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PRACTICE CONSISTENCY



Let the Courts Guide You: Planning and Zoning Consistency

By Brian W. Ohm

The idea that local land-use decisions should be consistent with an independently adopted local comprehensive plan is a fundamental concept of planning practice.

An increasing number of states have adopted legislation requiring consistency between certain land-use regulations, such as zoning and subdivision ordinances, and a local comprehensive plan. Many states also have adopted legislation that requires other decisions (including sewer extensions, the creation of tax increment finance districts or redevelopment districts, etc.) to be consistent with a comprehensive plan. In California, for example, the State Office of Planning and Research identifies 38 statutory or administrative code provisions that require consistency between a certain action and the comprehensive plan (or “general plan” as defined under California law).

The state legislation that requires consistency often uses terms such as “consistent with,” “in conformity with,” or “not in conflict with” interchangeably. However, the statutes requiring consistency usually offer little guidance about how to determine whether a decision is consistent with a local comprehensive plan. The state planning office also developed the following general rule for consistency determinations, which the California courts accept:

An action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.

More specific guidance for how to apply the legislative requirement for consistency is often left to the determination of the courts.

This issue of *Zoning Practice* explores some of the case law developed by the courts as they interpret statutory requirements for consistency. It focuses primarily on cases arising



Brian Wesley

⊕ When the goal is to prevent non-contiguous development patterns (top) and protect rural character (bottom), the land-use map and the policies of the land-use element should be consistent to achieve that goal.



Peter Chen

ing in California, Maine (two pioneers with legislative requirements for zoning/planning consistency since the early 1970s), Florida, and Washington.

What is striking is the relative paucity of reported court decisions in some states with consistency requirements. However, states such as California and Florida, which expressly provide for citizen enforcement of consistency determinations, seem to generate the most cases. The impact of these determinations can be important. A zoning ordinance that is inconsistent with the comprehensive plan at the time it is enacted is “invalid when passed” as determined by *Leshner Communications v. City of Walnut Creek*, 52 Cal. 3d 531 (1990); see the similar conclusion in *Price v. Payette County Board of Commissioners*, 131 Idaho 426; 958 P.2d 583 (1998). The following are some general rules developed by state courts to guide consistency determinations.

IS THE PLAN COMPLETE?

When courts review cases for consistency determinations, the review is not intended to second-guess the merits of the policies that appear in a local comprehensive plan. Judicial review is focused on compliance with state law. Before a court can make a consistency determination, attention needs to be paid to whether the comprehensive plan is complete and adequate. In other words, does the comprehensive plan comply with the applicable procedural and substantive legal requirements? For example, if state law requires that a comprehensive plan include a housing element, does the plan, in fact, have such an element? In *Neighborhood Action Group v. County of Calaveras*, 156 Cal. App. 3d 1176,

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1184 (1984), the California Court of Appeals held that a finding of consistency based on an inadequate general plan was a legal impossibility. Challenges to the adequacy of the comprehensive plan, however, require some connection between the particular approval and the claimed inconsistency in the plan; see *Garat v. Riverside*, 2 Cal. App. 4th 259 (1991).

Another important principle is that all elements of a general plan have equal legal status. For example, in *Sierra Club v. Board of Supervisors of Kern County*, 126 Cal. App. 3d 698 (1981), the California Court of Appeals struck down a provision in the general plan that stated if there is a conflict between the land-use element and the open space element, the land-use element controls. Recognizing the comprehensive nature of comprehensive planning, the court found that no element is legally subordinate to another.

“SHALL” VS. “SHOULD”

Assuming a local comprehensive plan meets all the procedural and substantive requirements of state law, courts then focus on whether a local determination of consistency (or inconsistency) is supported by the facts. When reviewing consistency determinations, courts will pay attention to how a policy is written. For example, courts acknowledge distinctions in local policies between the use of “shall” or “must,” which courts define as a mandatory policy, and “should” or “may,” which courts view as a discretionary policy.

