IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2007

No. 44

DAVID TRAIL, *et al*.,

Petitioners,

v.

TERRAPIN RUN, LLC, *et al*.,

Respondents.

BRIEF *AMICUS CURIAE* OF

AMERICAN PLANNING ASSOCIATION

AND MARYLAND CHAPTER OF APA

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INTEREST OF THE *AMICUS CURIAE*

The American Planning Association and its Maryland Chapter (collectively the "APA") respectfully submit this *amicus curiae* brief in support of Petitioners and state as follows:

1. The important question before this Honorable Court in *Trail v. Terrapin Run, LLC* is what connection is required between the grant of a special exception and the adopted county comprehensive plan?

2. The APA has a special expertise in this issue by virtue of its long-standing professional interest and involvement in the field of land use planning nationally and in the State of Maryland which it believes will be helpful to this Court.

3. The APA is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary and scientific research purposes to advance the art and science of planning – including physical, economic, and social planning – at the local, regional, state and national levels. The APA's mission is to encourage planning that will contribute to the well-being of people today as well as future generations by developing sustainable and healthy communities and environments.

4. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934.

5. The organization has 46 regional chapters and 21 divisions devoted to specialized planning interests. The APA represents more than 42,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The Maryland Chapter of APA represents a membership of more than 630 planning commissioners and professional planners throughout Maryland. APA members are involved on a day-to-day basis in formulating and implementing planning policies and land-use regulations.

6. The present case has great significance to the future of land use and community planning in the state of Maryland because the decision provided by this Court will determine, in large measure, whether or not adopted comprehensive plans will successfully be implemented in the future.

7. As the need arises, the APA develops policies that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In recent years, several policy guides have been adopted that highlight APA's concerns about the issues involved in the present case, including a Policy Guide on Planning for Sustainability (April 2000), and a Policy Guide on Smart Growth (April 2002).[1]

8. As an advocate for good planning, the APA regularly files *amicus curiae* briefs in cases of importance to the planning profession and the public interest. A few of the cases in which the APA has participated as *amicus curiae* include:

[1] APA's policy guides can be found at http://www.planning.org/policyguides/

Agins v. Tiburon, 447 U.S. 255 (1980), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Kelo v. City of New London*, 545 U.S. 469 (2005), *Lingle v. Chevron*, 544 U.S. 528 (2005), *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006), and most recently *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).[2]

9. APA explains -- from a broad, national perspective -- the important role the comprehensive plan assumes in local land use decision-making, and why there must be a strong connection between the comprehensive plan and the day-to-day land use decisions made by elected and appointed officials, such as special exceptions and other administrative decisions, where judicial review must always be more vigorous.

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[2] APA's *amicus curiae* briefs can be accessed at http://www.planning.org/amicusbriefs/

INTRODUCTION AND SUMMARY OF ARGUMENT

The APA respectfully submits this *amicus curiae* brief to provide a national perspective on the central issue in this case – the connection between a grant of a special exception[3] and the community's comprehensive plan. APA is very concerned about the special exception approved by the Allegany County Board of Appeals ("Board") in this case which authorized 4,300 new homes and 125,000 square feet of new commercial and retail space on land zoned for non-urban uses. Under any objective review, the Board's decision appears to be a contradiction of the community's zoning regulations and comprehensive plan, as well as a violation of the eight Vsions adopted by Maryland's General Assembly.[4]

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[3] The term "special exception" is interchangeable with "conditional use permit" in Maryland and other states.

[4] § 1.01. Visions

In addition to the requirements of § 3.05(c) of this article, a commission shall implement the following visions through the plan described in § 3.05 of this article:

(1) Development is concentrated in suitable areas.
(2) Sensitive areas are protected.
(3) In rural areas, growth is directed to existing population centers and resource areas are protected.
(4) Stewardship of the Chesapeake Bay and the land is a universal ethic.
(5) Conservation of resources, including a reduction in resource consumption, is practiced.
(6) To assure the achievement of items (1) through (5) of this section, economic growth is encouraged and regulatory mechanisms are streamlined.
(7) Adequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur.
(8) Funding mechanisms are addressed to achieve these visions.

