Protecting Land around Airports; Avoiding Regulatory Taking Claims by Comprehensive Planning and Zoning

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I. INTRODUCTION

Airline traffic in the United States has experienced phenomenal growth since industry deregulation in 1978.¹ The fifty busi-

* Member of the American Institute of Certified Planners. The author would like to thank Dr. Robert Ward, Professor of Geography and Planning, Eastern Michigan University, for his help and guidance in the preparation of this Comment.

¹ Significant increases in airline travel have caused an almost doubling of traffic in U.S. airports since 1978. Lyn L. Creswell, Airport Policy in the United States;
est U.S. commercial airports handled eighty percent of all passenger boardings in 1986. Industry growth combined with consolidation of airline traffic into hub airports creates an urgency for land use planning around airports to insure maximum efficiency of operations and noise compatibility with adjacent uses. The idea of concentrating U.S. airline flight traffic into a few hub airports gained popularity with the heightened competitive environment after deregulation. Concentrating airline operations into hub airports increases efficiency, but significantly burdens airport infrastructure.

Airports have failed to construct infrastructure to service the increased demand for air transportation. Most major airports were built and designed in the 1930s and did not incorporate plans for future growth or adequate buffer zones to insure compatibility with adjacent uses. More importantly, from the standpoint of future expansion, most communities had not enacted zoning regulations which might have prevented residential and commercial development from encroaching on airport borders. Airports in the United States have become "bulls eye" facilities with insufficient buffers between airports and adjacent

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The Need for Accountability, Planning, and Leadership, 19 TRANS. L.J. 1, 6 (1990) (citing DOT, NATIONAL TRANSPORTATION STATISTICS (1989)).


3 [L]and use compatibility also provides an important means of mitigating the effect of aircraft noise... for those airport environs which are still relatively undeveloped. Although there are often ill defined legal barriers to utilization of zoning to achieve land use compatibility... airport zoning could be effective if it is part of an overall comprehensive plan and if it does not attempt to accomplish too much.


4 Creswell, supra note 1, at 19.

5 Id. at 32.

6 Zoning was a relatively new regulatory tool for the control of land use by local governments in 1930. The zoning classification system was upheld in the landmark United States Supreme Court decision of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The opinion supported zoning as a valid function of local government police power which set the stage for a nationwide proliferation of zoning ordinances. See id. at 394-97. For a thorough discussion of zoning and its relationship to airports, see 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 15.01 (1992).

incompatible land uses. This has proven to be a significant problem for airports in the United States.  

Despite congestion, hubbing, and traffic growth, there has been no significant expansion of U.S. airports during the past thirty years. But that may be changing with "at least seven major expansions (Pittsburgh, Baltimore, Savannah, Nashville, Memphis, Portland, and Tampa) . . . currently in the works." Dallas/Ft. Worth International Airport (DFW) was one of the last major airports to open in the U.S. despite years of haggling over its location. Existing hub airports are operating at or near capacity and efforts to expand have encountered difficult opposition from neighbors.

Environmental constraints have also proven to be a difficult obstacle in the path of airports because environmental awareness has grown along with the need for airport expansion. The National Environmental Policy Act of 1969 (NEPA) requires that an Environmental Impact Statement (EIS) be included in recommendations or reports on proposals for federal actions.

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8 For example in Miree v. DeKalb County, 433 U.S. 25 (1977), the passenger survivors of a lear jet that crashed and burned shortly after take-off sued a Georgia county. The suit arose when the crash was determined to have resulted from the aircraft's ingestion of birds into its engines. The swarming birds were from an adjacent landfill. DeKalb County owned and operated the airport and the landfill. The plaintiffs sued on the theory that they were third-party beneficiaries of grant contracts between the county and the Federal Aviation Administration (FAA). The county had agreed to restrict the use of land adjacent to or near the airport to activities compatible with normal aircraft operations. The plaintiffs contended that by operating the landfill directly adjacent to the airport, the county had breached its grant contracts. Id. at 34. See also Pike v. Kentucky Power Co., 876 F. Supp. 143 (E.D. Ky. 1993) (the personal representative of a pilot's estate brought a wrongful death action against Kentucky Power after an airplane collided with utility lines that were over two hundred foot high).

9 Creswell, supra note 1, at 34.


11 DFW was the result of pressure by the Civil Aeronautics Board (CAB) and the Federal Aviation Administration after the federal government refused to fund airport expansion plans at Love Field (the main airport in Dallas at the time) because of limited expansion potential and homeowner opposition to increased noise levels. Airline pilots declared Love Field unsafe. Creswell, supra note 1, at 35.

12 Paul S. Dempsey et al., Aviation Law and Regulation §7.01, 7-4 (1992).

significantly affecting the quality of the human environment.\textsuperscript{14} Some state statutes also require an EIS.\textsuperscript{15}

While many hub airports are under significant pressures to expand, most are surrounded by encroaching land uses that hinder or prevent growth plans. The problem of incompatible adjacent land uses has far reaching effects. The need for airport expansion under these conditions is well recognized:

One of the foremost problems confronting aviation today is the protection of airports from urban encroachment. A considerable number of the major air terminals of recent years have become practically worthless, since they are unable to expand in order to meet the runway demands of our modern aircraft. Many of our present airports were constructed especially to meet the war emergency and little thought was given to their post-war use and the type of airplanes they would be serving. . . . Few airport planners . . . could [envision] today’s jet liner, which is . . . standard equipment for commercial carriers.\textsuperscript{16}

In major metropolitan areas, too often the only solution to airport expansion is to build a new airport away from the urbanized center.\textsuperscript{17} When expansion is not feasible because of site constraints, increased air traffic can be accommodated only by smaller incremental improvements, technological advances in air traffic control systems which allow more frequent flights, or more efficient use of existing sites and facilities.\textsuperscript{18}

The high cost of technological improvements coupled with the limited benefits derived from incremental expansion makes full utilization of existing sites and facilities the most economically practical solution to the capacity problem.\textsuperscript{19} But jet operations and the severe encroachment of existing airports, by incompatible land uses, increases the problem of aircraft noise

\textsuperscript{14} See, e.g., City of Irving v. FAA, 539 F. Supp. 17 (N.D. Tex. 1981) (holding that a permanent change in a departure route at DFW is a major federal action necessitating an EIS).

\textsuperscript{15} See, e.g., Secretary of Envtl. Affairs v. Massachusetts Port Auth., 323 N.E.2d 329, 338 (Mass. 1975) (holding that an EIS was required under Massachusetts law before an airport expansion project).


\textsuperscript{17} JFK outside of New York City, Dulles Airport outside of Washington, D.C., and Detroit Metropolitan Airport are examples.

\textsuperscript{18} DEMPSEY, \textit{supra} note 12, at 7-5.

\textsuperscript{19} \textit{Id.}
and its adverse impact on adjacent property limits the full utilization of airport facilities.  

The most effective method by which to prevent airport expansion problems from noise compatibility and encroaching land uses is to keep border areas free from all development. But this is no longer an economically or physically practical solution. The elimination of border development would require the outright purchase of surrounding properties by the power of eminent domain. Because of the problems associated with this technique, better utilization of existing airport sites and innovative techniques in comprehensive planning and zoning have emerged as the preferable methods to preserve open space around airports.

The purpose of this Comment is to alert the reader to the major issues related to the regulatory control of land around airports and to the current status of airport planning in the United States while also providing a framework for drafting legally sustainable comprehensive plans and overlay zoning regulations. Section II provides a brief review of the involvement of the federal government both legally and practically in issues related to the development of land and regulation of property adjacent to airports. Section III provides a guide to the administrative and legal framework for communities to undertake planning. The majority of Section III is devoted to discussion and review of past and present “ takings” jurisprudence,

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20 See Shafer, supra note 16, at 275-76.

21 Growth and development near airports:  
[H]ave placed a high premium on unimproved land and have made it virtually impossible to retain large amounts of open space. Unable to establish buffer zones around major airports, many communities have adopted alternate measures to protect . . . against encroachments while still permitting neighboring landowners to use and enjoy their property . . . .

Rohan, supra note 6, at 15-5.

