments is a necessary prerequisite for a discussion of which techniques are constitutionally and practically favorable. The following parts provide an explanation of provisions included universally in enabling statutes, an overview of how state legislatures differ in delegating to local government the power to enact comprehensive land use plans and zoning legislation, the standards by which the state courts review local zoning legislation, and the role that local comprehensive land use plans play in that standard.

A. Enabling Statutes

Under the U.S. Constitution, local governments have no inherent authority to regulate land use; they must derive their authority from the state legislature.[79] Each state has created enabling legislation that authorizes municipal governments to draft land use plans and zoning ordinances in their respective areas.[80] A typical enabling statute grants municipalities the power to regulate land use for the purpose of promoting the public's health, safety, morals, and general welfare.[81]

As a result of such delegation of the state's police powers, the municipalities' actions taken pursuant to the police power are subject to the same constitutional standards of review as actions taken by the state itself pursuant to such powers.[82] In addition to Takings Clause constraints, typical

77. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

78. *Id.* at 397.

79. Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997); Clark v. Town Council, 144 A.2d 327, 332 (Conn. 1958).

80. Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 688-89 (2001).

81. *Id.*

82. Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be*

enabling legislation imposes further restrictions on the local government's regulatory authority.[83] These restrictions include limitations on purposes that justify regulatory actions, requirements for the organization of regulatory agencies, and the imposition of procedural safeguards.[84]

A review of the Standard State Zoning Enabling Act (SZEA) provides a basic understanding of the common conditions that legislatures place on the authority they delegate to municipalities.[85] The United States Department of Commerce drafted the SZEA in 1926, and it has since served as the template for the majority of state enabling statutes.[86] While the SZEA's basic structure and some of the original language have survived, each state may adjust its enabling legislation to address evolving land use needs. These changes can severely impact a local zoning policy's structure and its constitutional validity. Prior to detailing these modifications and their effects, however, one must review the SZEA, as it serves as the starting point for typical state enabling legislation.

Sections 1 through 3 of the SZEA function as a grant of zoning authority to the local municipality. The first section of the SZEA, like most state statutes, begins by expressly granting the state's police power to the municipality for the purpose of regulating various aspects of local land use.[87] The next section of the SZEA permits the local government to divide land in its jurisdiction into districts for any of the regulatory purposes allowed under the statute.[88] The third section of the SZEA lists the specific purposes for which zoning ordinances may be enacted.[89] This section also requires that zoning ordinances "be made in accordance with a comprehensive plan," and that "[n]o zoning should be done without . . . a comprehensive study."[90] The stated purpose for the comprehensive plan requirement is to "prevent haphazard and piecemeal

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Consistent with an Independently Adopted Comprehensive Plan: A Model Statute, 3 WASH. U. J.L. & POL'Y 295, 297 (2000).

83. *Id.* at 297-98.

84. *Id.*

85. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter STANDARD STATE ZONING ENABLING ACT], *reprinted in* MODEL LAND DEV. CODE app. A (Tentative Draft No. 1, 1968).

86. Ross D. Cohen, *Why Require Standing if No One Is Seated? The Need to Clarify Third Party Standing Requirements in Zoning Challenge Litigation*, 42 BRANDEIS L.J. 623, 627 (2004).

87. STANDARD STATE ZONING ENABLING ACT, *supra* note 85, § 1, at 4-5.

88. *Id.* § 2, at 6.

89. *Id.* § 3, at 6-7.

90. *Id.* § 3 & n.22, at 6.

zoning."[91] Nevertheless, the SZEA neither defines the term "comprehensive plan," nor elaborates on the procedure for developing one.

Sections 4 through 6 of the SZEA provide procedural requirements for the exercise of the authority granted in section 1 through 3. Sections 4 and 5 of the SZEA outline the procedure a municipal body must use to adopt zoning legislation and to consider petitions to amend or make exceptions to its legislation.[92] Section 6 allows the municipality's legislature to appoint a zoning commission, whose task it is to advise the legislature on its regulatory decisions.[93] The legislature is not bound by the commission's recommendation, but it cannot take action without first receiving the commission's report.[94]

Sections 7 and 8 of the SZEA provide for review and enforcement of the municipality's actions under sections 1 through 6. Section 7 permits the appointment of a board of adjustment to decide when it is appropriate to deviate from the requirements of the municipality's ordinances.[95] The SZEA restricts the board of adjustment's discretion in granting variances to situations in which doing so "will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship."[96] In addition, section 7 provides the state court appellate procedure for appeals of board of adjustment decisions.[97] Finally, section 8 empowers the local legislature to draft ordinances for the purpose of enforcing its acts under the enabling statute, including punishment of violations by misdemeanor.[98]

In summary, the SZEA and its successor enabling statutes describe the scope of the police power that states delegate to their local governments. Because the delegated powers are specifically enumerated rather than general, a municipality's authority to regulate land use is subject to more restrictions than just those in the U.S. Constitution. One such limitation is the list of acceptable regulatory purposes for regulation provided in section 3 of the SZEA.[99] The series of procedural requirements for passing legislation and making amendments detailed in sections 4 and 5 represents another such

91. *Id.* § 3 n.22, at 6.
92. *Id.* §§ 4-5, at 7-8.
93. *Id.* § 6, at 8-9.
94. *Id.* at 9.
95. *Id.* § 7, at 9.
96. *Id.* at 11.
97. *Id.* at 10-11.
98. *Id.* § 8, at 12..
99. *Id.* § 3, at 6-7.

limitation.[100] For purposes of this comment, however, the most important enumerated limitation is the requirement in section 3 that zoning legislation "be made in accordance with a comprehensive plan."[101]

B. Differing State Requirements for Consistency with a Comprehensive Land Use Plan

The limitations placed on municipal land use regulation by state enabling statutes affects how the state courts review challenges to such regulations brought by landowners.[102] In particular, the role that a state assigns a municipality's comprehensive land use plan is decisive in establishing the level of discretion the municipality has in drafting zoning ordinances.[103] States fall into one of two general categories with regard to the role assigned to a comprehensive plan: majority or minority.

