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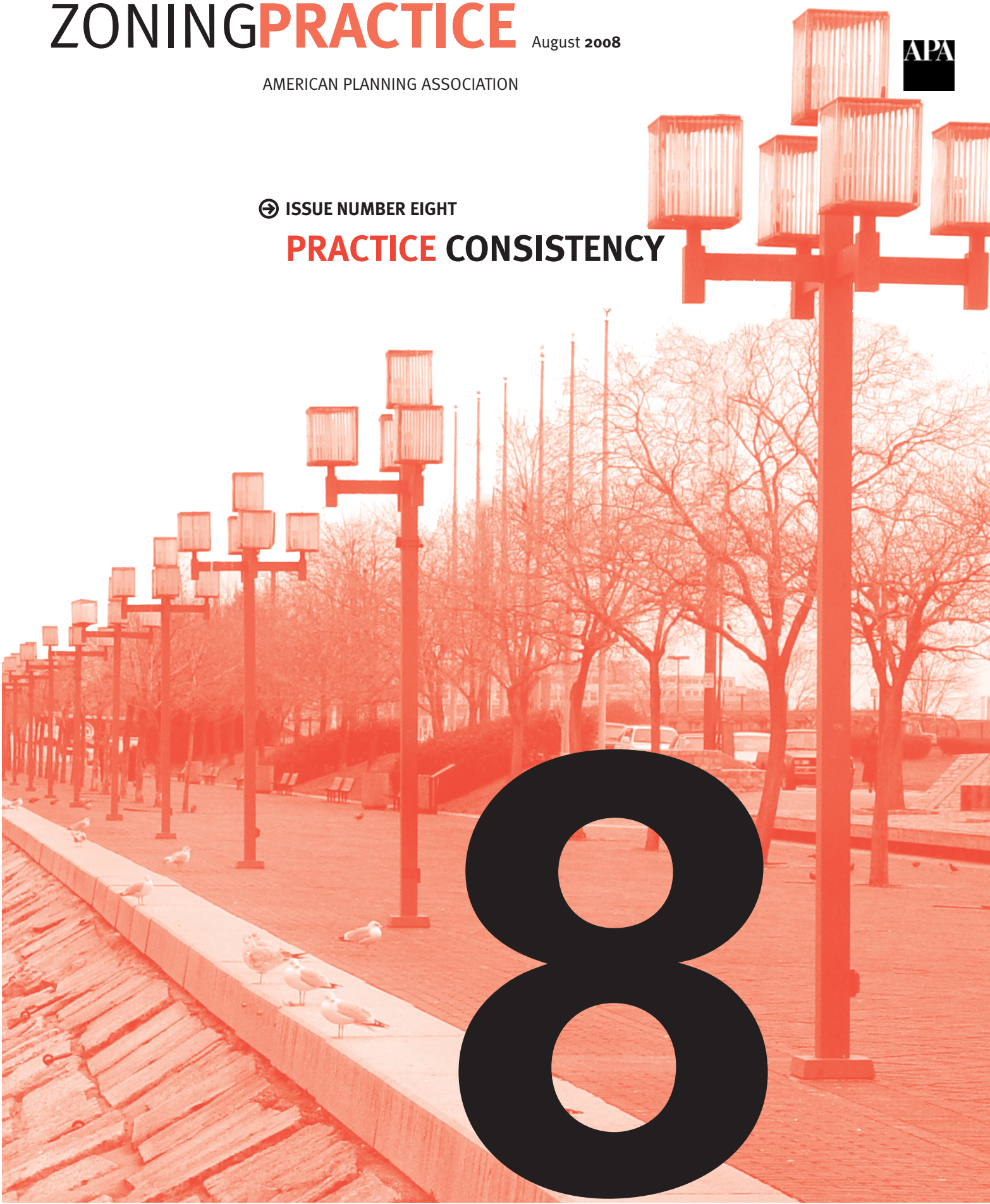
# PRACTICE CONSISTENCY



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# The Consistency Doctrine: Merging Intentions with Actions

*By Lora A. Lucero, AICP*

The zoning ordinance is the primary tool that communities use to regulate where, when, and how they will grow and develop.