22 Unquestionably, this would be the most desirable method, but there are large constraints to this approach. The amount of land that would have to be purchased is substantial, particularly if attempts are made to acquire all residential property affected by noise. The other problem is that land near airports is extremely valuable for development purposes. An airport typically finances construction and operations through user fees, and it would be extremely difficult for most airports to raise sufficient capital to carry out such a program. These constraints would also be present in attempts to obtain aviation easements (easements for the right to fly over land and cause noise, vibrations, smoke, fumes, glare, dust, etc.). Easements are expensive, but cost less than outright purchase.

Id.

23 Id. at 15-8.
with particular emphasis on recent U.S. Supreme Court case law and its effect in shaping and defining "regulatory takings." This discussion includes recommendations for avoiding claims. Also reviewed are the underpinnings of local government police power and the authority to enact planning and zoning regulations.

Section IV is intended to be a guide to the basics of comprehensive planning as it relates to airports. The Section recommends using the ALI Model Land Development Code and individual state law to develop plans. Section IV also provides a brief evaluation of the recent case law related to comprehensive planning.

Section V gives the reader an introduction into the concept of overlay zoning and its successful use in regulating property around airports for noise and land use impacts. Included is a discussion of recent decisions pertaining to the validity of overlay zoning.

II. FEDERAL ROLE IN AIRPORT PLANNING

While federal policy makers recommended a greater role for the Federal Aviation Administration (FAA) in land use planning in the 1960s, the agency did not play a significant role until 1979.24 Since 1979, substantial federal funds have enabled the federal government to play a pivotal role in airport planning.25 The FAA, however, has been handily criticized for "setting up a good program on paper, but then not training and participating with airports in the development of plans."26 The lack of federal standards and representation in local planning efforts adds to the fragmented system of airport planning in the United States. While most airports are owned by local governments, aviation impacts are "almost universally felt across . . . jurisdictional boundaries."27 Locally owned and operated airports are typi-

24 Congress adopted the Airport Safety and Noise Abatement Act of 1979 (AS-NAA) providing federal noise abatement grants for airports. 49 U.S.C. § 2103 (1988). Grants were available only if a noise abatement plan was developed in consultation with local governments. Id.


26 Creswell, supra note 1, at 9.

27 Id. at 32.
cally immersed in community and regional complexities and rivalries. The predictable result has been disagreements between governmental entities, including outright efforts to block each other's plans. The loser in these battles is usually the airport and the general public.

While airport plans must be submitted to the FAA, the agency does not have the authority to veto specific plans. But in a practical sense, the FAA's large financial contributions to airports gives the agency substantial leverage in making sure airport plans meet national objectives and requirements.

III. REGULATORY FRAMEWORK FOR AIRPORT PLANNING

A. Preemption

A fundamental issue in airport planning is the potential conflict between federal regulations and state land use law when states exercise their police power by imposing land use controls in areas subject to federal regulations. Federal regulation of natural resources, economic activities, and public facilities has raised substantial questions about the exercise of federal power under the Commerce Clause in regulating local conditions. For example, FAA flight regulations for aircraft often conflict with local land use and zoning regulations designed to reduce noise from aircraft takeoffs and landings. Professor Malone notes that the U.S. Supreme Court, in City of Burbank v. Lockheed Air Terminal, Inc., held that local land use regulations to control aircraft noise are preempted by FAA regulations. But Professor Malone points out that Burbank created some confusion because the Court, in dicta, distinguished between municipalities as regulators exercising police powers and municipalities as owners operating airports. Owners are allowed to impose restrictions and controls on land in their ownership, but local governments who do not own airports cannot impose restrictions.

29 Creswell, supra note 1, at 31.
32 U.S. CONST. art. I, § 8, cl. 3.
35 MALONE, supra note 33, at 11-24.
Although *Burbank* is most often cited for federal noise pre-emption, the case is more important for airport vicinity planning because of the dicta in footnote fourteen.\(^{36}\) Buried in its majority opinion, the Court in footnote fourteen cited a letter from the Secretary of Transportation from the Senate Report to the Noise Control Act.\(^{37}\) The footnote stated that “many airports are owned by one municipality yet physically located in another. . . . Authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.”\(^{38}\) *Burbank* affirmed the basic principle that local governments are preempted from exercising police powers to regulate navigable airspace, but they can enact regulations which apply to the land surrounding airports for valid public purposes.\(^{39}\)

**B. POLICE POWER AND “TAKINGS” JURISPRUDENCE**

The Constitution gives states and local governments broad powers to regulate the use of property for community health, safety, and welfare.\(^{40}\) But the Supreme Court has read the Fifth Amendment’s “Takings Clause” to prohibit the government from “forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.”\(^{41}\) Regulations that appropriate or take private property

\(^{36}\) *Burbank*, 411 U.S. at 635 n.14.

\(^{37}\) This letter has proven to be significant in the development of U.S. air law, providing that:

> [T]he proposed legislation will not affect the rights of a state or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory.

*Id.*

\(^{38}\) *Id.*

\(^{39}\) The FAA in its regulations implementing the Aviation Safety and Noise Abatement Act of 1979 expressly stated that local land use regulation was not preempted. 46 Fed. Reg. 8320 (1981) (formerly codified at 14 C.F.R. § 150 (1981)). The regulation now states: “No submittal of a map, or approval or disapproval, in whole or part, of any map or program submitted under this part is a determination concerning the acceptability or unacceptability of that land use under Federal, State, or local law.” 14 C.F.R. § 150.5 (1995).

\(^{40}\) See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sinclair Refining Co. v. City of Chicago, 178 F.2d 214 (7th Cir. 1949).

for a public use, as distinguished from those which merely regulate the use of property, are unconstitutional. Prominent land use and zoning commentators agree that “takings” jurisprudence has been developed by the Supreme Court on almost a case by case basis:

In literally thousands of cases, state and federal courts have been called upon to determine whether a particular regulation was overly burdensome and violated the takings clause. Decisions and rationales have been widely divergent with resulting uncertainty for all concerned. In recent cases, the Supreme Court itself has noted the considerable difficulty it has had in developing any set formula to determine whether there has been a “regulatory taking.”

The Fifth Amendment provides that private property cannot be taken for public use without just compensation. The Supreme Court has decided that this limitation applies to state and local governments through the due process clause of the Fourteenth Amendment. Similar “takings” clauses exist in state constitutions.

When a “regulatory taking” of private property actually occurs is a topic of heated debate in U.S. courts and legislatures. Recent U.S. Supreme Court decisions indicate a shift toward greater judicial protection of individual property rights. Courts have begun to invalidate laws that unfairly affect property interests by inappropriate use of police power. The main theories used by courts to defend private property against exercises of police power include presumptions against retroactive legislation, recognition of vested rights, and application of equitable estoppel.

United States Supreme Court decisions in Nollan v. California Coastal Commission, Lucas v. South Carolina Coastal Council,

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43 U.S. Const. amend. V.
46 Id. at L6.
48 483 U.S. 825 (1987) (holding that a development exaction requires an “essential nexus” between the regulation and a legitimate public objective).
and *Dolan v. City ofTigard* demonstrate the shift toward greater judicial protection of private property rights. While the boundaries of greater protection are not completely clear, the decisions demonstrate the Court's heightened respect for the Fifth Amendment. In addition, states and the federal government are considering and enacting statutory provisions to provide compensation to property owners when a "regulatory taking" occurs.

There are no hard and fast rules to determine when a land use restriction would be considered a "taking." For a number of years, a regulation was considered a "taking" if it goes "too far." The balancing test for "regulatory taking" claims determined in *Pennsylvania Coal* was revised and updated by the *Penn Central Transportation Co.* decision. Now commonly referred to as the "ad hoc analysis," the *Penn Central Transportation Co.* court set forth three primary factors to consider: (1) the character of

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40 505 U.S. 1003 (1992) (holding that a “categorical taking” occurs when a regulation denies all economically beneficial or productive use of land).

50 114 S. Ct. 2309 (1994) (holding there must be “rough proportionality” between a development exaction and the extent of a development impact creating the need for the exaction).

51 Justice Rehnquist commented in *Dolan*: “[W]e see no reason why the “Takings Clause” of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.” *Dolan*, 114 S. Ct. at 2320.