MD. CODE ANN. ART. 66B §1.01

APA does not specifically address any of the three statutory standards in Maryland for connecting land use decisions to the comprehensive plan. Whether the correct standard is *"consistency"* with the comprehensive plan as the Circuit Court Judge ruled; or *"in conformance with"* the comprehensive plan as Appellants believe; or *"in harmony with"* the comprehensive plan as the Board thought when it approved the special exception and with which the Court of Special Appeals concurred, APA believes that "[p]lans are documents that describe public policies that the community intends to implement and not simply a rhetorical expression of the community's desires."[5] APA hopes the Court will sweep away the confusion with a clear statement that whatever standard is used, a reasonable and rational decision-making process requires that there be a strong connection between the land use decision and the community's comprehensive plan.

APA's position is that (1) the adopted comprehensive plan must be implemented; (2) effective implementation requires that the day-to-day decisions made by local officials be consistent[6] with the adopted comprehensive plan; and (3) the court's review of whether consistency is achieved should be more

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[5] Robert Lincoln, AICP, *Implementing the Consistency Doctrine*, THE GROWING SMART WORKING PAPERS, VOL. 1, PLANNING ADVISORY SERVICE REPORT NO. 462/463 (Chicago: American Planning Association, 1996) at 89.

[6] APA uses "consistency" because that term is most commonly used in the planning literature and judicial opinions addressing the link between the comprehensive plan and land use decisions.

searching when local officials are acting in their administrative (quasi-judicial) capacity.

Maryland has been recognized nationally as a leader in the planning community beginning with the passage of the 1992 Maryland Economic Growth, Resource Protection and Planning Act (Chapter 437, Laws of Maryland 1992) and the 1997 Smart Growth Areas Act (Chapter 759, Laws of Maryland 1997).[7] In addition to the other noteworthy features of this statutory reform, the eight Visions enacted by Maryland's General Assembly provide compelling evidence that state leaders are looking at the "big picture" and have delegated the planning and land use authority to local governments to do likewise. This Court now has an opportunity to provide much-needed guidance and clarity to planners, local government officials, and property owners about the important relationship between plans and land use decisions, such as the special exception granted by the Allegany County Board of Appeals in this case.

[7] PLANNING COMMUNITIES FOR THE 21ST CENTURY – A SPECIAL REPORT OF THE AMERICAN PLANNING ASSOCIATION'S GROWING SMART[SM] PROJECT, American Planning Association, Dec.1999; James R. Cohen, *Maryland's 'Smart Growth' – Using Incentives to Combat Sprawl*, G. Squires (ed.) 2002. ("The Smart Growth Act bolstered Maryland's reputation as a leader in state growth management."); Denny Johnson, Patricia E. Salkin, Jason Jordan, Karen Finucan, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES, American Planning Association and Smart Growth Network, February 2002.

ARGUMENT

I. The Adopted Comprehensive Plan Must Be Implemented; If Not, Why Plan?

There is no crystal ball. If there were, there would certainly be no need for plans or planning. We send our children to college and we join the ranks of the retired because we have planned our financial future – or more accurately, because we have *successfully implemented* our plan for the future. Of course, circumstances may change and our plans must be adjusted accordingly. No plan is ever cast in concrete. However, if we fail to base our decisions today on our plan, the odds of reaching the retirement we hope for or sending our children off to college will be greatly diminished.

A community must plan for its future too. In a democratic society, the residents of the community express their goals for the future in two ways – by participating in a public planning process which culminates in an adopted plan, and by electing representatives to implement that plan. Local officials implement the community's plan day-by-day when they, among other things, approve the local government's capital infrastructure budget, when they adopt land use regulations such as zoning and subdivision ordinances, and when they approve or reject 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 that the community's goals will be achieved.

The consequences of failing to plan or failing to implement the community's comprehensive plan can be serious. The challenges and opportunities confronting them are more difficult and complex today than they have ever been. Professor John R. Nolon from Pace University School of Law notes in an upcoming article[8] that in just 35 years,

> … the nation's population will grow by 100 million people: an increase of 33%. 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.
> *Id. (emphasis added)*

Communities prepare and adopt a comprehensive plan to address these serious challenges; to strive towards the Visions enacted by the Maryland Legislature and the goals expressed by the community residents; to find a way to get from the present to the future; and to balance the competing interests in a fair and democratic fashion.