What role does the comprehensive (or general) plan play in the development review process?

This issue of *Zoning Practice* discusses the disconnections between plans and zoning ordinances and recommends that states and local communities put teeth into their plans by adopting the consistency doctrine: the logical connection or relationship between comprehensive plans and the regulatory tools designed to implement those plans. The comprehensive plan is supreme, the constitution for the community. The tools—zoning, subdivision, capital improvements, impact fees, and others—must be consistent with the plan, rather than inconsistent with or blind to the plan.

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Historic St. Louis Cathedral in Jackson Square, New Orleans. The survival of New Orleans requires mandatory planning; all land-use decisions must be consistent with the comprehensive plan.

## THE ADOPTED COMPREHENSIVE PLAN MUST BE IMPLEMENTED; IF NOT, WHY PLAN?

In a democratic society, the residents of the community express their goals for the future by participating in a public planning process culminating in the adoption of the comprehensive plan, and by electing members of a local governing body to implement that plan. Local officials implement the community's plan by approving the capital infrastructure budget, adopting land-use regulations such as zoning and subdivision ordinances, and approving or rejecting development applications. Connecting development and land-use decisions to the adopted plan is the best way to achieve the community's goals, or at least to increase the odds of achieving them.

Failing to plan or successfully implement the comprehensive plan can have serious consequences. The challenges and opportunities confronting communities are more difficult and complex today than ever before. Professor John R. Nolon from Pace University School of Law notes in the January 2008 issue of *Planning & Environmental Law* that, in just 35 years,

> . . . the nation's population will grow by 100 million people: an increase of 33 percent. The private sector will produce for these new Americans over 70 million homes and over 100 billion square feet of offices, stores, factories, institutions, hotels, and resorts. Researchers predict that two-thirds of the structures in existence in 2050 will be built between now and then.
>
> This **growth cannot proceed randomly** without great cost to the economy, environment, and public health. This is neither an ideological nor a political issue. The consequences of haphazard development are not popular with the vast majority of Americans. They complain about the results of current growth patterns: an increase of asthma and obesity among the young, traffic congestion that stalls commuters, insufficient housing for the workforce and the elderly, the decline of cities as economic and cultural centers, threats to drinking water quality and quantity, reduced habitats and wetlands, higher incidences of flooding, rampant fossil fuel consumption, and an ever-larger carbon footprint. (emphasis added).

Communities prepare and adopt comprehensive plans to address these challenges and to balance the competing interests in a fair and democratic fashion. The public expects that the goals and policies of the plan will be successfully implemented, as evidenced by the countless hours, days, and weeks many volunteer to engage in the community's planning process. But after the plan

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**About the Author**
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is adopted everyone goes home, leaving implementation of the plan in the hands of politicians and planners. Elected officials typically make decisions with a short time horizon in mind, not much further than the next election. The comprehensive plan, on the other hand, typically addresses a longer view—20 years or beyond. In those states and communities that have not adopted the consistency doctrine, many planners often morph into development review and approval specialists.

The consistency doctrine can provide political cover to elected officials who face difficult or unpopular decisions. ("The plan made me do it.") But elected officials may not support requiring consistency between the decisions they make and the plan they adopted. Why? Because exercising discretion is one of the "perks" of elected office and a sign of political power. State municipal leagues may oppose consistency requirements because they fear increased litigation or loss of home rule control. The development community typically speaks out against giving plans a greater role in the development review process because developers have typically negotiated well under the existing rules of the game and don't want those rules to change.