52 Recent legislative initiatives in a number of states propose that states should compensate private property owners for reductions in value caused by public regulation unless the regulated activity is considered a nuisance under state law. The State of Washington considered the most radical legislation. By some estimates, Initiative 164, narrowly defeated in November 1995, would have cost local governments up to $11 billion in compensation costs. The proposed Washington legislation would have required payment for any action by government that diminished the value of land, no matter how small the loss. Kim Murphy, *Washington State’s Property Rights Proposal Goes Farthest of All*, *Ann Arbor News*, Oct. 29, 1995, at A8. A new Texas statute permits compensation or invalidation of the regulation if a regulatory taking diminishes market value of the affected parcel by more than 25%. Act of June 12, 1995, S.B. 14, 74th Leg., 1st C.S. (to be codified at 10 Tex. Gov’t Code Ann. § 2007).

53 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In an often quoted portion of *Pennsylvania Coal*, Justice Holmes described the determination of a “regulatory taking” as follows:

> When [diminution in value] reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. . . . The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.

*Id.* at 413, 415.

the government action; (2) the economic impact of the regulation; and (3) the degree to which the regulation interferes with reasonable investment-backed expectations. Under the established, but still emerging, line of regulatory taking analysis, courts use this updated "ad hoc" test when considering regulatory takings.

Takings challenges are often brought in cases related to airports and airspace. In Griggs v. Allegheny County and United States v. Causby, the Supreme Court determined that a landowner has a property interest in the airspace above his land. Since Griggs and Causby, airports have been financially liable for damages due to noise. In Causby, the Court determined that physical violation of the airspace interest is a "taking" entitling the owner to just compensation. The Court reasoned that an owner has the right to "at least as much of the space above the ground as he can occupy or use in connection with the land." The Griggs case provided a legal framework that places liability for noise control with the federal government, the local governments surrounding the airport, and the airport itself.

Physical

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55 Id. at 124.
56 Ziegler, supra note 45, at L14.
59 328 U.S. 256 (1946).
60 In Causby, military aircraft taking off from a nearby airport passed less than 70 feet over the plaintiff's farm. The Court determined the flights were so low that they interfered with the plaintiff's use and enjoyment of his land, constituting a compensable "taking" under the Fifth Amendment. Id. at 266. While the Court determined a "taking" occurred in Causby, the case is readily distinguishable because of its extreme facts. The end of the airport's runway was 2220 feet from the plaintiff's barn. Id. at 258. Chickens were killed by flying into walls due to fright. Id. The plaintiff lost over 150 chickens in this manner. Id. See also Griggs, 369 U.S. at 84 (holding that a taking occurred because of the physical invasion of airspace over the plaintiff's property by aircraft).
61 Causby, 328 U.S. at 264.
violation of landowner airspace is a "taking"\textsuperscript{65} entitling the owner to compensation.\textsuperscript{64}

C. The Power to Zone

Land surrounding public airports can be controlled when courts find that the regulations used by local governments are a reasonable and proper exercise of police power.\textsuperscript{65} The determination of the validity of airport zoning as a reasonable restriction involves the same inquiry that would be used to determine the validity of comprehensive zoning under \textit{Euclid}.\textsuperscript{66} Validity depends on two questions: (1) Does the regulation bear a substantial relation to public health, safety, and general welfare? and (2) is public interest sufficient for the reasonable imposition of restrictions on property adjacent to an airport, without having to compensate the owner for the diminution in value?\textsuperscript{67}

The test involves weighing the public interest against the individual property owner's interest. Some commentators have suggested that the increasingly important interest in air travel as public transportation and as an avenue of commerce (for freight and postal deliveries) constitutes a per se public interest.\textsuperscript{68} Along those same lines, a viable argument can be made that the substantial public investment in airports is by itself sufficient justification for police power based regulation.\textsuperscript{69} Airports' important role in defense is a similarly viable justification.\textsuperscript{70} However, public safety is an even more direct justification for using police power for airport zoning. Increasing use of existing facilities makes unobstructed approaches to airports essential to public safety.\textsuperscript{71}

Use of police power is upheld only when the state has delegated authority to local governments through statutes\textsuperscript{72} or by a

\textsuperscript{65} For a discussion of "taking" claims see infra notes 48-94 and accompanying text.

\textsuperscript{64} See Griggs, 369 U.S. at 90.


\textsuperscript{66} See supra note 40 and accompanying text.


\textsuperscript{69} Id.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} All states have adopted some form of zoning enabling statute. See the discussion of the Standard Zoning Enabling Act infra notes 103-06 and accompany-
PROTECTING LAND AROUND AIRPORTS

Although the federal government authorized the use of airport zoning through the Airport and Airway Development Act of 1970, the Act was repealed in 1982. The current regulations provide that before a "sponsor" airport is eligible to receive federal funds for planning or expansion projects, it must show:

(a) Action that it has taken to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft. The sponsors statement must include information on—

(1) Any property interests (such as airspace easements or title to airspace) acquired by the sponsor to assure compatible land use, or to protect or control aerial approaches;

(2) Any zoning laws enacted or in force restricting the use of land adjacent to or in the vicinity of the airport, or assuring protection or control of aerial approaches;

(3) Any action taken by the sponsor to induce the appropriate government authority to enact zoning laws restricting the use of land adjacent to or in the vicinity of the airport, or assuring protection or control of aerial approaches, when the sponsor lacks the power to zone the land.

Problems can arise, however, when proposed expansion is beyond the local government's territorial limits or the airport's lands are contained in more than one jurisdiction. These problems are exemplified by Dallas/Fort Worth International Airport (DFW). Before construction of DFW, the cities of Fort Worth and Dallas maintained separate airports. With their existing airports already at or near capacity, the cities decided to join forces and build one large regional airport to serve the met-

See also Yara Eng'g Corp. v. City of Newark, 40 A.2d 559, 560-61 (N.J. 1945) (holding airport zoning regulations invalid because there had been no authorization by the state to zone land solely for an airport).

See Euclid, 272 U.S. at 365.

49 U.S.C. § 1718(4) (1980) (repealed 1982) provided that before funding a project "the Secretary [of Transportation] shall receive assurances . . . that . . . appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport." Id.


For a detailed review of the problems related to the expansion of DFW, see Cole, supra note 28, at 193-96.

DFW was built on property in the cities of Grapevine, Irving, and Euless. Only a small portion is in the city of Fort Worth. Within ten years, DFW grew to be one of the busiest airports in the world.

After learning about the DFW Airport Board's $3.5 billion expansion plans, the cities of Grapevine, Irving, and Euless enacted zoning ordinances which required that the cities approve any new airport construction within their boundaries. The DFW Airport Board sued the cities seeking a declaratory judgment that their zoning ordinances were preempted by the Texas Municipal Airports Act (TMAA) and inapplicable to DFW. The Dallas district court held that the cities' zoning ordinances were not preempted by the TMAA or by federal regulations or statutes. The Dallas Court of Appeals affirmed the district court's ruling in March of 1993.

At the same time in the spring of 1993, the Texas Legislature passed Senate Bill 348 (S.B. 348), amending the TMAA to specifically preempt the adjacent cities' authority to regulate DFW. The cities announced immediate plans to challenge the constitutionality of S.B. 348. DFW responded by filing suit in

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78 Id. at 1019-20.
79 Cole, supra note 28, at 195.
80 Passenger trips at DFW grew from 6.8 million in 1974 to 21 million in 1987. Id. (citing Brief for Appellant at 5, Dallas/Fort Worth Int'l Airport Bd. v. City of Irving, Tex., 854 S.W.2d 161 (Tex. App.-Dallas 1993)).
81 Cole, supra note 28, at 196.
83 Id. at 460.
84 See Dallas/Fort Worth Int'l Airport Bd. v. City of Irving, 854 S.W.2d 161 (Tex. App.—Dallas), judgment vacated without reference to merits, 868 S.W.2d 750 (Tex. 1993).
85 The language of Senate Bill 348 of 1993 has been codified at TEX. TRANSP. CODE ANN. § 22.074 (Vernon Supp. 1996). The bill states in part:
   (b) A joint board may exercise on behalf of its constituent agencies all the powers of each with respect to an airport, air navigation facility, or airport hazard area, subject to the limitations of Sections 22.079-22.082.
   (c) A joint board may plan, acquire, establish, construct, improve, equip, maintain, operate, regulate, protect, and police an airport, air navigation facility, or airport hazard area jointly acquired, controlled, and operated. The joint board may also realign, alter, acquire, abandon, or close a portion of a roadway or alleyway without a showing of paramount importance if the portions to be realigned, altered, acquired, abandoned, or closed are in the geographic boundaries of the airport at the time of or after the realignment, alteration, acquisition, abandonment, or closing.
Tarrant County seeking a declaratory judgment that the law was valid and constitutional.