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[8] John R. Nolon, untitled commentary to be published in PLANNING & ENVIRONMENTAL LAW, January 2008, American Planning Association.

Not all plans are created equal; some plans are stronger, more thorough, and more focused than others. The quality of the adopted comprehensive plan certainly influences the odds that it will be implemented. However, there is very little chance for successful plan implementation unless local officials connect their land use decisions to the adopted comprehensive plan.

The general public certainly expects that the goals and policies of the plan will be successfully implemented, as evidenced by the countless hours, days, and weeks they volunteer to engage in the community's planning process. In the absence of a strong legislative and judicial requirement to connect land use decisions to the comprehensive plan, the plan has questionable relevance for day-to-day decision-making and runs the risk of sitting on the proverbial shelf gathering dust.

There are a number of reasons why the community's comprehensive plan must be successfully implemented.

- Planning should not be an exercise in futility. Certainly, the Maryland General Assembly would never enact legislation or delegate planning authority which is ineffectual, or without a meaningful purpose.
- Some serious challenges – such as climate change – require that we take a longer view. Implementing the goals and policies in the comprehensive plan provides better 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 that is preceded by a meaningful public planning process presumably represents the desires of the community's residents and the inevitable competing interests have been heard and reconciled in that process.
- Successful implementation of the provisions of the comprehensive plan engenders greater public trust and confidence in the local decision-making process. "One of the greatest failings of contemporary zoning law," a land use law commentator 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."[9]
- 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

[9] Charles L. Siemon, *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*, 16 STETSON L. REV. 603, 627 (1987).

zoning game[10] and helps avoid *ad hoc* decision-making disconnected from the plan.[11]

- 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. Decision-makers should not confuse one with the other, attempting a *de facto* amendment of the comprehensive plan through a development review process or grant of a special exception.
- And 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. When decision-makers at the local level are making legislative decisions, the court's standard of review should be deferential. However, when decision-makers are acting in their administrative or quasi-judicial role, such as the approval of the special exception in this case, the court's review should be more exacting.

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[10] Richard Babcock, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 120-21 (1966).

[11] Charles Siemon notes that "[i]n the absence of planning policies adopted in the abstract as a part of a serious planning effort, individual land use decisions become nothing more than ad hoc judgments influenced by the heat of the moment ('a decision based on … impulse, prejudice, or just plain fatigue …'), what has been sarcastically described as the 'mockery of ad hockery.'" *See*, note 9 *supra*. [Siemon quoting Babcock & Siemon, THE ZONING GAME REVISITED (1985) at 262.]

What happens if an unexpected opportunity or challenge confronts the local officials that the comprehensive plan fails to address or may even conflict with? This may have been the case in Allegany County. In addition to the periodic reviews and updates that should occur to keep the comprehensive plan current, if there are unforeseen opportunities or challenges, local officials may initiate the process to amend the plan, not through a development review process while considering the merits of a development application, but through a meaningful planning process. The public has an opportunity to participate and the unforeseen challenge or opportunity is examined in light of the "big picture" while the competing interests are addressed.

Divorcing the regulations and land use decisions from the comprehensive plan may be tempting. Elected officials typically work with a short time horizon when they make decisions, not much further than the next election.[12] This is not to fault our elected officials – it's just a political reality.[13] The comprehensive plan, on the other hand, typically addresses a longer view – twenty years or beyond.

Balancing the short-term needs with the long-term goals is no easy task. Ignoring the long-term goals, or jettisoning them altogether when the need arises, might be the expedient option. However, elected and appointed officials are more

[12] There's an acronym that many use to describe this predicament – NIMTOO. "Not In My Term Of Office."