### WHY IS THE CONSISTENCY DOCTRINE IMPORTANT?

Consistency matters because implementation matters. There are a number of reasons why successfully implementing the community's comprehensive plan is important:

- Serious challenges like climate change require that we take a longer view. Implementing the goals and policies in the comprehensive plan improves the odds that our community leaders are taking the longer view.
- In a democratic society, the public participates in setting the goals for the future. A comprehensive plan preceded by a meaningful public planning process presumably represents the desires of the community's residents and means that the inevitable competing interests have been heard and reconciled in that process.
- "One of the greatest failings of contemporary zoning law," land-use law commentator Charles L. Siemon notes, "has been the vulnerability of the system to influence by politically powerful individuals, a vulnerability that can only be overcome by establishing a procedural and substantive framework for individual decisions—planning."

> Successful implementation of the provisions of the comprehensive plan engenders greater public trust and confidence in the local decision-making process.

- The general public, property owners, and developers have a desire for stability and predictability in the land-use regulatory regime. Connecting development and land-use decisions to the adopted plan not only implements the plan, but also provides a measure of stability to the "zoning game," as author Richard Babcock called it, and helps avoid ad hoc decision making disconnected from the plan.
- Planning is a process by which we evaluate and weigh alternatives, and then select the best given our understanding today. The information available to us may change, and the plan may need to be amended, but the planning process is very different from the development review process. Too often, local officials either ignore the plan or amend the plan on the fly in order to conform to a development application. This blurs the lines between these two distinct processes.
- Perhaps most importantly from the perspective of the local government, connecting its land-use decisions to the comprehensive plan provides further evidence that the decisions are rational and reasonable. The consistency doctrine is a way of getting at substantive due process via statute, shoring up the constitutional argument that the decision is neither arbitrary nor capricious and advances legitimate interests.

Nolon points out that "[t]he development called for by the next 100 million Americans will largely be reviewed and approved by local officials applying locally adopted land-use standards. Our historical approach to influencing human settlement patterns and the use and conservation of the land has relied on private-sector forces and we have delegated the principal authority to regulate those forces to the local level of government through the adoption of land-use plans and regulations."

There's a very good reason for delegating this authority to local officials: they are more intimately familiar with the conditions and concerns at the local level. However, they

should not make such decisions in a vacuum. As Professor Charles M. Haar noted more than half a century ago, "in the press of day-to-day determinations in the field of land use, it is vital that there be some concrete unifying factor providing scope and perspective." The comprehensive plan provides that unifying factor.

Despite the words of caution from the drafters of the Standard State Zoning Enabling Act (SZEA) and the Standard City Planning Enabling Act (SCPEA) that zoning ordinances should be prepared "*in accordance with a comprehensive plan*," a number of preeminent land-use law commentators have pointed out that the connection between the two was called into question from the beginning. This zoning-planning enigma might have resulted from the unfortunate fact that the authority to zone contained in the SZEA (1926) preceded the authority to plan in the SCPEA (1928). Many communities enacted zoning ordinances before they ever prepared and adopted a comprehensive plan, creating the analytical disconnection that has spawned a large body of litigation and corresponding commentary and analysis on the question of regulatory consistency.

## Inconsistencies are the Challenge

A dysfunctional planning system has evolved—not by design, but by default—due in large measure to the timing of zoning versus planning enabling legislation and Americans' great deference to local home rule powers. Consider the following inconsistencies:

- *Outcomes not connected to the plan.* Federal, state, regional, and local governments have adopted a multitude of plans, but thousands of incremental decisions directly contradict those plans.
- *Development regulations (such as zoning, subdivision, and impact fees) not connected to the plan.* Many reasons are offered to explain this disconnection, but none are logical in the 21st century. Many communities never prepared a plan and simply adopted regulations in the absence of a plan. Other communities have adopted a plan, but the plan itself does not provide enough clarity or specificity, merely restating the "feel good" desires of the community in wishy-washy goals and policies that provide very little guidance when it comes time to write the regulations.
- *Development decisions and budget expenditures inconsistent with the plan.* Development decisions and public expenditures are often uncoordinated, but they need to be linked to the plan. If the link is not made, development decisions most likely reflect the short-term expedient response rather than the long-term public interest.
- *Conflicting plans and regulations within the same jurisdiction.* This is the age-old problem of the "left hand doesn't know what the right hand is doing." Particularly in larger metropolitan areas, planning and regulatory functions are so compartmentalized that the planning department might be preparing the comprehensive plan and the downtown revitalization plan while the economic development department is preparing the economic development plan and the utility division is preparing the water utility extension plan. One plan advocates infill and limiting sprawl on the edge of the community, while the other anticipates where the new water and sewer lines will be extended to accommodate growth on the edge.
- *Gaps and conflicts between jurisdictions.* There are vertical gaps (federal—state—regional—local) and horizontal gaps between different jurisdictions within the same region. One example of a vertical gap occurs when a state agency issues domestic well permits to owners of substandard-sized lots over the objections of the local government attempting to prevent development on these antiquated parcels. A horizontal gap is often noticeable in regions where local development decisions have tremendous regional impacts that cannot be addressed at the local level or where each community is competing for the tax ratables, zoning for the big box retail developments but not for the affordable housing units.

### DEFINITION OF "CONSISTENCY"

*A Planner's Dictionary* (PAS Report Number 521/522, April 2004) provides three definitions of "consistency."

- All regulations that are used to implement the local comprehensive plans must be consistent with the recommendations and policies of the plan, and state and local funding decisions must be consistent with the local plan. [Rhode Island Statutes]
- Free from variation or contradiction. Programs in the general plan are to be consistent, not contradictory or preferential. State law requires consistency between a general plan and implementation measures such as the zoning ordinance. [California Planning Roundtable]
- Compatibility and agreement with the general plan of the [municipality]. Consistency exists when the standards and criteria of the city general plan are met or exceeded. [Moorpark, California]

## MERGING INTENTION WITH ACTIONS

Robert Lincoln notes that requiring that land-use decisions to be consistent with the adopted comprehensive plan serves two competing purposes. First, from the macro level, consistency "is seen as a way of improving the results of land-use regulations and public infrastructure investments," focusing on the need for efficiency and environmental protection. At the micro level, consistency "deals with the fairness accorded landowners and neighbors in the regulatory process" because connecting development decisions to the comprehensive plan is considered a "touchstone for judicial review and a means of guaranteeing that political influence is not allowed to run roughshod over the individual or community interests."

How should the decision maker, and later the court upon appeal, determine whether the requisite connection between the comprehensive plan and the board's land-use decision exists? There are various degrees of consistency. At one end of the spectrum we might ask: Is the land-use decision *compatible* with the goals and policies in the comprehensive plan? If they are compatible, there is no reason why the land-use decision cannot coexist with those goals and policies. Continuing along the spectrum, does the land-use decision *further* the goals and policies in the comprehensive plan? In other words, does the decision make it more likely that the goals and policies will be achieved? They are not just compatible; one reinforces the other.

Finally, the most stringent inquiry would be to determine whether the land-use decision would *by necessity achieve* the goals and policies, or *implement* the plan. In other words, the decision must not only be compati-

ble with the plan, and further the plan, but it must ensure that the goals and policies are implemented. Regardless of which scale one uses to measure the link between decision and plan, it certainly must not *interfere* or *prevent* the goals and policies of the plan from being realized.

## EXAMPLES FROM STATE AND LOCAL GOVERNMENTS

A number of states have incorporated consistency provisions into their planning statutes. They include Arizona, California, Delaware, Florida, Kentucky, Maine, Minnesota, Nebraska, New Jersey, Oregon, Rhode Island, Washington, and Wisconsin.