Enabling statutes in majority states *do not require* mandatory consistency with a comprehensive plan, and therefore grant local legislators more discretion to make regulatory land use decisions that fall outside the scope of their comprehensive land use plan, if a plan is even required.[104] Minority states have enacted enabling legislation mandating that each zoning ordinance be strictly consistent with a comprehensive land use plan developed by the municipality.[105] The minority position has the effect of limiting local legislator discretion to actions within the scope of an existing comprehensive land use plan.[106] Whether a state requires mandatory or nonmandatory consistency with a comprehensive plan is sometimes the creation of judicial interpretation, rather than a difference in the literal reading of the enabling statutes.[107] As mentioned above, many states borrow their enabling statute language regarding comprehensive plans from section 3 of the SZEA, which states that zoning ordinances "shall be made in accordance with a comprehensive plan,"[108] but even states borrowing such language interpret this phrase in various ways.[109]

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100. *Id.* §§ 4-5, at 7-8.
101. *Id.* § 3, at 6.
102. *See, e.g.*, Gonzalez v. County of Tulare, 76 Cal. Rptr. 2d 707, 712 (Ct. App. 1998).
103. *Id.*
104. *Id.*
105. Edward J. Sullivan, *Recent Developments in Land Use, Planning and Zoning Law*, 36 URB. LAW. 541, 541 (2004).
106. *Id.*
107. Meck, *supra* note 82, at 305.
108. STANDARD STATE ZONING ENABLING ACT, *supra* note 85, § 3, at 6.
109. Meck, *supra* note 82, at 296-97.

1. Majority States: Nonmandatory Consistency with a Comprehensive Plan

Most states are nonmandatory states, meaning that their legislatures, courts, or both do not require each municipality to maintain strict consistency between every zoning ordinance the municipality enacts and the municipality's comprehensive land use plan.[110] Three subcategories exist within the nonmandatory category. First, states such as Oklahoma do not require any level of consistency between zoning ordinances and a comprehensive land use plan. In fact, these states do not require the existence of such a plan at all; therefore, these states forego a review for consistency and review such zoning ordinances under a rational basis standard.[111] The second subcategory of majority states, including Arizona, does not require each municipality to enact a comprehensive land use plan, but, if such a plan exists, these states require some level of consistency between a municipality's zoning ordinances and a land use plan.[112] The third subcategory of majority states, including Virginia, requires both the existence of a comprehensive land use plan in each municipality that wishes to enact zoning ordinances and some level of consistency, but these states do not require strict compliance between the zoning ordinances and the comprehensive plan.[113]

a) Oklahoma: Comprehensive Land Use Plan Not Required and Rational Basis Review of All Zoning Ordinances

The Oklahoma enabling statute is an example of legislation in majority states that delegates zoning authority to municipalities without requiring the passage of strictly consistent regulations and land use plans.[114] It is typical for enabling statutes in majority, nonmandatory states to require some type of relationship between zoning legislation and a comprehensive plan, but usually, as is the case in Oklahoma, these provisions are not interpreted to require strict consistency with a comprehensive plan.[115] Instead, courts in majority states grant zoning ordinances a presumption of validity, and defer broadly to the municipality's discretion under a variety of standards of review regardless of the ordinances' relation to a comprehensive plan.[116]

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110. *Id.*

111. *See, e.g.*, Holtzen v. Tulsa County Bd. of Adjustment, 2004 OK CIV APP 74, ¶ 23, 97 P.3d 1150, 1153; Tulsa Rock Co. v. Bd. of County Comm'rs, 1974 OK CIV APP 35, ¶ 19, 531 P.2d 351, 359.

112. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-462.01(F) (Supp. 2006).

113. *See, e.g.*, VA. CODE ANN. § 15.2-2223 (Supp. 2006).

114. 11 OKLA. STAT. § 43-103 (2001).

115. Meck, *supra* note 82, at 305.

116. *See id.*

As an example, the Oklahoma statute provides that "[m]unicipal regulations as to buildings, structures and land shall be made in accordance with a comprehensive plan."[117] Oklahoma courts, however, do not impose any restrictions on municipalities' zoning power beyond that which is present in the U.S. Constitution.[118] Oklahoma courts review zoning decisions under a common standard known as the "fairly debatable" standard.[119] An ordinance reviewed under this standard is upheld if "reasonable men [could] differ as to whether [it] is reasonable."[120] The "fairly debatable" standard is a product of constitutional analysis of substantive due process challenges under the Fourteenth Amendment and not a statutorily imposed restriction on municipal regulatory power.[121] The "fairly debatable" standard is the functional equivalent of the "arbitrary and capricious" or rational basis standard and provides a great deal of deference to local government regulatory decisions.[122] Therefore, in Oklahoma, the state legislature grants to municipalities the full authority of the state's police power regarding land use regulation and imposes no additional conditions in the enabling statute.

Holtzen v. Tulsa County Board of Adjustment[123] is an example of the deference Oklahoma courts afford zoning decisions. In *Holtzen*, the county had a comprehensive land use plan in place which did not include uses creating amusement park rides.[124] Nevertheless, the county's board of adjustment granted a special exception to its zoning legislation permitting the applicant to build a roller coaster in an area zoned for agricultural use only.[125] The parties agreed that the special exception was clearly in conflict with the plan.[126] Despite this, the court held that when there was a conflict between a zoning action and a land use plan, the zoning ordinance controlled.[127] Thus, because of the court's deference, construction of the roller coaster proceeded.[128]

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117. *Id.* The language in the Oklahoma statute is taken directly from the SZEA. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 85, § 3, at 6.

118. Heisler v. Thomas, 1982 OK 105, ¶ 5, 651 P.2d 1330, 1331.

119. *Id.*

120. City of Oklahoma City v. Barclay, 1960 OK 264, ¶ 16, 359 P.2d 237, 241.

121. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

122. Caldwell v. City of Norman, 1987 OK CIV APP 86, 748 P.2d 51.

123. 2004 OK CIV APP 74, 97 P.3d 1150 (2004).

124. *Id.* ¶ 6, 97 P.3d at 1151.

125. *Id.* ¶¶ 3-5, 97 P.3d at 1151.

126. *Id.* ¶ 12, 97 P.3d at 1152.

127. *Id.* ¶ 21, 97 P.3d at 1153.