[13] Another political reality is that many politicians prefer to retain their discretion to act as the needs arise, rather then circumscribing their options which is the logical result if their decisions and actions must be connected to the community's comprehensive plan.

likely to keep themselves focused on the long-term goals when they are required to make their decisions consistent with the comprehensive plan, and at the same time, reduce the pressure to make decisions based only on short-term considerations.[14]

The 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.[15] 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 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."[16] That is the role of Allegany County's Comprehensive Plan.

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[14] *See* Charles M. Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1174 (1955) [Connecting zoning and land use decisions to the comprehensive plan "will mean that the municipal legislature has an ever-present reminder of long-term goals which it has been forced to articulate, and will give lesser play to the pressures by individuals for special treatment which tend over a period of years to turn the once uniformly regulated district into a patchword."]

[15] Nolon, *supra* note 8.

[16] Haar, *supra* note 14, at 1155.

II. Connecting Land Use Decisions with the Comprehensive Plan – A Trend Is Emerging

Despite the words of caution from the early drafters of the Standard State Zoning Enabling Act[17] [SZEA] and the Standard City Planning Enabling Act[18] [SCPEA] that zoning ordinances should be prepared *"in accordance with a comprehensive plan,"*[19] a number of preeminent land use law commentators have pointed out that the connection between the two was called into question right from the very beginning.[20] This zoning-planning enigma[21]might have resulted from the unfortunate fact that the authority to zone contained in the SZEA preceded the authority to plan in the SCPEA by two years. Many communities enacted zoning ordinances before they ever prepared and adopted a comprehensive plan, creating the analytical disconnect which has spawned a large body of

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[17] ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926 [hereinafter cited as SZEA].

[18] ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928)[hereinafter cited as SCPEA].

[19] SZEA, Section 3

[20] Haar, *supra* note 14. Siemon, *supra* note 9. *See also,* Edward J. Sullivan and Laurence Kressel, *Twenty Years After – Renewed Significance of the Comprehensive Plan Requirement,* 9 URB. L. ANN. 33 (1975); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute,* 3 WASH. U. J. L. & POL'Y 295 (2000).

[21] Sullivan and Kressel, *supra* note 20 at 35.

litigation and corresponding commentary and analysis on the question of regulatory consistency.[22]

In 1971, Professor Daniel Mandelker provided the following insight as additional reasons for the failure by the courts to enforce the statutory comprehensive plan requirement in the early years:[23]

> The reasons advanced for this judicial emasculation of the statutory planning requirement have been many, and are often pragmatic, the most conventional being the point that many municipalities, especially the smaller ones, did not have plans until recently, and that to enforce the statutory requirement rigidly would have prevented municipal exercise of the zoning power. The explanation is suggestive, but it misses the point. What happened was that the courts were willing to accept the role of the zoning ordinance in adjusting land use interdependencies, but they were very reluctant to review the value preferences which the ordinance incorporated. To have done so would have involved the judiciary in the political function of evaluating community goals, and this they were unwilling to do. A narrow judicial reading of the statutory requirement avoided an appraisal of the community value judgments expressed in the zoning ordinance, an interpretation buttressed by judicial adoption of the conventional presumption that the zoning

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[22] Joseph F. DiMento, *The Consistency Doctrine and the Limits of Planning* (Cambridge, Mass.: Oelgeschlager, Gunn, and Hain, 1980); Charles Haar, *"The Master Plan: An Impermanent Constitution,"* LAW AND CONTEMP. PROBS. 20 (1955); Edith M. Netter and John Vranicar, *Linking Plans and Regulations: Local Responses to Consistency Laws in California and Florida,* PLANNING ADVISORY REPORT NO. 363 (Chicago: American Planning Association, 1981); Larsen & Siemon, *"In Accordance With A Comprehensive Plan – The Myth Revisited,"* 1979 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 105; A. Dan Tarlock, "*Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against,"* URB. L. ANN. 9 (1975). *See also*, Siemon, *supra* note 9; Haar, *supra* note 14; Mandelker, *supra* note 20; Sullivan and Kressel, *supra* note 20.

[23] Daniel R. Mandelker, THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE 57 (1971); as quoted in Edward J. Sullivan, *The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation*, 3 WASH. U. J. L & POL'Y 323 (2000).