New Jersey's cross-acceptance planning process is a bottom-up approach to planning, designed to encourage consistency between municipal, county, regional, and state plans under N.J.S.A. 52:18A-202.b. The Office of Planning and Sustainable Communities explains that the Plan Endorsement Consistency Review process encourages municipalities to engage in cooperative regional planning. It ensures that municipal, county, regional, and state agency plans are consistent with the State Development and Redevelopment Plan and with each other. Once a local plan has been endorsed through this process, the municipality or county is entitled to a higher priority for available funding, streamlined permit reviews, and coordinated state agency services.

California planners and officials have many years of experience with the consistency doctrine. Since 1971, cities have been required to have a legally adequate general plan. If the plan is not current or is internally inconsistent, the court may rule land-use actions invalid. Internal (horizontal) consistency requires that the data, assumptions, and projections used in various parts of the plan be consistent with one another. A general plan must be integrated and internally consistent, both among the elements and within each element. Internal consistency also requires that general plan diagrams of land use, circulation systems, open space, and natural resource areas reflect written policies and programs in the text. Vertical consistency is also required, meaning there must be consistency between the general plan and other land-use and development actions. The courts will generally defer to the city's interpretation and decisions

### MAJOR ELEMENTS OF PROPOSED SMART GROWTH AMENDMENTS TO HOME RULE CHARTER OF NEW ORLEANS

1. City Planning Commission is required to prepare a 20-year Master Plan for the physical development of the city. Elements of the Master Plan are defined.
2. The Land-Use Element of the Master Plan shall consist of text and a map setting forth categories of allowable land-use issues and density for each of the city's 13 Planning Districts.
3. The Land-Use Element of the Master Plan provides the city with the authority to do form-based zoning—traditional neighborhood development, transit-oriented development, smart codes, etc.
4. City Planning Commission shall prepare and recommend to the City Council a zoning ordinance and zoning map for the purpose of implementing the Master Plan. Both the ordinance and the map are required to be consistent with the Plan.
5. The city's capital improvement plan and its capital budget shall be consistent with the Master Plan.
6. In preparing the Master Plan, the City Planning Commission must hold at least one public hearing in each of the 13 Planning Districts to solicit the opinions of citizens that live and work in that District and a public hearing to solicit the opinion of citizens from throughout the community.
7. The City Planning Commission shall forward the Master Plan to the City Council for adoption. Any modifications of the Plan by the Council before adoption shall be referred back to the Planning Commission for a public hearing and comment.
8. Following the adoption of the Master Plan, all land-use actions by any government body shall be consistent with the Plan, as well as amendments to the Plan.
9. The Land-Use Element of the Master Plan and the Comprehensive Zoning Ordinance shall each contain a table or matrix specifying which zoning districts in the Zoning Ordinance are consistent with each of the land-use categories in the Land-Use Element of the Master Plan.
10. All land-use actions not consistent with the Master Plan, or amendments to the Plan, shall be null and void.
11. At least every five years, but not more often than two years, the City Planning Commission shall comprehensively review the Master Plan and shall determine whether the Plan requires amendment or comprehensive revision. If it is determined that amendment or comprehensive revision is required, the Planning Commission may take appropriate action.
12. The City Planning Commission may amend the Master Plan, including the Land-Use Element and Land-Use Map, following application affecting a particular parcel or parcels of property, provided all such amendments shall be considered on a regular schedule which shall allow all such amendments to be considered at one time and no more than twice per calendar year. The City Planning Commission shall hold at least one public hearing in the Planning District where the affected parcel or parcels of property are located to solicit the opinion of citizens that work or live in that district and a public hearing to solicit the opinions of citizens from throughout the community.
13. Any zoning ordinance or amendment to the zoning ordinance that is adopted by the City Council that is not consistent with the Master Plan shall be null and void.
14. Simultaneous with any amendment to the Master Plan, the City Planning Commission shall review the Comprehensive Zoning Ordinance, after one or more public hearings, to determine whether the ordinance requires revision and amendment.

*Source:* "A Citizen's Guide to Land Use Reform: Summary of Smart Growth Amendments to Home Rule Charter of New Orleans," March 3, 2008.