128. The court actually found that "the overwhelming weight of authority from other jurisdictions holds that where a conflict exists, the zoning laws themselves prevail over the

In addition to deferring to local legislatures' ability to draft regulations inconsistent with a comprehensive land use plan, Oklahoma courts do not even require a comprehensive plan beyond the zoning ordinance itself.[129] In *Tulsa Rock Co. v. Board of County Commissioners*,[130] the plaintiff mining company purchased an unzoned tract of land it wished to mine.[131] The local legislature then zoned the entire area for agricultural use and prevented the company from conducting its mining operations.[132] In upholding the board's decision, the Oklahoma Court of Civil Appeals stated that a comprehensive plan did not have to exist outside of the zoning ordinance and that the ordinance could stand on its own.[133] Further, the court applied the deferential "fairly debatable" standard to the ordinance; such that, in light of the valid ordinance, no mining operations were allowed to commence.[134]

In short, Oklahoma's enabling statute provision, which reads "in accordance with a comprehensive plan,"[135] has been interpreted by its courts as eliminating a comprehensive plan requirement and, therefore, provides municipal legislators' zoning decisions significant deference.[136] As Part IV of this comment discusses, states whose courts interpret such provisions in this manner risk depriving their citizens of the benefits associated with a distinct, written comprehensive land use plan. Further, this interpretation could deprive their municipalities of the constitutional certainty a comprehensive plan provides.

b) Arizona: Judicially-Created "Basic Harmony" Consistency Requirement

Some majority states do not require that a written comprehensive land use plan exist, but, when one is in existence, these states require some level of consistency.[137] Arizona interprets its comprehensive land use plans in such a fashion.[138] The Arizona enabling statute states that "[a]ll zoning and rezoning ordinances or regulations adopted under this article shall be consistent with and conform to the adopted general plan of the municipality, if any, as adopted

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comprehensive plan." *Id.*

129. Tulsa Rock Co. v. Bd. Of County Comm'rs, 1974 OK CIV APP 35, 531 P.2d 351.

130. *Id.*

131. *Id.* ¶ 4, 531 P.2d at 353.

132. *Id.*

133. *Id.* ¶ 15, 531 P.2d at 358.

134. *Id.* ¶ 19, 531 P.2d at 358.

135. 11 OKLA. STAT. § 43-103 (2001).

136. Holtzen v. Tulsa County Bd. of Adjustment, 2004 OK CIV APP 74, 97 P.3d 1150; *Tulsa Rock Co.*, 1974 OK CIV APP 35, 531 P.2d 351.

137. *E.g.*, ARIZ. REV. STAT. ANN. § 9-462.01(F) (Supp. 2006).

138. *Id.*

under article 6 of this chapter."[139] The statute expressly relieves the municipality of any requirement to draft a comprehensive land use plan.[140] And, similar to Oklahoma courts, Arizona courts do not require the existence of a comprehensive land use plan.[141] Oklahoma and Arizona differ, however, in the level of judicial deference granted when a comprehensive plan is in place. *Haines v. City of Phoenix*[142] illustrates this difference.

In *Haines*, a resident challenged a rezoning that allowed a builder to construct a 500-foot-tall tower in a zone that otherwise permitted structures a maximum of 250 feet in height.[143] The resident claimed the rezoning decision violated the enabling statute's requirement that any city ordinance "be consistent with the adopted general or specific plans of the municipality."[144] Although the court affirmed the city council's motion for summary judgment, the Arizona Court of Appeals, unlike the Oklahoma Court of Civil Appeals in *Holtzen*, refused to apply the rational basis standard in its review of the rezoning decision and, instead, applied a heightened standard to the city's rezoning decision.[145]

Applying a stricter standard than rational basis, the *Haines* court reasoned that the state legislature's inclusion of a consistency requirement in its enabling statute evidenced its intent to impose restrictions on the city's zoning powers beyond the restrictions imposed by the U.S. Constitution.[146] Therefore, application of the rational basis standard of review, appropriate in substantive due process challenges, gave no effect to the enabling statute's consistency requirement, but, instead, would treat the Constitution as the only check on the city's zoning power.[147] The court defined "consistency" under the meaning of the Arizona enabling statute as those zoning decisions that were "in basic harmony with the general plan."[148] Despite its more exacting standard, however, the court held that the rezoning decision under review was in "basic harmony" with the general plan, because it was consistent with specific goals

139. *Id.*

140. *Id.* ("All zoning and rezoning ordinances or regulations adopted under this article shall be consistent with and conform to the adopted general plan of the munipicality, *if any* . . . ." (emphasis added)).

141. *See* Haines v. City of Phoenix, 727 P.2d 339, 340-41 (Ariz. Ct. App. 1986); *see also supra* text accompanying note 137.

142. 727 P.2d 339.

143. *Id.* at 341.

144. *Id.* at 342 (quoting ARIZ. REV. STAT. ANN. § 9-462.01(E) (Supp. 1986) (amended 1992)).

145. *Id.* at 343-44.

146. *Id.*

147. *Id.*

148. *Id.* at 344.

of the plan.[149] For instance, the plan sought to increase commercial development in the area, free up open space, and provide opportunities for landscaping.[150] Further, the height restrictions were only mentioned in precatory language of the plan.[151] Thus, the rezoning ordinance furthered each of the plan's goals to the extent it could be considered in "basic harmony" with the city's general plan.[152]

The "basic harmony" standard employed by Arizona courts reflects lesser deference to the municipality's regulatory discretion than that of Oklahoma's "fairly debatable" standard. Although neither state's enabling statute requires a written comprehensive plan,[153] Arizona courts at least afford the legislature's call for consistency with existing comprehensive plans some meaning. Comprehensive land use plans, therefore, play a greater role in Arizona where local governments have an incentive to commit resources to research and development of community master plans. Likewise, members of the community benefit from the likelihood of greater economic certainty once a land use plan is in place, because the courts have assured landowners that further action by the local government will at least be in harmony with the goals of the plan.

Because it does not require a comprehensive land use plan to be in place before the municipality can enact zoning ordinances, however, the Arizona enabling statute as interpreted may have the perverse effect of discouraging the adoption of such plans in the first place. Local legislators wishing to maintain heightened discretion in their zoning decisions could simply avoid creation of any type of official land use plan that might later act as a barrier to regulatory actions. Therefore, in Arizona, economic certainty for landowners is reserved for members of communities whose governments have opted to tie their future zoning decisions to some type of comprehensive land use plan.

c) Virginia: Statutory Requirement for Existence of a Comprehensive Plan and "Reasonable Consistency" Requirement for All Zoning Ordinances

The approach of some nonmandatory states closely reflects the comprehensive land use plan requirements of mandatory states. Such states, Virginia for example, require the existence of a comprehensive land use plan as a prerequisite for the power to enact zoning ordinances.[154] Additionally,

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *See supra* text accompanying notes 137, 140-41.
154. *See, e.g.*, VA. CODE ANN. § 15.2-2223 (Supp. 2006).

these states require some level of consistency, short of strict consistency, between zoning decisions and the plan.[155] The Virginia enabling statute requires that "every governing body shall adopt a comprehensive plan for the territory under its jurisdiction," and provides specific elements that must be present in each plan.[156] Specific elements include "long-range recommendations for the general development of the territory covered by the plan" and "a transportation element that designates a system of transportation infrastructure needs and recommendations."[157] The Virginia enabling statute also requires that "zoning ordinances and districts shall be drawn and applied with reasonable consideration for . . . the comprehensive plan."[158] Municipalities in Virginia who wish to enact zoning ordinances are therefore obligated to ensure that such a plan exists and to consider plans in existence.[159]