Several months after the Tarrant County suit was filed, the Texas Supreme Court remanded the earlier suit to the Dallas County district court with instructions to consider the validity of applying S.B. 348 to the cities. The Texas Supreme Court prohibited the Tarrant County district court from taking any action "indirectly or directly" with the remanded case. Ultimately, after more clarification from the Texas Supreme Court, both the Tarrant County and Dallas County district courts ruled that S.B. 348 was constitutional. The Dallas Court of Appeals affirmed in 1995.

In *City of Grapevine v. Department of Transportation*, the plaintiffs petitioned for the court's review of the FAA's decision to approve plans to expand DFW and declare portions of the project eligible for federal funding. The plaintiffs alleged that the FAA's exclusion of some elements of the proposed expansion from the project's required Environmental Impact Statement (EIS) resulted in an inadequate document. As a result, the plaintiffs argued that the FAA failed to consider the environmental impact of all feasible and reasonable alternatives in violation of the National Environmental Protection Act (NEPA). The plaintiffs also claimed that the FAA had failed to consider the environmental impact of the expansion of historic properties as defined in section 4(f) of the Department of Transporta-

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A taking of a right-of-way that occurs in the exercise of this power shall be compensated at fair market value.

(d) If the constituent agencies of a joint board are populous home-rule municipalities, a power described by Subsection (c) is exclusively the power of the board regardless of whether all or part of the airport, air navigation facility, or airport hazard area is located in or outside the territory of any of the constituent agencies. Another local government or other political subdivision may not enact or enforce a zoning ordinance, subdivision regulation, construction code, or other ordinance purporting to regulate the use or development of property applicable in the geographic boundaries of the airport as it may be expanded.

87 *Dallas/Fort Worth Int'l Airport Bd.*, 868 S.W.2d at 751.
88 *City of Irving*, 894 S.W.2d at 459-61.
89 See id. at 459.
91 Id. at 1503.
92 Id. at 1503 (citing 42 U.S.C. §§ 4231-4370 (1994)).
tion (DOT) Act\textsuperscript{93} and that the FAA had failed to complete the review required by the National Historic Preservation Act (NHPA)\textsuperscript{94} prior to rendering a final decision.\textsuperscript{95}

The court dismissed the plaintiffs' argument that the FAA excluded substantive portions of the Airport Layout Plan (ALP) from its review\textsuperscript{96} and found the plaintiffs' attempt to require the EIS to address categorically-exempt items without merit.\textsuperscript{97} The plaintiffs also contended that the FAA had approved the project before completion of the reviews required by the NHPA.\textsuperscript{98} The FAA had conditioned its final approval of the west runway on a subsequent reevaluation of its effect on the historic properties, noting that it would consider the results of the consultation process required by statute.\textsuperscript{99} The court dismissed the plaintiffs' argument because the FAAs conditional approval did not violate the requirements of the NHPA because it did not "approve the expenditure of any Federal funds."\textsuperscript{100}

The DFW cases confirm the principle that police power based regulations are normally upheld if provided for by state legislative act. Courts generally abide by the decisions of administrative agencies charged with enforcing legislation as long as decisions are "reasonably supported by substantial evidence."\textsuperscript{101} A number of states have adopted enabling statutes that expressly grant or restrict authority to local governments to adopt airport zoning regulations.\textsuperscript{102}

\textsuperscript{93} 49 U.S.C. § 303(c) (1983).
\textsuperscript{94} 16 U.S.C. §§ 470-470w-6 (1988); see also 36 C.F.R. §§ 800.4(b), 800.4(c), 800.5 (1995).
\textsuperscript{95} City of Grapevine, 17 F.3d at 1503.
\textsuperscript{96} Id. at 1505.
\textsuperscript{97} Id. at 1506.
\textsuperscript{98} Id. at 1508.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 1509.
\textsuperscript{101} See, e.g., Pickens v. Railroad Comm'n, 387 S.W.2d 35, 45 (Tex. 1965).
\textsuperscript{102} The following states have adopted statutes specifically granting authority to adopt airport zoning regulations: ALA. CODE § 4-6-4(a),(b) (1995); ALASKA STAT. § 02.25.020 (1995); ARIZ. REV. STAT. ANN. § 2-324 (1995); ARK. CODE ANN. § 14-359-113 (Michie 1995); CAL. GOV'T CODE § 50485.3 (West 1995); CONN. GEN. STAT. ANN. § 15-91 (West 1995); FLA. STAT. ANN. § 333.03 (West 1995); HAW. REV. STAT. § 262-3 (1995); ILL. ANN. STAT. ch. 620, para. 13 (Smith-Hurd 1996); IND. CODE ANN. § 14(d) (West 1996); IOWA CODE ANN. § 329.3 (West 1995); KAN. STAT. ANN. § 3-703 (1994); KY. REV. STAT. ANN. § 183.867 (Baldwin 1995); LA. REV. STAT. ANN. § 381 (West 1995); ME. REV. STAT. ANN. tit. 6, § 241 (West 1995); MD. CODE ANN., TRANSP. § 5-502 (1995); Mich. Comp. Laws Ann. § 259.445 (West 1996); MINN. STAT. ANN. § 360.063 (West 1996); MISS. CODE ANN. § 61-3-81 (1993); MO. ANN. STAT. § 67.1203 (Vernon 1996); MONT. CODE ANN. § 67-6-201
One test for the validity of a zoning action is whether or not the action is consistent with the comprehensive plan if a plan is required by the enabling statute. The Standard State Zoning Enabling Act (SZEA)\(^\text{103}\) states that all zoning and regulation of land should be "in accordance with a comprehensive plan."\(^\text{104}\) Most states have adopted some form of the SZEA to authorize local planning.\(^\text{105}\) While the SZEA contemplates adoption of an optional "master plan" containing community goals and policies to guide development, the "comprehensive plan" requirement is a mandatory prerequisite to the adoption of zoning regulations.\(^\text{106}\)

The "in accordance with" requirement has not resulted in a consistent judicial interpretation of what constitutes a comprehensive plan. Some experts suggest that the commentary to the Act merely requires that zoning not be done in a "piecemeal" manner.\(^\text{107}\) The majority view\(^\text{108}\) is that a comprehensive plan must reasonably relate zoning regulations to the public health, safety, and welfare, but the majority view does not require a document separate from the zoning regulations themselves.\(^\text{109}\) Because courts traditionally did not require comprehensive plans to be independent documents, plans eluded precise definition.

\(^{103}\) Standard State Zoning Enabling Act § 3 (U.S. Dep't of Commerce Revised Ed. 1926) [hereinafter Standard State Zoning Enabling Act].

\(^{104}\) Footnote 22 of the Act states that the "in accordance" requirement "will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study." Id. § 3.

\(^{106}\) Standard State Zoning Enabling Act, supra note 103, § 12.


\(^{108}\) See id. § 3.15, 82.