## RESOURCES

### PUBLICATIONS


- Babcock, Richard. 1966. *The Zoning Game: Municipal Practices and Policies.*
- Delaney, John J., Charles M. Haar, and Theodore C. Taub. 2008. "Maryland's Highest Court Opines on the Relationship between Plans and Development Decisions." *Planning & Environmental Law*, July.
- DiMento, Joseph F. 1980. *The Consistency Doctrine and the Limits of Planning.* Cambridge, Mass.: Oelgeschlager, Gunn, and Hain.
- Haar, Charles M. 1955. "In Accordance with a Comprehensive Plan." *Harvard Law Review.*
- Lincoln, Robert. 1996. "Implementing the Consistency Doctrine," *The Growing Smart Working Papers*, Vol. 1, PAS Report No. 462/463. Chicago: American Planning Association.
- Mandelker, Daniel R. 2002. *A Report on Planning in New Orleans.* Prepared for the New Orleans Master Plan Coalition (January 14, 2002). Available at http://law.wustl.edu/landuselaw/neworl.htm.
- _____. "The Role of the Local Comprehensive Plan in Land Use Regulation." 1976. *Michigan Law Review.*
- Mandelker, Daniel R., and A. Dan Tarlock. 1992. "Shifting the Presumption of Constitutionality in Land Use Law," *Urban Lawyer,* January.
- Meck, Stuart. 2000. "The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute." *Washington University Law and Policy Journal*, March.
- Netter, Edith M., and John Vranicar. 1981. *Linking Plans and Regulations: Local Responses to Consistency Laws in California and Florida*, Planning Advisory Report No. 363. Chicago: American Planning Association.
- Siemon, Charles L. 1987. "The Paradox of 'In Accordance With a Comprehensive Plan' and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations," *Stetson Law Review.*


### STATES

- New Jersey's cross-acceptance planning process: See www.state.nj.us/dep/opsc/envcbp.html.
- California: For additional information on courts' decisions to defer to a city's interpretation and decisions regarding consistency, see *Save Our Peninsula Committee v. County of Monterey*, 87 Cal.App. 4th 99, 142 (2001) (citing *Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1012, 1021 (1980)), discussed in Curtin's *California Land Use and Planning Law*, 2004, 24th Ed.)

regarding consistency "because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in an adjudicatory capacity." The consistency requirement addresses future growth. A city is not required to bring existing public works projects, including neighborhoods and streets, into compliance with the general plan.

Concerned about greenhouse gas emissions, California legislators are now considering new legislation to require regional transportation plans to include a "preferred growth scenario" that must be consistent with state planning priorities. After January 2009, projects to be funded from the regional transportation improvement programs must be consistent with the regional transportation plan. SB 375 includes a definition of consistency to mean that the "capacity of transportation projects and improvements does not exceed that which is necessary to provide reasonable service levels to the preferred growth scenario."

Beginning on January 1, 2010, Wisconsin will require the following local land-use actions to be consistent with the comprehensive plan:

- municipal incorporations
- annexations
- cooperative boundary agreements
- transportation facilities
- official mapping
- impact fees (new or amended)
- subdivision regulations
- extraterritorial plat review
- zoning (new or amended)
- agricultural preservation plans
- any other land-use ordinance, plan, or regulation.

Recognizing the difficult disconnection between water planning and land-use planning, Minnesota requires local governments to submit existing water and related land resources plans and official controls to the county board for review when exercising water and related land resources planning and regulatory responsibility. If the board finds inconsistencies, the local government must revise its plans and regulations to conform them to the county board's recommendations.

Counties in Pennsylvania must prepare comprehensive plans (municipalities may prepare plans), but a troublesome provision in the Municipalities Planning Code (MPC Sec. 303c) renders comprehensive plans legally powerless. That provision states, "[n]otwithstanding any other provision of this act, no action by a governing body of a municipality shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provision of the comprehensive plan." Although it was originally included in the statute to prevent frivolous lawsuits, this provision has been interpreted to mean that courts and hearing boards cannot consider the comprehensive plan in any zoning matter.