One example is the Supreme Judicial Court of Maine’s decision in *Adelman v. Town of Baldwin*, 2000 ME 91; 750 A.2d 577. The case involved a citizen challenge to the town’s approval of an application to construct a tele-

vision tower. The citizens argued that an amendment to the town’s zoning ordinance, which added communication towers as a conditional use in the highlands and rural areas, was inconsistent with the town’s comprehensive plan. In support of their argument, the citizens relied on four sections of the comprehensive plan that referenced restricting development in the highlands and protecting the rural character of the community. The court found that the citizens did not prove the ordinance amendment was inconsistent with the town’s comprehensive plan. The court noted that the sections of the comprehensive plan cited by the citizens did not mandate action but merely suggested recommended conduct. Three of the four sections used the permissive term “should” and none of sections used mandatory language such as “must” or “shall.” The court, therefore, found these sections did not prohibit the construction of a communications tower. The court

also noted four other sections of the comprehensive plan that could be interpreted to encourage the development of the communications tower.

Another example is the California Court of Appeals decision in *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors*, 62 Cal. App. 4th 1332 (1998). The case involved a challenge by a city, a land conservancy, and a citizen group to the county’s approval of a low-density residential subdivision of 566 lots on 7,868 acres. While the proposed development was consistent with the land-use map of the general plan, the court found that the proposed development was clearly inconsistent with the “fundamental, mandatory, and specific” policy of the land-use element of the county’s general plan. The policy at issue stated that low-density residential uses “shall be further restricted to lands contiguous to community regions and rural centers . . . and shall not be assigned to



Does your comprehensive plan mandate action or merely suggest recommended conduct? For example, while zoning may allow the construction of telecommunications facilities in rural areas, the preservationist goals of the comprehensive plan may use language—often discretionary language such as the word “should”—that undermines its very purpose. Such inconsistencies can lead to costly and time-consuming legal battles.



➡ Residential densities are a recurring issue in both zoning ordinances and comprehensive plans. But are the documents in line with one another on this issue? Left: Essentially, garages with attached single-family houses. Right: Single-family homes built in the style of new urbanism. Cars go behind the houses.

lands which are separated from community regions or rural centers by the rural residential land-use designation. . . .” Community regions and rural centers were specified town by town in the county’s plan.

A final example is the Florida Court of Appeals decision in *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. App. 2001). The case in Martin County involved a 136-unit multifamily development proposal on 21 acres, with a density of 6.5 units per acre. The Martin County comprehensive plan designated the area as “medium-density residential” with a maximum of eight units per acre. The county determined that the proposed development was consistent with the county comprehensive plan. The adjacent land owners—and ultimately the courts—disagreed. The adjacent land was developed at a density of 0.94 units per acre. The Martin County comprehensive plan had a tiering policy to address how new development would be added to existing single-family residential communities. The tiering policy of the plan required that the new development include a transition zone equal in depth to the first block of lots in the existing development of “comparable density and compatible density unit types.” The court found that the new development was inconsistent with the county’s comprehensive plan because the two-story apartment buildings were not “comparable and compatible” to the existing single-family homes. Since the plan stated that a density transition zone “shall” be established, the court found that a transition zone was a mandatory requirement and not a discretionary guide.

The nature of the policy (discretionary versus mandatory, general versus specific), therefore, can be a critical factor for consistency

determinations. Using “may” in comprehensive plans can provide greater discretion in consistency determinations whereas “shall” can provide greater legal weight to the directive of the policy.

THE ABSENCE OF SPECIFIC POLICY

While the nature of policy language is important for consistency determinations, the absence of a specific policy enabling a particular aspect of a project is not necessarily grounds for a finding of inconsistency. In *City of Old Town v. Dimoulas*, 2002 ME 133, 803 A.2d 1018, the Supreme Judicial Court of Maine held that the absence of language in a comprehensive plan expressly allowing a specific use in a certain area does not necessarily mean the use is not allowed and that some amount of that use is not inconsistent with the city’s comprehensive plan. *Dimoulas* involved a neighborhood grocery store that had operated for several years in a residential area. The store property was zoned as residential, and neighborhood grocery stores were allowed in residential zones. The Dimoulases decided to add tables and chairs where customers could eat deli and bakery items purchased at the store. However, the city determined the addition of tables and chairs brought the store outside the definition of a neighborhood grocery store. The Dimoulases requested that the city rezone the property to a commercial zone. The city denied the request. As allowed under Maine law, the Dimoulases then presented the rezoning request to the voters in a referendum. The voters approved the rezoning. In response, the city initiated a lawsuit seeking to declare the rezoning void because it failed to comply with the city’s comprehensive plan. The city identified several sections of its com-