> ordinance was constitutional unless proved otherwise. Also of interest from this perspective are judicial interpretations of the comprehensive plan requirement which emphasize a comprehensiveness in process as the essential component of the statutory test, rather than the substantive content of the plan's goals and objectives.[24]

Fifteen years later, Charles Siemon noted that "planning, a seemingly logical predicate for land use regulation, was lost in the shuffle… as courts bent over backwards to sustain local land use regulations."[25] He shared a logical and coherent description of the historical evolution of the planning/land use disconnect, and described the response by a number of state legislatures to mend this disconnect, including Hawaii, California, Oregon, Idaho, New Jersey and Florida, in addition to Maryland.[26] By 1987, the nexus between planning and zoning was becoming stronger, such that Siemon opined that "the relationship between planning and land use regulation has found general judicial

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[24] *Id.* at 58-59.

[25] Siemon, *supra* note 9 at 608.

[26] *Id.* at 612. Examples of such reforms include: The Affordable Housing Appeals Act in Massachusetts (1969); Act 250 - State Land Use and Development Act in Vermont (1970); Environmental Land and Management Act in Florida (1972); SB100 – Oregon Land Use Act (1973); State and Regional Planning Act and Omnibus Growth Management Act in Florida (1984-5); State Planning Act and Fair Housing Act in New Jersey (1985-6); Comprehensive Planning and Land Use Regulation Act in Maine (1988); Act 200 – Growth Management Act in Vermont (1988); Comprehensive Planning and Land Use Regulation Act and Comprehensive Appeals Board Act in Rhode Island (1988); State Planning Act in Georgia (1989); Growth Management Acts I and II in Washington (1990-1); SB23 (comprehensive planning and zoning) in Kansas (1991); Comprehensive Planning Enabling Act in South Carolina (1994); SB 3278 (growth management) in Tennessee (1998); and Act 9 in Wisconsin (1999). GROWING SMART[SM] LEGISLATIVE GUIDEBOOK, Stuart Meck, FAICP, Gen. Ed, American Planning Association (2002 Edition) at 1-11.

acceptance."[27] Nevertheless, he went on to note the tension that existed between "the deliberativeness of planning" and the typical "post hoc rationalizations" that often accompanied land use decision-making.[28]

In addition to Charles Siemon and Professors Mandelker and Haar,[29] Edward J. Sullivan, a distinguished land use attorney from Oregon, has also been a strong advocate for reforming the zoning-planning disconnect. For more than thirty years, Sullivan has traced the progress (and sometimes lack of progress) that states have made in linking zoning and land use decisions to the comprehensive plan.[30] Although in 1975, he noted that "the relationship of planning to land use regulations has been a matter silently relegated, by the acquiescence of local

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[27] *Id.* at 614 [Siemon provided a comprehensive list of cases addressing the nexus required between zoning and the comprehensive plan.]

[28] *Id.* at 616.

[29] Haar, *supra* note 14. See also, Charles Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955); *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); *Wayne Township: Zoning for Whom? In Brief Reply*, 67 HARV. L. REV. 986 (1954).

[30] Sullivan and Kressel, *supra* note 20. Sullivan provides an annual update of the role of the comprehensive plan in THE URBAN LAWYER. He has divided the state case law on this subject into three categories – the "traditional" approach, which gives no significance to the plan; the "planning factor" approach, which gives the plan a role in such determinations; and the "planning mandate" approach, which treats the plan as a dispositive standard for land-use regulations and actions. Based on his review of recent decisions, Sullivan places Connecticut, Ohio, Texas and Wisconsin in the "traditional" category; but has noted that "many states have abandoned the position that the plan, where it exists, is meaningless, yet do not have the statutory direction to declare that the plan is an "impermanent constitution." Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 38 URB. LAWYER 3 at 685, 688 (2006) quoting Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).

government and the judiciary, to the back-waters of planning law,"[31] more recently Sullivan believes that "slowly and incrementally, the comprehensive plan has been invested with an increasing role in judging land use regulations or actions, so that, either by legislation or court decision, separate plans are required and, once in place, are a significant, if not decisive, factor in evaluating regulations."[32] He also notes "the judicial discussion of comprehensive plans has tended to shift away from whether such plans are required and toward the manner of implementation of plans."[33]