\(^{109}\) The leading case representing this view is Kozesnik v. Township of Montgomery, 131 A.2d 1 (N.J. 1957); see also Theobald v. Board of County Comm'n, 644 P.2d 942 (Colo. 1982); Furtney v. Simsbury Zoning Comm'n, 271 A.2d 319 (Conn. 1970).
Courts generally require at a minimum some evidence of comprehensive planning before validating zoning regulations.\footnote{Consistency generally means that a comprehensive plan should be something more than a reflection of existing zoning ordinances. See Wolf v. City of Ely, 493 N.W.2d 846 (Iowa 1992) (holding that a city failed to properly adopt a zoning ordinance "in accordance with" a comprehensive plan when the plan was nothing more than various plans and maps with no legislative adoption).}

The trend in states with relatively new planning legislation is toward "consistency" requirements that mandate local adoption of a "master" plan and that require zoning regulations be consistent with the adopted plan.\footnote{California and Florida are among the leading states requiring plan and zoning "consistency." The movement to stronger master planning has been largely in response to growth management concerns. When a state statute does not define consistency, courts have developed their own rules to determine when zoning is consistent with a comprehensive plan. See Mandelker, supra note 107, § 3.17.} Some states also mandate the content and elements of local plans and regulate their amendment procedures. Mandatory consistency strengthens the uniform application of zoning regulation and local land use planning efforts.\footnote{See, e.g., S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813 (Fla. Dist. Ct. App. 1978) (sustaining single-family zoning in a resort area stating: "Our State Legislature, in recognition of the need to strengthen the role of local government in the establishment and implementation of the comprehensive planning process adopted the [consistency requirements] . . . ." Id. at 815).}

D. The Comprehensive or "Master" Plan as a Land Use Control

Comprehensive or "master" plans developed in conjunction with zoning regulations serve as blueprints for future community growth. The term "master plan" comes from the Standard City Planning Enabling Act (SPEA).\footnote{The SPEA provides in part:
It shall be the function of [local governments] to make and adopt a master plan for the physical development of the municipality . . . . Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the [local government's] recommendations for . . . development . . . including . . . aviation fields . . . as well as a zoning plan for the control of the height, area, bulk, location, and the use of buildings and premises. Standard City Planning Enabling Act § 6 (U.S. Dep't of Commerce 1928).} Plans generally contain a number of standard characteristics and account for all the geographic characteristics. The most influential policy of the SPEA was that planning was optional.\footnote{Id. § 13. The language of the SPEA is permissive except that the adoption of a major street plan is a mandatory prerequisite to approval of subdivisions.} The \textit{optional} requirement,
combined with the fact that the public demand for zoning prompted publication of the Standard Zoning Enabling Act two years before the SPEA, resulted in early failures to integrate planning and zoning. While some states today have made planning mandatory, most have followed the SPEA "optional" format. Courts hold that adoption and implementation of zoning ordinances does not depend on the adoption of a comprehensive plan.

Optional planning makes the enactment of zoning regulations under a "self containment" view possible, but many courts look for separate community planning efforts to justify zoning regulations. The validity of zoning may not depend on separate planning documents, but courts will give weight to planning studies that have been documented and adopted by local governments, upholding plans that are clearly written and up-to-date. Conversely, the lack of independent planning may

115 See Mandelker, supra note 107, § 3.05.
116 Id.
117 Most states have enacted planning enabling statutes modeled after the SPEA authorizing optional planning by local governments. Haar, supra note 105, at 1155.
118 See, e.g., Kozesnik, 131 A.2d at 1, where the New Jersey Supreme Court found a zoning ordinance amendment permitting a quarrying operation invalid because it unreasonably and arbitrarily discriminated between improved and unimproved property. But the court rejected the plaintiff's contention that zoning regulations must be in accordance with a comprehensive plan evidenced by a writing outside of the zoning ordinance itself stating:

   It is thus clear that the 'comprehensive plan' of the zoning statute is not identical with the 'master plan' of the Planning Act and need not meet the formal requirements of a master plan. The Zoning Act nowhere provides that the comprehensive plan shall exist in some physical form outside the ordinance itself.

   Id. at 7.
119 See infra notes 142-45 and accompanying text.
120 An often cited example is Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.), appeal dismissed, 409 U.S. 1003 (1972) (holding that development in some areas of a community can be delayed until adequate public services are available based on the city's substantial comprehensive planning efforts); see also Biske v. City of Troy, 166 N.W.2d 453 (Mich. 1969) (holding that a formally adopted master plan does not invalidate a zoning regulation, but does weaken the presumption of validity of a zoning ordinance or amendment).
121 A plan must provide clear guidelines. E.g., Board of Supervisors v. Jackson, 269 S.E.2d 381 (Va. 1980).
weaken the presumption of validity usually accorded to zoning regulations even though separate planning is not mandated.  

IV. DEFENSIBLE COMPREHENSIVE PLANNING FOR LAND AROUND AIRPORTS

As this Comment suggests, the number of approaches available to local governments and airport management to regulate property around airports varies depending on site and jurisdictional factors. State statutes delegating police powers, government control, and management of the airport, in combination with precedential case law affecting regulatory efforts, vary the methods that can be utilized to regulate safety, noise control, and future expansion. Establishing effective regulations typically begins with comprehensive planning.

Comprehensive planning for community development is an accepted fact in most urban areas of the United States. Most cities maintain a "planning" or "community development" department charged with comprehending the "whole urban problem." The department prepares the city's plans and zoning regulations for plan implementation. The objectives of planning include:

(1) To improve the physical environment of the community as a setting for human activities—to make it more functional, beautiful, decent, healthful, interesting, and efficient . . . (2) to promote the public interest, the interest of the community at large, rather than the interests of individuals or special groups within the community . . . (3) to facilitate the democratic determination and implementation of community policies on physical development . . . (4) to effect political and technical coordination in community development . . . (5) to inject long-range considerations into the determination of short-range actions . . . [and] (6) to bring professional and technical knowledge to bear on the making of political decisions concerning the physical development of the community.

Comprehensive plan preparation basically follows four major steps: "(1) the formation of goals and objectives, (2) the making of basic research studies, (3) the drafting of the plan, and (4) . . ."

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123 See, e.g., Forestview Homeowners Ass'n, Inc. v. County of Cook, 309 N.E.2d 763, 773 (Ill. 1974) (holding that the failure of Cook County to plan comprehensively weakened the presumption of validity that would otherwise attach to zoning ordinances).

124 4 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 23.02 (3d ed. 1986).

125 Id. § 23.04 (quoting T.J. KENT, JR., THE URBAN PLAN 38 (1964)).
implementation of the plan." Effective planning generally follows these guidelines. Airport planning, however, requires a higher level of intergovernmental coordination because of the jurisdictional complexity that accompanies the location and expansion of airports. The minority of states mandating planning require detailed plans for airports, while also providing statutory authorization for airport zoning regulations. For airports not located in mandatory planning states, a preferable option for planning is to follow the guidelines recommended by the American Law Institute in the ALI Model Land Development Code.

A. ALI Model Land Development Code

The ALI Model Land Development Code makes planning optional except when local governments want to adopt more sophisticated land use controls. The ALI planning requirements are comprehensive, following the planning criteria of even the most demanding state statutes. If adopted by

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126 Id. § 23.05. Most communities follow some form of the basic steps outlined by Anderson. Variation is required based on differences in enabling legislation, community funding available for planning, and sophistication of the staff available to prepare the plan.

127 Creswell, supra note 1, at 9.

128 For example, § 333, Florida Statutes mandates that local governments with "airport hazard" areas adopt airport zoning regulations. Fla. Stat. Ann. § 333.03(1)(a)-(b) (West 1996). In cases where the airport is operated by or located in a different political subdivision than that adjacent to the airport, the statute provides that inter-local agreements or joint planning efforts be undertaken to enact airport zoning regulations. Id. The statute also requires at a minimum that airport zoning include variance requirements for any proposed structures that would exceed federal obstruction standards. Id. § 333.03(1)(c). Florida regulations also provide that the most stringent zoning regulations prevail in the event of conflicts. Id. § 333.04.

129 MODEL LAND DEV. CODE (Am. Law Inst. 1976) [hereinafter MODEL LAND DEV. CODE].

130 Section 2-201(2)(h) provides for development in specially planned areas only in accordance with a precise plan and only if the requirements of § 2-211 are met. Section 2-211 allows local governments to designate "specially planned areas" to be developed in a coordinated manner. Development will be held up until the local government "adopts by rule a precise plan." After a precise plan is adopted, an owner may obtain a development permit consistent with the plan. Landowners seeking development permission that is inconsistent with the plan may file a written petition for adoption or amendment of the plan. The local government agency has six months to issue an order related to the proposed change or the change automatically is adopted. Id. § 2-201(2)(h).

131 Plans for airports and surrounding areas should follow statutory requirements for individual states and follow the recommendations in the ALI Model
local governments, the ALI provisions create a continuous planning process that addresses some of the criticisms leveled at end-state planning. The ALI Code provides an option to use text policies, maps, or a combination of both in comprehensive plans.

One of the primary benefits of using the ALI approach is designating an airport as a “Specially Planned Area” under provisions in the Model Code. Originally contemplated to be ap-

Land Development Code Section 3-103. Model Land Dev. Code, supra note 129, § 3-103.