prehensive plan that it contended the rezoning violated. The court noted that these provisions did not prohibit commercial development. The city also argued that the absence of a statement affirmatively allowing commercial development should be interpreted to mean that no commercial development is permitted. The court disagreed, citing general descriptive language in the plan that referenced commercial activity in the area where the store was located.

Another example is *No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223 (1988). In that case, the California Court of Appeals found oil drilling to be consistent with the designation “open space for the managed production of resources” in a comprehensive plan. The court’s decision was based in part on the absence of specific contradictory language in the plan that would lead the court to find that oil drilling was not the “managed production” of a natural resource.

CONSISTENCY, NOT PERFECTION

Dimoulas is an example of the approach followed by many courts that generally look for “harmony” or “compatibility” between the action taken and the comprehensive plan when reviewing consistency determinations. These types of consistency issues can be a challenge when dealing with mixed use development projects. For example, a future land-use map may designate an area for residential development. A community may also want to promote some neighborhood commercial development in the area. The community should have policies and standards allowing for neighborhood commercial in the area even though the precise area for the neighborhood commercial is not mapped. Despite the residential designation on the plan, a neighborhood commercial project should be compatible with the comprehensive plan, given the policy language providing for that use. Courts recognize that comprehensive plan maps are usually general in nature and are not to provide a precise parcel specific map. See, generally, *Las Virgenes Homeowners Assoc. v. County of Los Angeles*, 177 Cal. App. 3d 312 (1987).

The quest for harmony is also prominent when there are multiple policies that may apply to a project. Achieving consistency with all the policies may be difficult. In *Sequoia Hills Homeowners Assoc. v. City of Oakland*, 23 Cal. App. 4th 704 (1993), the California Court of Appeals recognized that a

project need not be in perfect conformity with each and every comprehensive plan policy if the plan text provides for flexibility of interpretation. In such cases, courts will look at the reasonableness of the local government's action. An example is the Maine Supreme Judicial Court's decision in *La Bonta v. City of Waterville*, 528 A.2d 1262 (1987), which involved a challenge by residents to the rezoning of a parcel in their neighborhood from residential to commercial for the construction of a 170,000-square-foot shopping center. The residents focused their argument on the comprehen-

POLICIES AND PRECEDENCE OF THE PLAN

Some courts acknowledge the integrative nature of comprehensive planning. Comprehensive plans are intended to provide consistent policy direction for multiple community functions such as transportation, housing, land use, parks, open space, and utilities. Consistency determinations, therefore, need to balance designations in the community's future land-use map with other plan policies and considerations that further refine what is appropriate in the context of the issues and concerns identified in a community's plan. Simply evaluating consistency against future land-use designations may be

range specified in the plan. The court upheld the challenge because the court found the rezoning inconsistent with the city's comprehensive plan. The plan designated a range of residential densities for a relatively undeveloped area of the city. To implement these plan recommendations, the city rezoned the area for residential development at the highest densities allowed in the density ranges. The Community Council, a neighborhood planning organization that has authority to reject rezonings under Washington law, denied the rezonings as inconsistent with the comprehensive plan.