In 1997, the Supreme Court of Virginia interpreted the predecessor statute[160] to the current enabling statutes, which contained the current statutory requirements.[161] In *Town of Jonesville v. Powell Valley Village Ltd. Partnership*, the plaintiff-builder received a zoning permit under existing town zoning ordinances.[162] The town subsequently amended its zoning ordinance in a manner that precluded the builder's desired land use; the builder then applied for a building permit based on the previous zoning ordinance.[163] The town denied the building permit, and the builder sought declaratory relief in state court.[164]

The builder asserted that the zoning ordinance was invalid because the town had failed to adopt a comprehensive plan beforehand.[165] The town claimed that the ordinance itself contained the elements required of a comprehensive plan, but merely failed to label itself as such.[166] The Supreme Court of Virginia agreed with the builder. Because several elements required by the enabling statute were missing from the ordinance,[167] the court concluded that

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* § 15.2-2284 (2003).
159. *Id.*
160. VA. CODE ANN. §§ 15.1-446.1, -490 (1989 & Supp. 1996), *repealed by* Act of Mar. 20, 1997, ch. 587, 1997 Va. Acts 976, 976.
161. Town of Jonesville v. Powell Valley Vill. Ltd. P'ship, 487 S.E.2d 207 (Va. 1997).
162. *Id.* at 208.
163. *Id.* at 208-09.
164. *Id.* at 209.
165. *Id.*
166. *Id.* at 210.
167. *Id.*

the town's zoning ordinance did not achieve the status of a comprehensive plan, and was therefore invalid under the Virginia statute.[168]

Virginia's policy of mandating the existence of a comprehensive land use plan in each municipality addresses the concerns of uncertainty present in Oklahoma and Arizona.[169] The builder in *Powell Valley Village* is an example of a landowner who benefited from the certainty that accompanies the required existence of a land use plan in his community.[170] According to the *Powell Valley Village* court, comprehensive plans "provide[] a guideline for future development and systematic change, reached after consultation with experts and the public. '[T]he Virginia statutes assure [landowners] that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning.'"[171] When a municipality is forced to both research its future land use options and publish the results of that research through a comprehensive land use plan, the security of landowner expectations and the encouragement of real estate investment are likely results. Nevertheless, because Virginia's enabling statute calls for "reasonable consideration" of the comprehensive plan in all zoning ordinances,[172] it is still one step short of inclusion with minority states that require strict consistency between zoning ordinances and the comprehensive plan.

2. Minority States: Mandatory Consistency with a Comprehensive Plan

A minority of states mandate that municipalities make all zoning ordinances strictly consistent with a comprehensive land use plan.[173] In these minority states, the legislature, the courts, or both require municipalities to draft a comprehensive land use plan and then treat it as a legally binding document for the purpose of enacting zoning ordinances.[174] Initially, the policy of requiring consistency with a comprehensive plan was adopted through litigation.[175] Recently, however, many states which mandate consistency with a comprehensive plan have enacted their mandatory policy through legislation.[176] Regardless of the mechanisms for instituting a mandatory

168. *Id.* at 211.

169. *See* VA. CODE ANN. § 15.2-2223 (Supp. 2006); *see also supra* text accompanying notes 137, 140-41.

170. *Powell Valley Village*, 487 S.E.2d at 76.

171. *Id.* (last two alterations in original) (quoting Bd. of Supervisors v. Snell Constr. Corp., 202 S.E.2d 889, 892 (Va. 1974)).

172. VA. CODE ANN. § 15.2-2223.

173. Sullivan, *supra* note 106, at 541.

174. *Id.*

175. *See, e.g.*, Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973) (holding that all zoning changes must be consistent with a comprehensive land use plan).

176. *See, e.g.*, CAL. GOV'T CODE § 65860 (West Supp. 2007); N.J. STAT. ANN. § 40:55D-62

consistency policy, such a policy results in less zoning discretion for municipalities, as they are confined by the provisions in their own comprehensive land use plans.[177]

a) California: Mandatory Compatibility with the Goals and Objectives of the Comprehensive Plan

California's enabling statute expressly requires all zoning ordinances to be "consistent with the general plan of the county or city."[178] The statute's definition of "consistency" requires satisfaction of two conditions: (1) that such a plan first be officially adopted and (2) that zoning ordinances be "compatible with the objectives, policies, general land uses, and programs specified in the plan."[179] This definition of consistency is similar to the consistency policy enforced in majority states such as Virginia, which also require a comprehensive land use plan to be in place prior to the enacting of zoning ordinances and requires "reasonable consistency" between zoning ordinances and the comprehensive plan.[180] Unlike Virginia courts, however, California courts require more than "reasonable consistency" between zoning ordinances and comprehensive plans by requiring compatibility with the specific objectives of the plan.

The difference between Virginia's and California's requirements lies in the level of deference afforded to municipalities' zoning decisions. Although the Virginia legislature requires both the existence of a comprehensive plan before zoning ordinances can be enacted and "reasonable consistency" between the plan and the ordinance,[181] Virginia courts view the comprehensive plan as "an advisory guide that does not bind the locality."[182] Thus, the comprehensive plan is only one factor under the "reasonable consistency" analysis applied by Virginia courts, which tend to focus more on the reasonableness of the zoning decision as it relates to the public's general welfare rather than as it relates to the comprehensive plan.[183] Further, Virginia courts give great deference to municipalities, by permitting them to interpret their own comprehensive land use plans.[184]

(West Supp. 2006).

177. Edward J. Sullivan, *The Evolving Role of the Comprehensive Plan*, 32 URB. LAW. 813, 837 (2000).

178. CAL. GOV'T CODE § 65860(a).

179. *Id.*

180. *See* VA. CODE ANN. § 15.2-2223 (Supp. 2006).

181. *Id.*

182. Guest v. Bd. of Supervisors, 42 Va. Cir. 348, 352 (Cir. Ct. 1997) (quoting JOHN H. FOOTE, PLANNING AND ZONING IN VIRGINIA 10-23 (1996)).

183. *Id.* at 351.

184. *Id.* at 352.