As this trend continues, we find courts around the country explaining the role of the comprehensive plan. In California, the community's general plan is considered the "constitution for all future development."[34] This pronouncement came from that state's Supreme Court nearly twenty years after the California Legislature enacted the consistency doctrine in 1971.[35]

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[31] Sullivan and Kressel, *supra* note 20 at 33.
[32] Sullivan, *supra* note 30 at 686.
[33] *Id.* at 686.
[34] *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990).
[35] Perhaps the California courts were ahead of the curve, appreciating the need for the consistency doctrine even before the California Legislature adopted it. In *O'Loane v. O'Rourke*, 231 Cal.App.2d 774 (1965), the Court of Appeals stated: "It is apparent that the plan is, in short, a constitution for all future developments within the city. No mechanical reading of the plan itself is sufficient. To argue that property rights are not affected by the general plan (as the city so asserts) as adopted ignores that which is obvious. Any zoning ordinance adopted in the future would surely be interpreted in part by its fidelity to the general plan as well as by the standards of due process." The decision in *DeVita v. County of Napa*, 9 Cal.4th 763, 772 (1995) went on to say: "[A]fter 1971 the general plan truly became, and today remains, a "'constitution' for future development" (*Lesher Communications*,

The general plan in California "provides the blueprint for development throughout the community, and is the vehicle through which competing interests and the needs of the citizenry are balanced and meshed."[36]

In Florida, a ruling by that state's intermediate court[37] which the Florida Supreme Court declined to review,[38] directly addressed the consequences for failing to follow the local comprehensive plan. The *Pinecrest* court required the developer to demolish the apartment buildings he constructed during the multi-year litigation because they were inconsistent with the community's comprehensive plan.[39] The developer had been put on notice that the neighbor challenging the approval of his development would seek injunctive relief if she prevailed on appeal, but he ignored her and built the apartment units during the course of the litigation. When he lost, he argued during the remedy phase of the trial that the court should balance the equities in his favor because he would suffer a $3.3 million loss if forced to demolish the buildings, while the neighbor's property was reduced in value by $26,000.[40] The court noted that "respect

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Inc. v. City of Walnut Creek, 52 Cal.3d 531, 540 (1990)) located at the top of "the hierarchy of local government law regulating land use." (*Neighborhood Action Group v. County of Calaveras*, 156 Cal.App.3d 1176, 1183 (1984)).

[36] Daniel J. Curtin, Jr. and Cecily T. Talbert, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW (Solano Press, 26th ed. 2006).

[37] *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191 (Fla. App. 2001).

[38] *Pinecrest Lakes, Inc. v. Shidel*, 821 So.2d 300 (Fla. 2002) (*cert denied*).

[39] Nancy E. Stroud, *And the Walls Came Tumbling Down*, 54 LAND USE LAW & ZONING DIGEST No. 9, 3-6 (2002).

[40] *Id.* at p. 5.

for law, in this case the Comprehensive Plan, trumps any 'inequity' of financial loss arising from demolition."[41]

The *Pinecrest* court's determination of inconsistency relied heavily on the clear terms and standards contained in the comprehensive plan, as well as the court's interpretation of the requirements contained in Florida's planning enabling legislation. What is notable is the court's high regard for abiding by the goals and policies contained in the comprehensive plan.

> Every citizen in the community is intangibly harmed by a failure to comply with the Comprehensive Plan, even those whose properties may have not been directly diminished in value. We claim to be a society of laws, not of individual eccentricities in attempting to evade the rule of law. A society of law must respect law, not its evasion. If the rule of law requires land uses to meet specific standards, then allowing those who develop land to escape its requirements by spending the project out of compliance would make the standards of growth management of little real consequence. It would allow developers such as this one to build in defiance of the limits and then escape compliance by making the cost of correction too high. That would render (the statute) meaningless and ineffectual.[42]

Perhaps the court's job was made easier because Florida includes statutory tests for determining consistency for development orders (such as a special exception), land development regulations (such as zoning), and development:

> (a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the

[41] 795 So.2d at 208.
[42] 795 So.2d at 208.

objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.[43]

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.[44]

In an effort to assist states with their statutory reforms, and to spur other states to update their planning laws, the American Planning Association prepared a model planning enabling act which includes a consistency requirement.[45] Most recently, a committee of the American Bar Association's Section of State and Local Government has drafted a "Model Statute on Local Land Use Process" which requires a finding that the decision-maker has connected the land use

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[43] FLA. STAT. ANN. § 163.3194(3)(a).