132 Plans prepared under the SPEA and SZEA are often criticized as assuming a rigid pattern of land development that proceeds on a lot-by-lot basis. Of course, this is almost never the case in practice. Development is affected by market conditions. Plans are often out of date by the time they make it out of the approval process. The ALI Model Code tries to address these problems by encouraging the compilation of a wide amount of information and creating a “land development plan” rather than a more traditional “comprehensive plan.” See Mandelker, supra note 107, § 3.13.

133 Model Land Dev. Code, supra note 129, § 3-101(1).

134 A “Specially Planned Area” under the ALI Model Code works as follows:

(1) A development ordinance may authorize the Land Development Agency to designate by rule any specially planned area in which development will be permitted only in accordance with a plan of development for the entire area.

(2) A specially planned area shall be designated only for areas which a Land Development Plan determines should be developed in a coordinated manner in order to achieve the objectives of the plan.

(3) If a specially planned area has been designated no development in the area shall be permitted until the Land Development Agency adopts by rule a precise plan for the area, which may include provisions relating to

(a) the location and characteristics of streets, other rights of way, and utilities;

(b) the dimensions and grading of parcels and the dimensions and siting of structures;

(c) the location and characteristics of the permissible types of development; and

(d) any other planning matters which contribute to the development and use of the area as a whole.

(4) After a precise plan has been adopted the precise plan shall constitute the development regulations applicable to the specially planned area, and any owner of land in a specially planned area for which a precise plan has been adopted may obtain a development permit for development consistent with the precise plan upon compliance with the requirements of this Article.

(5) Any landowner seeking development permission in a specially planned area for which no precise plan has been adopted, or seeking development permission for development consistent with an adopted precise plan, shall, prior to filing an application for
plied to "undeveloped land" or "redevelopment" areas, the designation could be effectively applied to land surrounding airports. The "Specially Planned Area" criteria and resulting "precise plan" would lay an excellent foundation to support the validity of airport overlay zoning regulations. "Specially Planned Areas" stop issuance of development permits from the time of designation until a "precise plan" is adopted. The regulation also provides a remedy for landowners where a "precise plan" has not yet been adopted or where the owner seeks to develop in a manner inconsistent with the "precise plan."  

Development of a "precise plan" should take into account aspects specific to airport planning. The plan should permit land development of certain areas while also considering flight zones and noise impacts. The plan should identify areas for future airport acquisition and expansion, prohibiting development inconsistent with future plans. But the plan must also provide for continuance or non-continuance of non-conforming uses existing in the area at the time the plan is enacted.  

Because plans have been invalidated without such statements, plans should also contain statements of trends, objectives, policies, and standards. They also should be designed to include development permission, file with the Land Development Agency a written request for the adoption or amendment of a precise plan for the area, which request may contain part or all of a proposed precise plan for the area.

The Agency shall give notice of the written request under § 2-305.

(6) Within six months after filing of a written request under subsection (5) the Land Development Agency shall adopt a precise plan or amended precise plan for the specially planned area, or shall issue an order refusing to approve or amend an existing precise plan. If no such action is taken within six months any precise plan filed by a landowner shall be treated as having been adopted in regard to his land.

Id. § 2-211.

135 Id. (see the advisory note after the proposed statute text).
136 Id.
137 Following the logic of the MODEL LAND DEV. CODE, supra note 129, § 3-201.
138 Because of the tremendous amount of existing development around major U.S. airports, the provisions for the existence of non-conforming uses is of major importance to any airport land use planning efforts. The ALI Code provides one option for handling this sensitive issue in § 4-101.

both a short (often five years) and long term development program with estimates of the land acquisition needed to carry out the plan.\textsuperscript{140} Most importantly, the plan should be adopted by the airport administrative agency and the regulatory local government in strict compliance with any state statutory requirements.\textsuperscript{141}

**B. Case Law Related to Comprehensive Planning**

Courts will generally uphold challenges to plans on “takings” grounds when the disputed plan is based on rational and thorough planning. Courts have invalidated zoning ordinances when they do not conform to comprehensive plans. In *Pennington County v. Moore*,\textsuperscript{142} the defendants operated a twenty-acre auto salvage yard. The county sued the defendants for operating their business in violation of a county zoning ordinance. The Moores argued that the ordinance was not effective because it was not adopted under a valid comprehensive zoning plan as required by state law.\textsuperscript{143} The county argued that the Moores acquiesced in the zoning ordinance even if it was enacted under a legally defective comprehensive plan.\textsuperscript{144} The trial court ruled for the Moores, allowing their challenge to the zoning ordinance. The South Dakota Supreme Court affirmed the trial court and invalidated the ordinance because it was not adopted in accordance with the comprehensive plan and declared the property unzoned.\textsuperscript{145}

In a recent Missouri case, *State ex rel. Chiavola v. Village of Oakwood*,\textsuperscript{146} property owners challenged the village’s zoning ordinance on statutory and constitutional grounds. The ordinance dated back to 1955 and was adopted shortly after a housing subdivision had been incorporated into a village. The ordinance provided for only single-family residential use on large lots. The plaintiffs in *Chiavola* sought to rezone about five acres on a ma-

\textsuperscript{140} Model Land Dev. Code, supra note 129, § 3-105.

\textsuperscript{141} The potential rigidity that can result when the comprehensive plan must be adopted and amended by legislative process is illustrated by a California decision where an opponent of the plan sought its repeal by the legislative body or submission to referendum. The court described the plan as a “constitution for all future development within the city” and held that it was subject to the referendum process. O’Loane v. O’Rourke, 231 Cal. App. 2d 774 (1965).

\textsuperscript{142} 525 N.W.2d 257 (S.D. 1994).

\textsuperscript{143} Id. at 257.

\textsuperscript{144} Id.

\textsuperscript{145} Id. at 260.

jor thoroughfare from residential to commercial. The village denied the rezoning. On appeal, the circuit court reversed the village, holding the zoning ordinance invalid because Oakwood had not previously adopted a comprehensive plan in accordance with state statutes and finding the ordinance could not be both the zoning plan and zoning ordinance.  

On further appeal, the court of appeals reversed, finding the ordinance constitutional and in compliance with statutory requirements. The court allowed the village’s plan to be inferred from the ordinance, reasoning that the village could plan for a small residential community and exclude business and industry based on health, safety, and welfare concerns. The court concurred with decisions from other states that stand for the proposition that a plan separate from the zoning ordinance is not required. The resulting rule from this case requires courts to “determine on an ad hoc basis whether [a city’s] efforts to meet the requirement of creating a general plan to control and direct the use and development of property in a municipality” has been met. The failure of the court in this case to require a plan may be the result of the small nature of the community. The holding in the case may be limited by dicta stating that an ordinance similar to Oakwood’s might not meet the needs of a larger or more complex community to satisfy the state requirement that its zoning regulations conform with a comprehensive plan.

In Little v. Winborn, the Supreme Court of Iowa struck down a rezoning action by Scott County as illegal spot zoning. The rezoning would have permitted the location of a shooting range and two buildings in a large area qualifying as prime agricultural land. The court found the rezoning to be inconsistent with the county’s comprehensive plan and policies to protect prime agricultural land from scattered development. The court emphasized the integral role of the comprehensive plan in analyzing rezonings by concluding that “spot zoning for the benefit of the

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147 Id. at 75.
148 Id. at 76.
149 Id. at 77-78.
150 Id. at 79.
151 Id. at 82.
152 Id.
153 518 N.W.2d 384 (Iowa 1994).
154 Id. at 388-89.
owner and contrary to the comprehensive plan is unreasonable."

In the recent Montana Supreme Court case of Bridger Canyon Property Owners' Ass'n v. Planning and Zoning Commission for the Bridger Canyon Zoning District, neighboring property owners sued the planning commission seeking reversal of a 651 acre re-zoning of a Planned Unit Development (PUD) permitting construction of recreational housing. The property owner's association contended that the rezoning was void as a matter of law because the planning commission lacked the authority and jurisdiction to approve the PUD because of a conflict between the zoning ordinance and the Bridger Canyon General Plan. The court held:

"To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, to require no compliance at all would defeat the whole idea of planning. . . . The statutes are clear enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan)."

The court in Bridger further recognized that while the master plan may have to be modified as the result of changed circumstances, the "correct procedure is to amend the master plan rather than erode the master plan by simply refusing to adhere to its guidelines."