In contrast to Virginia courts, California courts that review zoning decisions strictly interpret California's compatibility requirement. Rather than simply considering the comprehensive plan as one factor in a reasonableness analysis,[185] California courts apply mandatory consistency, requiring that all zoning ordinances strictly conform to the comprehensive land use plan.[186] Thus, the comprehensive plan must contain a statement of the city's development policies and objectives,[187] and a reviewing court will invalidate all zoning ordinances containing objectives that are inconsistent with the policies and objectives expressed in the comprehensive plan.[188]

Lesher Communications, Inc. v. City of Walnut Creek is an example of a California court's application of the zoning enabling statute's compatibility requirement.[189] In *Lesher*, the city passed an initiative measure that limited municipal growth.[190] The court, however, considered the city's comprehensive land use plan to be "growth oriented" because its objectives included expansion of residential and commercial areas and densities as well as encouragement of development.[191] As a result of the incompatibility between the antigrowth objectives of the city's initiative ordinance and the growth-oriented goals of the city's comprehensive plan, the court ruled that the ordinance was invalid.[192] The city argued that the initiative ordinance operated as an amendment to the comprehensive land use plan and that, therefore, no need existed to find compatibility between the two.[193] The court rejected such an argument because the electorate who passed the ordinance was notified that it was approving an ordinance — not an amendment to the city's comprehensive land use plan.[194]

The court also rejected the related argument that the voters' willingness to condone the antigrowth objectives of the ordinance was enough evidence to show that the voters intended to amend the comprehensive plan.[195] The court found that allowing an ordinance to transcend the objectives of the comprehensive plan would render the compatibility requirement in the enabling statute meaningless.[196] If the court held otherwise, every zoning

185. Lesher Commc'ns, Inc. v. City of Walnut Creek, 802 P.2d 317, 322 (Cal. 1990).
186. *Id.*
187. CAL. GOV'T CODE § 65302(a) (West Supp. 2007).
188. *Lesher*, 802 P.2d at 324.
189. *See id.* at 317.
190. *Id.* at 318.
191. *Id.* at 319.
192. *Id.* at 322.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*

ordinance that conflicted with the comprehensive plan could be considered evidence of intent to overrule the comprehensive plan, negating the legislature's intent to make comprehensive plans binding as to all future zoning ordinances.[197]

California legislative and judicial insistence on a binding comprehensive land use plan places California in the minority of states as a "mandatory" state.[198] While California and Virginia occupy the middle ground on the mandatory versus nonmandatory spectrum, the two states are distinguished by the level of deference given to municipalities when zoning ordinances are not entirely consistent with an existing land use plan.[199] In a nonmandatory state such as Virginia, municipality discretion still remains, even where the court identifies inconsistency between a municipality's zoning ordinance and the comprehensive land use plan.[200] In a mandatory state such as California, however, a finding of inconsistency between a zoning ordinance and the comprehensive plan will render the ordinance invalid.[201] Some mandatory states, such as New Jersey, however, require even greater consistency regarding the requisite level of consistency between zoning ordinances and the comprehensive land use plan than California.[202]

b) New Jersey: Substantial Consistency with the Master Plan

The New Jersey zoning enabling act, New Jersey's enabling statute, further removes municipalities' zoning discretion by requiring that "all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements."[203] The enabling statute also specifies the means by which a municipality may overcome the consistency requirement, entailing a vote of a majority of the full governing body, typically a city council.[204] Thus, the New Jersey statute requires greater consistency than the California statute, because the New Jersey statute provides the elevated standard of "substantial

197. *Id.*
198. Sullivan, *supra* note 179, at 830.
199. *Compare Lesher*, 802 P.2d 317, *with* Guest v. Bd. of Supervisors, 42 Va. Cir. 348 (Cir. Ct. 1997).
200. *Guest*, 42 Va. Cir. at 352.
201. *Lesher*, 802 P.2d at 322.
202. N.J. STAT. ANN. § 40:55D-62 (West Supp. 2006).
203. *Id.* § 40:55D-62(a)
204. *Id.*

consistency" with particular elements of the plan and specifies the only means by which the "substantial consistency" requirement can be foregone.[205]

New Jersey courts have strictly applied the substantial consistency requirement to challenged zoning decisions.[206] In *East Mill Associates v. Township Council*, the Superior Court of New Jersey reviewed an ordinance that rezoned an area from one that permitted apartment buildings to one that only permitted single family residences.[207] A landowner challenged the ordinance under the New Jersey enabling statute, claiming that the ordinance was not substantially consistent with the township's land use plan.[208] The Superior Court sided with the landowner, ruling that the ordinance was inconsistent with the land use plan because the plan called for the land in question to be used for industrial purposes.[209] As a result, the township's ordinance was held to be invalid, and the property was again zoned to permit construction of apartment buildings.[210]

The consistency policies in mandatory states such as California and New Jersey create a different regulatory environment than in nonmandatory states, because zoning decisions made by the local legislators in mandatory states are limited by more than the legislature's discretion and judicial review under a rational basis standard.[211] Instead, municipalities in mandatory states are required to express their informed policies in a published comprehensive land use plan and do not have discretion to act outside the parameters set forth in such a plan.[212] As a result, individual zoning decisions in mandatory states are part of a more predictable pattern based on compliance with the policies and goals the municipality has already expressed in its land use plan.[213] Thus, landowners in mandatory states are able to make more informed decisions about future uses of their property without the same concerns of sudden, undirected changes in zoning policy present in nonmandatory states.[214] In addition to landowner certainty, strict consistency requirements produce certainty for municipalities in the face of landowners' constitutional challenges to zoning decisions.

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205. *Id.*
206. *See* E. Mill Assocs. v. Twp. Council, 575 A.2d 61 (N.J. Super. Ct. App. Div. 1990).
207. *Id.* at 62.
208. *Id.*
209. *Id.* at 63.
210. *Id.*
211. *See* CAL. GOV'T CODE § 65302(a) (West Supp. 2007); N.J. STAT. ANN. § 40:55D-62 (West Supp. 2006).
212. *See* CAL. GOV'T CODE § 65302(a); N.J. STAT. ANN. § 40:55D-62.
213. Meck, *supra* note 82, at 316.
214. Udell v. Haas, 235 N.E.2d 897, 901 (N.Y. 1968).