Other provisions of the MPC now require general consistency between county and local plans and between plans and ordinances, but Section 303c undercuts those requirements. In a report to Governor Rendell in May 2006, the Pennsylvania State Planning Board recommended that Section 303c be amended by adding a provision that any challenge to the consistency of a zoning ordinance or decision with a comprehensive plan and with the consistency of a multimunicipal or county comprehensive plan be limited to mandamus and that such challenge only be brought after a reasonable time is allowed to make the plans consistent.

Massachusetts and New Mexico are also recognizing the importance of adding teeth to plans. In June 2004, a smart growth audit in 52 communities in southern Massachusetts found that plan implementation was a "major hurdle" and recommended a change to state law to require consistency between plans and regulations. In January 2007, the New Mexico Governor's Task Force on Our Communities, Our Future issued its second report including a recommendation to "[m]odify state enabling legislation to require consistency between the zoning and subdivision ordinances and the comprehensive plan."

New Orleans may take the prize. In 2002, Daniel Mandelker, FAICP, a law professor at Washington University and a consultant to APA in developing the *Growing Smart Legislative Guidebook*, was asked to review the planning and zoning processes in New Orleans and make recommendations for reforms. His report provides a clear description of both the current problems and possible solutions to fix a broken land-use planning system in that city. Mandelker recommended that the city adopt the consistency doctrine and embue the master plan with the force of law.

> "New Orleans is a priceless legacy; its survival requires care and protection. Mandatory planning, and a requirement that all land use decisions must be consistent with the comprehensive plan, are necessary to manage development within the city and to protect its historic neighborhoods. Planning for New Orleans must also take a visionary approach based on urban design principles. This kind of planning can provide responsive neighborhood and development plans that reflect a sense of place, and that will furnish a blueprint for neighborhood preservation and new development projects.
>
> The planning process must be completed through the preparation of all the necessary planning elements, and the land use plan must be revised to include the policy planning and neighborhood approach that this report recommends. The draft zoning ordinance should be shelved until the city can develop a different kind of zoning ordinance that implements the planning and zoning program recommended in this report.
>
> The planning and zoning program recommended in this report should be enacted into law by a city ordinance that mandates the adoption of a comprehensive plan by the city council and requires all zoning and land-use decisions to be consistent with the comprehensive plan. The city charter can eventually be amended to authorize these requirements. The neighborhood organization program and planning and zoning procedures recommended in this report should ensure that the policies of the plan are implemented, and that the zoning ordinance is fairly administered.
>
> Experience in other cities has taught me that you must adopt the legislation that mandates the creation of the master plan, establishes the principal of regulatory consistency, and legally structures the neighborhoods into the planning process before you begin to develop a plan for the community. Over and over again it has been shown that the public as well as private sector will ignore the plan unless they are legally required to follow it. To retain the services of planners, to write planning reports, and to involve citizens in a planning process before the legal authority has been established for that process is to waste taxpayers money and to cause citizen disillusionment."

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Cafe du Monde in the New Orleans French Quarter. Managing development within the city under a comprehensive plan will protect its historic neighborhoods.

On June 5, 2008, New Orleans city council member Jacquelyn Clarkson introduced charter amendments prepared by Smart Growth for Louisiana. The amendments propose to elevate the new Master Plan so that, when it is completed, it will have the force of law. Land-use regulations, including the zoning ordinance and all capital expenditures, will have to be consistent with it. The city council voted in July to place the proposed charter amendments on the ballot for a vote of the citizens on November 4, 2008. All eyes are on New Orleans.

Cover photo: Light posts along Baltimore's Inner Harbor.
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DOES YOUR ZONING FIT YOUR PLAN?

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