The Connecticut case of City of Bridgeport v. Town of Stratford exemplifies the complicated issues related to development control of land surrounding airports. The City of Bridgeport operates the Sikorsky Memorial Airport which is located in Stratford, Connecticut. Bridgeport sued Stratford, alleging that Stratford had failed to include the airport in its comprehensive plan and adopt zoning regulations pertaining to the airport, resulting in the loss of federal grants. Bridgeport cited Connecticut

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155 Id. at 388.
156 890 P.2d 1268 (Mont. 1995).
157 Id. at 1269-70.
158 Id. at 1273-74 (quoting Little v. Board of County Comm'n, 631 P.2d 1282, 1293 (Mont. 1981)).
159 Id. at 1274.
161 Id. at *1.
162 Id.
statutes mandating that a municipality with an airport within its territorial limits must adopt zoning regulations.165

The case arose because developers had purchased property with the intent to build in an area identified by the Greater Bridgeport Regional Planning Agency as a proposed “airport impact zone” to restrict and exclude development.164 While the merits of the decision were not finally decided because of standing issues,165 the case is illustrative of the issues related to development control around airports. Under the current “property rights friendly” takings climate,166 cities and counties with airports within their boundaries should help themselves avoid liability by adopting well conceived planning and zoning regulations.

V. OVERLAY ZONING AS AN IMPLEMENTATION TOOL

A. Overlay Zoning

Overlay zones have existed since the first zoning ordinance was adopted in the City of New York.167 Local governments adopt and administer zoning ordinances as a means of implementing comprehensive plans. Courts were slow in recognizing the relationship between comprehensive planning and zoning.168 The overlay zone is a separate zoning provision mapped over an existing zoning district in order to add new regulations to the underlying zone.169 Overlay zones are used to protect areas with special needs and characteristics, such as airport height, building and noise requirements, floodplains, wetlands, and historic districts.170 Overlays are sometimes used to encourage

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165 Id.
166 Id.
167 Id. at *4.
168 See discussion of taking claims, supra notes 42-63 and accompanying text.
169 Overlay zones applied to special height districts although the term was not used as such. New York City, N.Y., Zoning Resolution of 1916, § 8 (1916).
newer forms of development, including planned unit development or neotraditional towns. Overlay zones are normally mapped over selected zoning districts and apply sophisticated regulatory techniques.\textsuperscript{171} Administrative complexities vary with the subject matter being regulated by the zone. The advantages of overlay zoning are:

1. Boundaries of overlay zones fit into the affected area without having to consider the boundaries of existing or proposed land uses or property lines.\textsuperscript{172}

2. Overlay zones are a simple, but effective, way to permit different uses and regulation of development within the confines of conventional zoning.

3. Overlay zones are easier politically and administratively to adopt than rezonings or overall amendments of development regulations by the supervising government.

The disadvantages of overlay techniques are:

1. Overlay zoning adds another layer of regulation and review to property.

2. Unless carefully conceived, overlay zoning can significantly curtail the reasonable use of property creating overregulation that could lead to a regulatory takings claim.\textsuperscript{173}

Most airport overlay zoning ordinances are the result of implementation of title I of the Aviation Safety and Noise Abatement Act of 1979 (ASNA) and its subsequent amendments.\textsuperscript{174} The amended ASNA provisions established the parameters for measuring airport-generated noise, a system for determining exposure to airport-generated noise, and an airport noise compatibility planning program including the following:

1. Development and submission to FAA of Noise Exposure Maps and Noise Compatibility Programs by airport operators;

2. standard noise units, methods, and analytical techniques for use in airport assessments;

\textsuperscript{171} Some of these techniques include floor area ratios, vertical setbacks, architectural standards, and special design or building requirements. In the context of airport regulation they are used extensively for protection from noise, both in establishing special development setbacks and in building noise insulation requirements. \textit{Id.} at 2.

\textsuperscript{172} This is a particular advantage to property regulation resulting from the vicinity of an airport. The area mapped by the overlay can be the result of runway noise contour maps or expansion plans, or a combination of factors. \textit{Id.}

\textsuperscript{173} See discussion of taking claims \textit{supra} notes 43-64 and accompanying text.

(3) identification of land uses that are compatible, incompatible, or compatible with modification with various levels of noise around airports; and
(4) procedures and criteria for FAA review and approval of noise compatibility programs.\textsuperscript{175}

Participation in the federal program makes local operators of airports eligible for federal funding of noise compatibility planning and development. Over 200 airports in the United States participate in the program, most having some form of regulation based on noise.\textsuperscript{176}

Overlay zoning regulations, like any other zoning regulations, must be rationally related to the health, safety, and welfare of the community to be sustained legally.\textsuperscript{177} If conflicts arise between the requirements of the overlay zoning and the underlying district, overlays generally prevail because they are usually the more specific and restrictive regulation.\textsuperscript{178} An overlay district is also very flexible because it may be tailored to apply only to the targeted property and facilities.\textsuperscript{179} While overlay zoning is expensive to implement, it is far less costly than the purchase of sites or buildings through condemnation.\textsuperscript{180}

B. CASE LAW RELATED TO OVERLAY ZONING

While a number of cities and states have enacted overlay zoning,\textsuperscript{181} relatively few court decisions concerning the enforceabil-

\textsuperscript{175} Id.

\textsuperscript{176} Papsidero, supra note 10, at 4. See, e.g., Fairfax County Va., Code of Ordinances § 7-400 (1977). The airport noise impact zone controls conflicts between land uses and noise generated by aircraft by limiting property use, tailoring bulk regulations, and setting maximum interior noise levels for different land use categories.

\textsuperscript{177} See the discussion of zoning ordinances supra notes 65-73 and accompanying text.

\textsuperscript{178} See, e.g., Franchise Developers, Inc. v. Cincinnati, 505 N.E.2d 966, 970-71 (Ohio 1987) (ordinance at issue provided that the overlay district prevails if the two zoning regulations conflict).

\textsuperscript{179} See, e.g., A-S-P Assoc. v. City of Raleigh, 258 S.E.2d 444, 455-57 (N.C. 1979) (ninety-eight acre historic overlay zone did not apply to modern building).

\textsuperscript{180} Overlay Districts, supra note 169, at 2.

ity of overlay regulations exists. The enforceability of overlays will undoubtedly be affected by the new takings jurisprudence established by the U.S. Supreme Court.

An Ohio Supreme Court case, Franchise Developers v. City of Cincinnati, upheld an overlay zoning ordinance that limited and excluded certain commercial uses to preserve and revitalize certain neighborhoods in Cincinnati, Ohio. The court in Franchise Developers reversed an appeals court ruling that the overlay district in question was unconstitutional. The court found "the overlay zoning scheme . . . constitutes a proper exercise of the city's zoning authority in its attempt to preserve and protect the character of certain neighborhoods."

More recently, in Harris v. City of Wichita, landowners challenged restrictions imposed by the City of Wichita that placed use restrictions on land at the ends of the runway at McConnell Air Force Base. The plaintiffs owned land located in an Airport Overlay Zoning District (AOZD). The landowners argued that the regulations created a taking of their property and that the risk of a crash was so small that "it does not warrant any usage restrictions beyond the existing zoning regulations." In holding that the AOZD regulations constituted a reasonable exercise of police power, the court determined the city had a legitimate interest in seeing "that in the event of an aircraft accident, as few people as possible are killed or injured."

Harris is also important in the takings context in light of the Supreme Court's decision in Dolan v. City of Tigard, which established the "rough proportionality" nexus test for development exactions. After Dolan was decided, the plaintiffs in

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182 Courts will generally sustain a zoning ordinance unless "its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Euclid, 272 U.S. at 396. See also Nectow v. City of Cambridge, 277 U.S. 183, 189 (1928).

183 See discussion supra notes 48-52 and accompanying text.

184 505 N.E.2d 966 (Ohio 1987).

185 Id. at 971.

186 Id. at 970.

187 Id. at 971.


189 Id. at 289.

190 Id. at 292.

191 Id.

192 114 S. Ct. 2309 (1994); see discussion supra notes 50-52 and accompanying text.