IV. The Effectiveness of the Mandatory Consistency Approach in Addressing Areas of Uncertainty in Takings Law: Public Use and Investment-Backed Expectations

A state's choice between adopting a mandatory or nonmandatory approach to consistency between zoning ordinances and comprehensive land use plans affects the decisions of individual landowners and local governments within the state.[215] Specifically, the decision impacts the future formation of land use policy in each municipality and investment decisions made in the private market.[216] In mandatory states, local governments are compelled to make careful decisions regarding long-term land use regulation, and landowners enjoy more certainty in their property investments based on the comprehensive plan's land use policies combined with the knowledge that such policies will be given effect in zoning ordinances.[217] In nonmandatory states, local governments are less likely to be concerned with researching and implementing detailed plans for future land use policy, because such planning is not required to enact zoning ordinances.[218] Landowners in nonmandatory states are, therefore, more likely to experience uncertainty and hesitation in their property investment decisions given that zoning decisions are not necessarily predicated by a carefully considered comprehensive land use plan and are limited only by the municipalities' discretion.[219]

In addition to addressing long-term city planning and landowner concerns, mandating consistency between zoning ordinances and land use plans increases the likelihood that local ordinances are constitutionally valid.[220] Two types of landowner challenges under the Takings Clause, regulatory takings challenges and "public use" challenges, are particularly threatening to municipalities' efforts to enact valid land use ordinances.[221] First, zoning ordinances are threatened by *Penn Central's* doctrine that regulation may go "too far" and, thus, become a regulatory taking.[222] Municipalities have an interest in ensuring that their zoning ordinances do not result in a taking, because such a ruling diminishes the local governments' resources either by

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215. Robert F. Benintendi, *The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 DAYTON L. REV. 207, 227 (1991).

216. *Id.*

217. *Id.* at 221.

218. Ronda Larson, *The End of an Era: Suburban Village Aversion in* Citizens for Mount Vernon v. City of Mount Vernon, 74 WASH. L. REV. 367, 370-72 (1999).

219. Benintendi, *supra* note 217, at 227.

220. *Id.* at 225.

221. *See* Kelo v. City of New London, 545 U.S. 469 (2005); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

222. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

forcing them to pay compensation to landowners or by forcing them to abandon the regulation and start over with a new ordinance. Second, even if a municipality is willing and financially able to compensate landowners of condemned property, the municipality may face a suit challenging and invalidating the ordinance as an unconstitutional taking that was not for "public use."[223] Such a finding forces a municipality to abandon a regulatory scheme on which it had likely spent time and resources and to initiate another regulation capable of withstanding a Takings Clause challenge.

Furthermore, in the case of either a regulatory taking or a "public use" challenge, the municipality incurs litigation costs in defending the challenge.[224] Therefore, municipalities have a strong interest in accurately predicting which ordinances might fail either a regulatory takings challenge or a public use challenge.[225] Because Supreme Court decisions addressing regulatory takings and "public use" are governed by uncertain ad hoc analysis,[226] a municipality's ability to predict the type of regulation that will remain valid under the Takings Clause is uncertain.

A state's decision to adopt a mandatory land use policy can circumvent the uncertainty surrounding U.S. Supreme Court regulatory takings and "public use" decisions. In short, states can mitigate these two forms of constitutional uncertainty inherent in drafting valid ordinances by requiring a comprehensive land use plan to be in place in each municipality and by requiring that ordinances be consistent with that plan.

A. The Effect of Mandatory Consistency on the Uncertainty Surrounding "Investment-Backed Expectations"

A significant source of the confusion surrounding regulatory takings decisions stems from the Supreme Court's consideration of a landowner's investment-backed expectations as one of the three factors the *Penn Central* Court presented in its regulatory takings test.[227] Because regulatory takings jurisprudence now requires use of *Penn Central*'s ad hoc analysis in all regulatory takings challenges except those involving permanent deprivation of all use of the property, a landowner's investment-backed expectations play

223. *See Kelo*, 545 U.S. at 452-54.

224. Dwight H. Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1, 2 (2001).

225. *Id.* at 1-2.

226. *See supra* Part II.A.

227. Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 894-95 (2002).

a primary role in determining whether a regulation has gone too far, thus requiring the payment of compensation.[228]

In considering the investment-backed expectations of a landowner who brings a regulatory takings challenge, the Supreme Court has refused to consider dispositive a landowner's awareness of regulatory restrictions on his property at the time of its acquisition.[229] In rejecting this so-called "notice rule,"[230] the Supreme Court has held that *Penn Central* should not be interpreted as considering such knowledge by the landowner an absolute bar to his ability to challenge the regulation as a taking.[231] Instead, the *Penn Central* holding requires consideration of the overall reasonableness of the regulation based on the three *Penn Central* factors, including the landowner's investment-backed expectations.[232] Thus, although the U.S. Supreme Court does not recognize a per se "notice rule," *Penn Central* still requires analysis of a landowner's reasonable investment-backed expectations at the time he acquired the property.[233] According to Justice O'Connor's concurring opinion in *Palazzolo*, the regulations that existed at the time the landowner acquired the property in question help define the reasonableness of the owner's expectations and should, therefore, be given consideration in deciding whether a regulatory taking has occurred under *Penn Central*.[234]

After *Palazzolo*, however, investment-backed expectations are not considered a bar to nor a controlling factor in favor of a takings claim.[235] Additionally, the Supreme Court has failed to articulate a clear template for the amount of weight given to the regulatory environment that existed at the time the owner acquired his property.[236] The absence of a clear rule leaves lower courts free to deny regulatory takings claims as long as they find that a landowner's expectations as to the use of his property were not reasonable as of the time he acquired the property.[237] This means that if a local legislature can establish that a landowner challenging zoning legislation had *unreasonable* expectations at the time he acquired the property, the ordinance is likely to withstand scrutiny under the Takings Clause.

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228. *Id.* at 895.

229. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833-34 (1987).

230. Stein, *supra* note 229, at 893-94.

231. *Palazzolo*, 533 U.S. at 630.

232. *Id.*

233. Stein, *supra* note 229, at 897.

234. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

235. Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 37-38 (2003).

236. *Id.* at 15.

237. *Id.* at 38.

A municipality could establish that a landowner's investment-backed expectations were unreasonable at the time of acquisition if the municipality shows that he was on notice of a zoning regulation that prohibited the use for which the landowner seeks approval. Although the *Palazzolo* holding prohibits treating the notice issue as controlling, Justice O'Connor's opinion in that case makes it clear that the regulations in place at the time of acquisition contribute to the reasonableness analysis.[238] Because the regulatory environment in place at the time the challenging owner acquires the property is relevant to the determination of whether the owner has reasonable investment-backed expectations, the existence of a comprehensive land use plan creates an advantage for a municipality attempting to uphold its land use legislation against a takings claim. A municipality with a comprehensive plan that extensively addresses the property and use in question is more likely to prove that an owner was on notice regarding what uses of the property were reasonable than a municipality with a plan containing very little regulation or a municipality with no comprehensive plan at all.