While the community council acknowledged that the rezoning conformed to the density ranges in the comprehensive plan, it argued that it should be at a lower density within those ranges consistent with other provisions in the comprehensive plan. The council based its consistency argument on the comprehensive plan's designation of level of service on roadways in the area as "D-," combined with policies that existing single-family neighborhoods should be protected from encroachment from more intense uses, that land-use densities should be encouraged that would not intensify vehicular congestion, and that restrictions would be considered on land development and density as a viable means of



Should the absence of a statement in the comprehensive plan affirmatively allowing commercial development in a residential area be interpreted to mean that no commercial development is permitted? If so, what happens when the owners of a neighborhood grocery store lawfully permitted in residential districts add tables and chairs for customers to eat items purchased at the store, essentially bringing the store outside the definition of neighborhood grocery store?

sive plan's stated goal of protecting residential neighborhoods. However, the court rejected the residents' argument as an overly narrow and inflexible reading of the comprehensive plan. The court focused on the plan's emphasis on expanding economic opportunity in the city and providing adequate space for commercial development. The plan also specifically identified commercial development along the arterial street where the development was proposed and identified residential areas to be protected—the residential area in the vicinity of the proposed development was not one of them. The court found the rezoning struck a reasonable balance among the multiple goals of the city's comprehensive plan.

Similarly, the California courts follow a standard whereby a city council's finding of a project's consistency with the plan will not be reversed by a court if, based on the evidence before the council, a reasonable person could have reached the same conclusion; see *No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223 (1987).



Does this strip mall violate the comprehensive plan's stated goal of protecting nearby residential neighborhoods or support its emphasis on expanding economic opportunity in the city and providing adequate space for commercial development? The courts may have to decide.

insufficient when there are other mitigating factors identified in the plan.

One example is the Washington Supreme Court's decision in *City of Bellevue v. East Bellevue Community Council*, 138 Wn. 2d 937, 983 P.2d 602 (1999), involving a neighborhood organization's challenge to the city's rezoning of an area consistent with the highest density

controlling traffic congestion. The court agreed, noting that the city had flexibility within the density range to use a different zoning designation that would be consistent with these other policies.

Another example is the Court of Appeal of California decision in *Napa Citizens for Honest Government v. Napa County Board of*

Supervisors, 91 Cal. App. 4th 342 (2001), in which the court held that the county's amendment of a specific plan for an industrial area near its airport was inconsistent with the county's general plan. The industrial land use was in an area designated in the general plan for industrial uses. However, the circulation element of the general plan identified traffic problems and the housing element identified a housing shortage. According to the court,

The County cannot state a policy of reducing traffic congestion, recognize that an increase in traffic will cause unacceptable congestion and at the same time approve a project that will increase traffic congestion without taking affirmative steps to handle that increase. It also can-

not state goals of providing adequate housing to meet the needs of persons living in the area, and at the same time approve a project that will increase the need for housing without taking affirmative steps to handle that increase.

As a result, the court found that the amendment would frustrate the general plan's goals and policies, and hence, was not consistent with the general plan.

COMPREHENSIVE PLANNING VS. SPECIFIC IMPLEMENTATION TOOLS

As the Supreme Court of California noted in *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 541 (1990), zoning and

planning consistency requires that local communities amend zoning ordinances to conform to the plan, and not vice versa: "The tail does not wag the dog." Nevertheless, because of the general nature of comprehensive plans, consistency issues can arise when more than one zoning district may be consistent with the land-use categories designated in a comprehensive plan. Zoning/planning consistency does not eliminate the need to comply with standards and requirements found in the applicable zoning ordinances. A developer may propose a rezoning that is consistent with the comprehensive plan to permit a project that is not consistent with the existing zoning for the property. Just because a landowner demonstrates that a pro-

CLARK COUNTY, WASHINGTON, URBAN PLAN DESIGNATION TO ZONE CONSISTENCY CHART

(Shaded areas indicate allowed zones in each designation)

PLAN

UL Urban Low-Density Residential
UM Urban Medium-Density Residential
UH Urban High-Density Residential
NC Neighborhood Commercial
CC Community Commercial
CG General Commercial
MU Mixed Use
EC Employment Center
ML Light Industrial
MH Heavy Industrial
A Airport
PF Public Facilities

ZONE

R1 Single-Family Residential Districts
R Residential Districts
OR Office-Residential Districts
C Commercial Districts
CL Commercial Districts
CH Commercial Districts
MX Mixed-Use District
OC Office Campus District
BP Business Park District
ML Industrial Districts
MH Industrial Districts
U University District
A Airport District