193 Id. at 2312.
Harris filed a motion for reconsideration, alleging the new standard established in Dolan should apply to Harris. The district court denied the motion, finding the Dolan "rough proportionality" standard applicable in the context of development exactions, but not to the facts in Harris. 194

In another recent decision, overlay zoning to protect property adjacent to an airport was found a proper application of police power. In Maryland Aviation Administration v. Newsome, 195 the Court of Appeals of Maryland upheld a state statute that permitted overlay zoning on the area surrounding the Baltimore-Washington International (BWI) Airport for environmental noise control. 196 The case arose when the state denied the plaintiff a variance to construct twenty-seven homes in the airport overlay zone. 197

The plaintiff in Newsome had purchased a development site near BWI in 1989 which included property zoned M-2 (industrial manufacturing) and a portion of R-12 (a residential category) zoned property. 198 Twenty-seven unimproved residential lots, 6.3 acres of the site, were located within the BWI noise overlay district. 199 As a state owned airport, BWI had established noise overlay zoning in 1975 as part the Maryland Environmental Noise Act of 1974. 200 The property in question was located within the BWI noise overlay as designated by the state aviation division in 1988. 201

The plaintiff requested a permit to construct the residences, one per lot, but was denied by the Maryland Aviation Administration (MAA). State law prohibited the MAA from granting a permit when the proposed action violated local land use or zoning laws or enlarged an impacted noise zone. 202 The plaintiff requested and was denied a variance from the Board of Airport

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194 Harris, 862 F. Supp. at 293.
197 Newsome, 652 A.2d at 118-21.
198 Id. at 117.
199 Id.
200 Id.
201 Id. "In addition to measurements of actual sound, noise zone delineation includes projections of future flight operations. The 1988 BWI noise study projected increased operations to the west of BWI, in the direction of the property." Id.
Zoning Appeals.\textsuperscript{203} The plaintiff filed suit and the circuit court reversed the Board and directed that a variance be granted subject to conditions.\textsuperscript{204} The MAA appealed to the Court of Special Appeals which affirmed the circuit court.\textsuperscript{205}

The Maryland Supreme Court accepted certiorari to decide "whether the noise zone statutes and regulations allow 'the Board to consider the high population density resulting from a developer's application for a variance.'"\textsuperscript{206} The court found that state regulation of land use adjacent to airports was grounded in state law and was intended by the State to "protect the health and general welfare of the occupants of land near airports."\textsuperscript{207} Newsome therefore stands for the proposition that well designed overlay districts, with the support of state law, will be sustained by courts.

In \textit{Commonwealth v. Rogers},\textsuperscript{208} the Pennsylvania Supreme Court upheld a state statute requiring approval of the Pennsylvania Department of Transportation (PDOT) after the plaintiff erected a ninety-five foot sign in an airport runway approach area.\textsuperscript{209} County officials cited the plaintiff in \textit{Rogers} for violating state statutes related to construction of the sign at his Dairy Queen Restaurant in Venango County.\textsuperscript{210} The trial court found the plaintiff guilty of violating state statutes requiring permission to construct obstructions within an airport approach area.\textsuperscript{211} The plaintiff appealed on the basis that the absence of an easement or zoning rule regulating the height of signs made enforcement of the Aviation Code provisions an unconstitutional taking of his property.\textsuperscript{212}

The appeal reached the Pennsylvania Supreme Court, which found the plaintiff had violated FAA guidelines and Pennsylvania law, and that PDOT had authority to enforce compliance with FAA regulations designed to identify potential hazards.

\textsuperscript{203} 652 A.2d at 118.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 121 (quoting MD. CODE ANN., TRANSP. § 802(2) (1977)).
\textsuperscript{208} 634 A.2d 245 (Pa. 1993).
\textsuperscript{209} Id. at 246.
\textsuperscript{210} Id. at 247.
\textsuperscript{211} Id. (citing 74 PA. CONS. STAT. § 5701 requiring approval from the Pennsylvania Department of Transportation before constructing an obstruction in an airport approach area).
\textsuperscript{212} Id. at 247.
to air navigation. The court declared that “the legislature empowered PDOT to enforce mandatory compliance with FAA regulations which are designed to identify potential hazards to air navigation . . . Unlike the determination of the FAA, [PDOT's] determination is enforceable, rather than advisory.”

The court further determined that the statute and its enforcement were legitimate exercises of police power, and found no taking of the plaintiff's property by virtue of his prosecution by state statute.

In Persyn v. United States, the plaintiffs, a group of landowners adjacent to Kelly Air Force Base in San Antonio, Texas, filed a $16 million suit against the United States and the City of San Antonio. They claimed increased noise from the Air Force's expanded use of the base and the city's passage of supplementary overlay zoning districts for noise protection constituted a taking under the Fifth Amendment. The landowners' claim asserted that the City of San Antonio acted for the sole benefit of the United States by passing a series of ordinances restricting property adjacent to the base. The district court dismissed the landowners action against the city for failure to state a claim for a constitutional taking.

On appeal to the United States Claims Court in 1994, the United States moved for summary judgment on the takings claim arguing the landowners were time barred, and that the applicable land use and zoning ordinances were enforceable. The court ruled that the regulations at issue did not prohibit the

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213 The Federal Aviation Act, codified at 49 U.S.C. § 1501 (1988), requires that any person who proposes to construct or make alterations to a structure in close proximity to an airport must give notice of the proposed construction to the FAA. See 14 C.F.R. § 77.13 (1995). The FAA then determines whether or not the proposed construction constitutes a hazard to air navigation. But the determination by the FAA has no legal effect. "The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation." Aircraft Owners and Pilots Ass'n v. FAA, 600 F.2d 965, 967 (D.C. Cir. 1979); see also Air Line Pilots Ass'n Int'l v. FAA, 446 F.2d 236 (5th Cir. 1971). The court in Rogers reaffirmed that it is the state's role to enforce regulatory standards. 634 A.2d at 253.

214 Rogers, 634 A.2d. at 253.

215 Id.

216 Id.

217 935 F.2d 69 (5th Cir. 1991).

218 Id. at 72.

219 Id. at 74.

220 Id.

plaintiffs from use of their property and the regulatory takings claim was dismissed.\textsuperscript{222}

In a recent decision of the Iowa Supreme Court, \textit{City of Iowa City v. Hagen},\textsuperscript{223} the court determined that Iowa City "clearly had a rational basis for adopting and enforcing an airport zoning district."\textsuperscript{224} The court reversed a lower court ruling that the city's actions in adopting and enforcing the overlay regulations deprived the plaintiff of substantive due process and were arbitrary and capricious.\textsuperscript{225} The court's reasoning for the reversal was based on the city's adoption, almost verbatim, of the federal standards for airport runways.\textsuperscript{226}

\textbf{VI. CONCLUSION}

To a great extent, it is too late to protect land around major United States airports from development and use that is either inconsistent or incompatible with airport operations. But with the pressures on airports to expand, and a number of expansion projects underway, the need to regulate for noise and use compatibility is well established and pressing. Keeping land around airports free from development that is inconsistent with their use insures airports long term safety and expansion potential.

One of the keys to a successful program of land use controls is legally sustainable zoning regulations that address the needs of the airport. The legality of zoning depends in large part on the adopted regulations being grounded on rational and well thought out comprehensive planning. This is particularly important today due to the increased judicial and legislative awareness in the protection of private property rights. Ironically, the answer to designing effective regulations that survive taking claims may be simply the return to the basic and well thought out approach of the ALI Model Land Development Code.

Innovative solutions to implementing comprehensive planning efforts to protect land around airports will also be required to avoid regulatory taking claims. Overlay zoning ordinances

\textsuperscript{222} Id. at 585. The plaintiffs in \textit{Persyn} had also brought a taking challenge based on a physical invasion of their airspace, similar to the theory forwarded in \textit{Causby}, discussed supra note 77. The court did not dismiss that portion of the takings claim. \textit{Persyn}, 32 Cl. Ct. at 582. Disposition of the physical invasion claim is pending.

\textsuperscript{223} 545 N.W.2d 530 (Iowa 1996).

\textsuperscript{224} Id. at 536.

\textsuperscript{225} Id. at 535.

\textsuperscript{226} Id. at 536 (citing 14 C.F.R. §§ 77.21, 77.23, 77.25 (1995)).
are a useful and legal tool for implementation. The key to their effectiveness includes a combination of factors: (1) the statutory authority to adopt them; (2) their basis on comprehensive planning; (3) the “reasonableness” of the regulations themselves; and (4) their adoption by overlaying existing zoning ordinances. Overlay zoning is the least expensive and most acceptable alternative for limiting the land areas next to airports to compatible development.