A 2004 Florida District Court of Appeals case illustrates this point. In *Leon County v. Gluesenkamp*, the court denied a landowner's temporary regulatory takings claim.[239] In *Gluesenkamp*, the county entered a development agreement with a landowner for road expansion and storm water management projects.[240] The landowner subsequently sold his property to a new owner who applied to the county for a permit to construct a residence under the existing development agreement.[241] Other local owners successfully challenged the development agreement as contrary to certain storm water provisions in the county's comprehensive plan.[242] As a result, the trial court enjoined the county from issuing development permits to its counterparty landowner under the development agreement.[243] The county complied with the injunction, and even entered a settlement agreement in which it agreed not to challenge the trial court's decision.[244] The new owner of the enjoined property sued the county, alleging that a regulatory taking occurred for the period of time during which the county refused to issue a development permit or to appeal the trial court's injunction.[245]

238. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).
239. 873 So. 2d 460 (Fla. Dist. Ct. App. 2004).
240. *Id.* at 461.
241. *Id.*
242. *Id.* at 462.
243. *Id.*
244. *Id.*
245. *Id.*

In the new owner's takings case, the appellate court held that the county's action did not constitute a regulatory taking, because, at the time the new landowner acquired the property, he did not have a reasonable expectation to develop his residential property under the development agreement.[246] The court held that even though the new landowner was not on notice that his development permit would be denied or enjoined at the time he acquired the property, he did have notice that such a permit was in conflict with the comprehensive plan, requiring further water studies before development could be allowed.[247] In denying the takings claim, the court relied on the inconsistency between the owner's expected use and the storm water provisions of the comprehensive plan.[248] The presence of a comprehensive plan can, therefore, be the difference in a constitutional and an unconstitutional land use ordinance.

The *Palazzolo* and *Tahoe-Sierra* Supreme Court decisions also highlighted the significant role a comprehensive land use plan plays in assuring that local legislation will survive a regulatory takings challenge.[249] In both decisions, the Court declined to adopt a per se takings rule regarding investment-backed expectations based on the timing of acquisition in relation to the timing of the regulation but, instead, required an ad hoc analysis of the reasonableness of the owner's expectations under *Penn Central*.[250] In both *Palazzolo* and *Tahoe-Sierra*, the Court did not reach a decision regarding the reasonableness of the owner's expectations, but reviewed evidence that would likely contribute to such a decision on remand.[251] In particular, the regional governments' regulatory bodies in both cases were acting under extensive, preexisting comprehensive plans.[252] Further, the Court's discussion of the elements of these plans implies that, at the time of acquisition of their respective properties, such elements were inherent in the owners' expectations. Such evidence was not substantial enough to create a per se takings rule, but would be influential in determining the reasonableness of the owners' investment-backed expectations.[253]

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246. *Id.* at 467-68.

247. *Id.*

248. *Id.*

249. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, Inc., 535 U.S. 302, 337 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

250. *Tahoe-Sierra*, 535 U.S. at 337; *Palazzolo*, 533 U.S. at 627.

251. *Tahoe-Sierra*, 535 U.S. at 337; *Palazzolo*, 533 U.S. at 627.

252. *Tahoe-Sierra*, 535 U.S. at 310-12 (involving the Tahoe Regional Planning Agency); *Palazzolo*, 533 U.S. at 614-15 (involving the Rhode Island Coastal Resources Management Council).

253. Stein, *supra* note 229, at 897.

Specifically, the *Palazzolo* Court refused to apply a per se rule that would eliminate a takings claim based strictly on the acquiring owner's notice of a plan, as the elements of the plan could have been unreasonable, regardless of the relative timing between the plan's passage and the owner's acquisition.[254] Because an ordinance passed under an unreasonable plan element might not provide an owner adequate notice, such an owner's takings claim could continue under *Penn Central*'s investment-backed expectation factor.[255] In *Palazzolo*, the Court discussed the goals of the Coastal Resources Management Council's wetlands protection plan in a manner that did not suggest any unreasonableness inherent in the plan.[256] On remand to analyze the case under the *Penn Central* factors, the lower court would likely consider the application of the Council's extensive wetlands plan to be reasonable based on the deference afforded to government land use plans in cases such as *Kelo*.[257] Such a presumption would contribute to the idea that any owner's expectation contrary to the plan was in turn unreasonable, most likely negating the takings claim under *Penn Central*. As with *Palazzolo*, the *Tahoe-Sierra* Court discussed the government's comprehensive plan in detail, implying that the elements of the plan were reasonable, considering that the Court refused to make a per se ruling in favor of the challenging property owner.[258]

Other holdings from lower courts support the idea that some form of detailed government planning with goals contrary to that of an individual landowner is strong evidence that the owner's expectations are unreasonable.[259] Such a view suggests that it is advantageous for state enabling statutes to require local governments to adopt a comprehensive land use plan and adhere to the plan throughout the course of its zoning legislation. The beneficial impact of such consistency extends beyond analysis of investment-backed expectations to other elements of takings jurisprudence, such as "public use."

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254. *Palazzolo*, 533 U.S. at 629-30 ("[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.").

255. *Id.* at 626-27, 630.

256. *Id.* at 614-15.

257. *See* Kelo v. City of New London, 545 U.S. 469, 487-88 (2005).

258. *Id.*

259. *See* Leon County v. Gluesenkamp, 873 So. 2d 460, 467-68 (Fla. Dist. Ct. App. 2004); Zanghi v. Bd. of Appeals of Bedford, 807 N.E.2d 221, 226 (Mass. App. Ct. 2004); Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 290 (N.H. 1984); Burrows v. City of Keene, 432 A.2d 15, 19-20 (N.H. 1981).

B. The Effect of Mandatory Consistency on the Uncertainty Surrounding the "Public Use" Requirement

In addition to the difficulty involved in shaping a standard for investment-backed expectations under *Penn Central*, another area of constitutional uncertainty facing local legislatures is whether condemned property serves "public use" within the meaning of the Takings Clause.[260] The Supreme Court addressed the meaning of "public use" in a condemnation case when it decided *Kelo*.[261] The *Kelo* Court refused to establish a bright-line test for determining whether a "public use" was present, but, instead, limited the holding to the facts present in the case.[262] As a result of that decision, defining the limits of "public use" in a physical taking is still unclear to local governments and lower courts. Nonetheless, the *Kelo* decision provides the most current guideline for local regulators who want to ensure that their physical taking of private property will not violate the Fifth Amendment.