[44] FLA. STAT. ANN. § 163.3194(3)(b). Furthermore, the Florida Legislature has provided guidance to the courts in interpreting the consistency requirement. [A court] may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relation of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation." FLA. STAT. ANN. § 163.3194(4)(a). *See*, Meck, *supra* note 20 at 309-310.

[45] *See* GROWING SMART[SM] LEGISLATIVE GUIDEBOOK, *supra* note 26, § 8-104 Consistency of Land Development Regulations with Local Comprehensive Plan.

decision to the comprehensive plan.[46] This draft is expected to go to the ABA House of Delegates in February 2008 for possible adoption.

> (9) Findings, decision, and notice.
>
> (a) A local government may approve or deny a development permit application, or may approve an application subject to conditions.
>
> (b) Any decision on a development permit application shall be based upon and accompanied by a written statement that:
>
> 1. states the land development regulations and goals, policies, and guidelines of the local comprehensive plan relevant to the decision;
> 2. states the facts relied upon in making the decision;
> **3. is consistent with the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement of the comprehensive plan as it existed at the time of the development application;**
> 4. responds to all relevant issues raised by the parties to the record hearing; and
> 5. states the conditions that apply to the development permit, the conditions that must be satisfied before a certificate of compliance can issue, and the conditions that are continuing requirements and apply after a certificate of compliance is issued.
>
> (c) A local government may give written notice of its decision to all parties to the proceeding [and publish a summary of its decision in a newspaper of general circulation and may [*or* shall] publish the decision on a computer-accessible information network.][47] [emphasis added]

Although the majority of states today still consider the plan as merely advisory in nature, the national trend appears to be moving towards

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[46] Copy of the draft is available at http://www.abanet.org/adminlaw/Land_Use_Planning/Model_Land_Use_Planning_May07.pdf. (Last accessed October 1, 2007)

[47] *Id.* at p. 17-18.

establishing a stronger connection between land use decisions and the plan. This trend can be seen in many state legislatures --- such as Arizona [Ariz. Rev. Stat. § 9-462.01 (1999)], California [Cal. Gov't Code § 65860 (1997)], Delaware [Del. Code tit. 9 §§ 2653, 2656 (1999)], Kentucky [Ky. Rev. Stat. § 101.213 (1997)], Maine [Me.Rev. Stat. tit. 30A §§ 23-114.03 (1999)], Nebraska [Neb. Rev. Stat. § 23-114.03 (1999)], Oregon [Or. Rev. Stat. § 197.010(1) (1997)], Rhode Island [R.I. Gen. Laws §§45-24-31, -34 (1998)], Washington [Wash. Rev. Code § 36.70A.040(1) and § 35.63.125 (1999)], and Wisconsin [Wis. Stat. § 66.0295 (1999)],[48] --- and the courts,[49] and even state agencies[50] across the country.

[48] *See* GROWING SMART[SM] LEGISLATIVE GUIDEBOOK, *supra* note 26 at 8-34, 35.

[49] Although the United States Supreme Court has not directly considered this issue, Justice Stephens in his majority opinion in *Kelo v. City of New London*, acknowledged the important role of the planning process and the adopted plan to sustain his conclusion that the power of eminent domain had been properly exercised in the City of New London. 545 U.S. 469, 125 S.Ct. 2655 (2005).

[50] On September 10, 2007, the New Mexico Development Council, a part of the Department of Finance and Administration, adopted new rules for awarding Community Development Block Grants to local communities which includes a requirement that the local comprehensive plan be adopted by ordinance in order to elevate the plan as a regulatory mechanism. TITLE 2 – PUBLIC FINANCE; CHAPTER 110- LOCAL GOVERNMENT GRANTS; PART 2 – SMALL CITIES COMMUNITY DEVELOPMENT BLOCK GRANT.