PLAN	UL	UM	UH	NC	CC	CG	MU	EC	ML	MH	A	PF
ZONE												
R1-20												
R1-10												
R1-7.5												
R1-6												
R1-5												
R-12												
R-18												
R-22												
R-30												
R-43												
OR-15												
OR-18												
OR-22												
OR-30												
OR-43												
C-2												
C-3												
CL												
CH												
MX												
OC/BP												
ML												
MH												
U												
A												

This table is located in the land-use element of the comprehensive plan for Clark County, Washington.

posed use is consistent with a comprehensive plan, the consistency requirement does not mean the landowner is presumptively entitled to the planned use.

In *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993), the Florida Supreme Court addressed a situation where 29 different zoning classifications were considered potentially consistent with a residential use classification on the comprehensive plan's future land-use map. The property

consistent with the plan. In *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997), the Washington Supreme Court held that when preexisting zoning regulations explicitly prohibit uses allowed in the comprehensive plan, the more specific preexisting zoning regulations govern the land-use decision. This provides an incentive for communities to update their ordinances within a reasonable period of time following the enactment of a comprehensive plan.

Issues may arise when a community has adopted a new comprehensive plan, but has not yet updated its ordinances to be consistent with the plan.

owners filed an application to rezone one-half acre of property to a zoning classification that would allow the construction of 15 residential units per acre. The rezoning was consistent with the residential use classification in the comprehensive plan. The developer indicated that he only intended to build five or six units. A number of citizens opposed the request. The county denied the rezoning without stating a reason. The developer challenged the denial on the basis that the rezoning was consistent with the county's comprehensive plan. The court determined that local government should have the discretion to decide that the maximum development density should not be allowed provided that the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence. The proposed use may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan. In the standard articulated by the court in *Snyder*, a landowner seeking to rezone property has the burden of proving the proposal is consistent with the comprehensive plan and complies with all the procedural requirements of the zoning ordinance. The burden then shifts to the community to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose.

Related issues may arise when a community has adopted a new comprehensive plan, but has not yet updated its ordinances to be

This is different than the case where, even though a local government has not enacted a new zoning district referenced in a newly adopted comprehensive plan, the local government may be able to approve a development as consistent with the plan when that development is proposed under other ordinances that are consistent with the plan. In *Pinecrest Homeowners Association v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 87 P.3d 1176 (2004), the Washington Supreme Court examined the application of a plan amendment adopted by the Spokane City Council that the city determined should take effect immediately. The city, however, had not yet enacted the new mixed-use zoning district described in the plan amendment. Nevertheless, the city determined that a development proposal that used existing zoning districts allowing mixed use was consistent with the city's amended comprehensive plan. The court upheld the city's action against a challenge by a neighborhood group.

CONCLUSION

This issue of *Zoning Practice* begins to examine some of the case law developed nationally as courts address issues related to consistency determinations. The cases highlighted are intended as a guide to help planners think about such determinations. However, one must exercise caution when generalizing the meaning of consistency. While the concept that certain actions should be consistent with a comprehen-

sive plan is well accepted in the field of planning, variations in state enabling laws and judicial precedent make it difficult to develop universally acceptable rules to guide consistency determinations. As recognized by the Nebraska Supreme Court, "To determine whether an ordinance complies with a comprehensive plan is not a mechanical test;" see *Giger v. Omaha*, 232 Neb. 676; 442 N.W.2d 182 (1989). Nonetheless, the evolving jurisprudence reported above is instructive. Courts give deference to local determinations of consistency, though not always. As a result, courts are constantly helping to refine what is meant by consistency and the role of comprehensive planning.

Digital copies of California's general plan guidelines and select zoning/planning consistency matrices are available to *Zoning Practice* subscribers by contacting Michael Davidson, editor, *Zoning Practice*, at the American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or by sending an e-mail to mdavidson@planning.org.

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CAN AN INCONSISTENCY
IN YOUR COMMUNITY
GO TO COURT?