In the majority opinion, Justice Stevens wrote that a strict definition of "public use" was not to be applied when evaluating a municipality's decision to condemn private property.[263] Instead, the municipality must only have a "public purpose" in mind for the property.[264] Thus, whether a municipality's condemnation project serves a public purpose depends on whether the municipality's primary goal is to benefit the public, even though it provides a windfall to private parties.[265]

As evidence that the goal of the project in the *Kelo* case was to provide a primarily public benefit, Justice Stevens noted that the physical taking was "executed pursuant to a 'carefully considered' development plan."[266] The Court considered the purpose of the city's comprehensive plan, facilitating economic development in the community, to be a public purpose.[267] Considering that the condemnation of private property at issue in *Kelo* was executed pursuant to a comprehensive plan, the Court determined that the condemnation of the property also served a public purpose.[268]

Such "public purpose" reasoning of the *Kelo* Court appears to grant a significant amount of deference to local governments because, as long as the

260. *See Kelo*, 545 U.S. at 485-88.
261. *Id.*
262. *Id.*
263. *Id.* at 478-80.
264. *Id.*
265. *Id.* at 485.
266. *Id.* at 477.
267. *Id.* at 483-85, 488-89.
268. *Id.* at 484-85.

comprehensive plan serves a public purpose, the purpose of each component of that plan will be labeled "public" as well.[269] This deference combined with the Supreme Court's history of applying the traditional rational basis test to "public use" challenges creates a great deal of flexibility for local governments seeking to condemn private property.

Despite the Supreme Court's history of deferring to governmental "public use" classifications, a court may not give such deference to a municipality's definition of "public use" if the municipality either insufficiently articulates its plans for the condemned property or fails to convince a court that the plans are designed to serve a public purpose.[270] In that event, no deference can be given, and a court will be forced to articulate its own reasons and goals for the condemnation, which may not bear a rational relationship to the condemnation action itself. According to the *Kelo* Court, a reliable way for a municipality to convince a court that a legitimate public purpose underlies the condemnation is to execute the taking pursuant to a carefully designed and communicated comprehensive plan.[271] Thus, state legislation mandating both the creation of a comprehensive plan and the consistency of future local condemnations with that plan increases the likelihood that courts will view condemnations favorably against "public use" challenges.

V. Other Benefits Resulting from a Mandatory Consistency Policy: More Efficiently Planned Communities and Certainty Against Due Process Challenges

The potential benefits created by mandatory consistency with a comprehensive plan extend beyond reassuring municipalities that local zoning regulations will withstand Takings Clause challenges. Additional benefits include more efficiently planned communities and certainty against due process challenges.

As a city grows, the need for land use regulation and city planning becomes more pronounced. Population growth creates greater competition for each parcel of land and increased traffic, noise, and pollution. The municipality must regulate structure size, parking, and type of use for each parcel to maintain order in the face of increasing density. As a city spreads geographically, the municipality must restrict which parcels of land it will add to the city, because extending services such as roads, schools, water, electricity, police, and fire to new properties drains the municipality's resources.

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269. *See id.* at 488-89.
270. *Id.*
271. *Id.*

As a result of these evolving needs, municipalities are compelled to alter or add zoning regulations. To enact such regulations without comprehensive, long-term planning increases the chances that uninformed or subjective land use regulation decisions will occur.[272] This reality is reflected in the judicial policy that greater deference should be given to a municipality's authority under its police power when the municipality is legislating pursuant to a comprehensive land use plan.[273] State legislatures that mandate consistency with a comprehensive plan are more likely to position cities in their state for orderly and efficient growth over the long term.

Constitutional validity under the Due Process Clause of the Fourteenth Amendment[274] represents another benefit resulting from carefully designed and implemented comprehensive land use planning. Local governments' authority to draft zoning legislation is based on the police powers delegated by state legislatures.[275] Under the Due Process Clause, this power does not extend to government regulation that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[276] Since *Euclid*, local legislatures have been free to draft a large variety of zoning ordinances to restrict various forms of private land use.[277]

If, however, a local governments' zoning ordinance does not meet due process requirements as expressed in *Euclid*, then the ordinance will not receive the customary deference given to such regulations.[278] Thus, it is the goal of municipalities to draft legislation that a court will not view as arbitrary or unreasonable with relation to the goal of serving the public safety and welfare. As stated in *Kelo* and in *Forestview Homeowners Association v. County of Cook*, the Court will look more favorably upon an ordinance or condemnation that is placed in effect as part of an organized, comprehensive land use plan.[279] Because such an ordinance or condemnation is less likely to be labeled by the court as arbitrary or unreasonable, it is in the best interest of

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272. City of Los Angeles v. State, 187 Cal. Rptr. 893, 898 (Dist. Ct. App. 1982) ("[A] failure on the part of the city to enact zoning ordinances consistent with its general plan would jeopardize the state's interest . . . in achieving the orderly and harmonious development of urban areas.").

273. Forestview Homeowners Ass'n v. County of Cook, 309 N.E.2d 763, 771 (Ill. App. Ct. 1974).

274. U.S. CONST. amend. XIV, § 1.

275. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

276. *Id.* at 395.

277. Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263 (2006).

278. *See* Gas 'N Shop v. City of Kearney, 539 N.W.2d 423, 430 (Neb. 1995).

279. Kelo v. City of New London, 545 U.S. 469, 488 (2005); Forestview Homeowners Ass'n v. County of Cook, 309 N.E.2d 763, 771 (Ill. App. Ct. 1974).

municipalities to draft and adhere to such a plan, and in the best interest of state legislatures to require that all municipalities in the state do so.

VI. Conclusion: The Universal Benefits of Mandatory Consistency in Zoning

Each state must make a decision regarding the role that comprehensive land use plans will play in cities' zoning schemes. The potential roles that cities' comprehensive land use plans play fall along a spectrum. For states at the discretionary end of the spectrum, the plan serves as a mere guide for local zoning regulators, who maintain discretion to pass zoning ordinances of their choice without regard to a land use plan. For states at the mandatory end of the spectrum, a plan must be enacted and thereafter serves as binding law on local zoning regulators for every zoning ordinance passed in the future. In between these extremes, states use the existence of a plan as a presumption of validity for zoning ordinances that have been challenged as invalid, or the absence of a plan as a presumption of invalidity.

States that place themselves near the mandatory end of this spectrum enjoy some advantages. First, greater consistency between a comprehensive plan and zoning ordinances creates certainty for municipalities that zoning ordinances will withstand challenges brought by landowners under the Takings Clause of the Fifth Amendment. Such certainty derives from a comprehensive plan's role in defining "public use" for a given regulatory project as well as in providing notice to landowners of a regulatory scheme, thereby shaping the owners' investment-backed expectations. Second, a high level of consistency benefits landowners and the local property market by creating a predictable regulatory environment in which real estate investments can be made with confidence. Third, zoning regulation that must follow a well developed and predictable comprehensive land use plan helps cities grow in an organized and efficient fashion. Finally, a consistent relationship between a comprehensive land use plan and zoning regulation fortifies zoning ordinances against substantive due process challenges by providing evidence that each ordinance is not arbitrary or capricious, but is, instead, part of an organized and carefully considered land use plan.

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