III. Plan Consistency – Merging Intention with Actions

There are two competing purposes for requiring that land use decisions be consistent with the adopted comprehensive plan.[51] 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.[52] At the micro level, the second reason "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."[53]

Whether the requisite standard is *"consistency," "in conformance with"* or *"in harmony with"* – the goal should be to merge intentions with actions.[54] "Plans are documents that describe public policies that the community intends to implement and not simply a rhetorical expression of the community's desires,"[55] nor "a series of pleasant clichés – impossible to quarrel with but of little assistance in directing municipal regulatory effort."[56]

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[51] Lincoln, *supra* note 5.
[52] *Id.* at p. 90.
[53] *Id.* at p. 90.
[54] *Id.* at p. 89.
[55] *Id*. at p. 89.
[56] Haar, *supra* note 14 at 1174.

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? The answer is not difficult if merely a weak connection is all that is required, but it certainly becomes more difficult if the consistency requirement has serious teeth.

There are various degrees of consistency.[57] 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 the goals and policies of the plan. Continuing along the spectrum, does the land use decision further the goals and policies in the comprehensive plan? In other words, does the land use decision make it more likely that the goals and policies will be achieved? They are not only compatible, but 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. For the land use decision to implement the goals and policies of the comprehensive plan, it must not only be compatible 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,

[57] Lincoln, *supra* note 5 at 91.

another spectrum addressing the disconnect between land use decisions and the plan.[58]

Asking whether the land use decision is compatible → further → implements the goals and policies of the comprehensive plan then logically raises another important question: which goals and policies of the plan? And what if there are conflicting goals and policies in the plan?[59] Can a land use decision be compatible → further → implement one goal while conflicting with another goal and still implement the plan? Arguably it can't. All goals and policies must support each other to effectively implement the plan. Certainly, an administrative board sitting in a quasi-judicial capacity, or the court, can't put itself into the role of determining which conflicting goals and policies are more important than another. That conflict is properly within the realm of the local legislative body to fix.

One last problem may arise: perhaps the goals and policies in the comprehensive plan are so ambiguously written that it is impossible to measure whether the land use decision (the special exception in this case) is consistent with the plan. However, that doesn't appear to be a problem in this case. The Maryland

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[58] *Id.* at p. 92. Lincoln distinguishes the "compliance" approach from the "compatible--furthers--implements" spectrum by noting that a land use decision might be required to comply with a specific directive in the plan, such as a requirement to provide a wastewater treatment plant for a development of a certain size. Either the development complies or does not comply, making the judgment about whether or not consistency has been satisfied fairly easy.

[59] A comprehensive plan might be considered internally inconsistent if there are goals and policies which conflict with each other.

General Assembly spoke clearly when it adopted the eight Visions; the Allegany County Comprehensive Plan incorporates those Visions; the zoning for the property implements those Visions by setting forth non-urban districts for the property. Consistency was achieved until the special exception was granted. Is the special exception compatible with the Allegany County Comprehensive Plan and Maryland's eight Visions? Does it further the goals and policies contained in the plan and expressed in the Visions?[60] Does it implement the Allegany County Comprehensive Plan and the Visions?

CONCLUSION

Maryland's land use and development challenges are many. APA believes that a meaningful public planning process which results in an adopted comprehensive plan is the best way to meet these challenges, now and in the future. Local government officials, property owners, neighbors, developers and, not least of all, planners, need clear direction about the role of the comprehensive plan in Maryland's land use regulatory regime. Will the comprehensive plan have teeth and be implemented? Or will it be relegated to a dusty shelf? The answer will greatly depend on the decision of this Court.

APA respectfully requests that this Honorable Court imbue the Comprehensive Plan with the regulatory strength that the Maryland Assembly

[60] To rephrase the question, does the special exception further the objectives and policies of the plan and not obstruct their attainment. (*Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985, 994 (1993).) (emphasis added)

must have intended when it adopted the eight Visions to guide future growth and development in the state.

Respectfully submitted,

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Proof of Service

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