

# Recent Developments in Comprehensive Planning Law

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## I. Introduction

THIS ANNUAL REPORT DISCUSSES COURT DECISIONS INVOLVING the status of the comprehensive plan<sup>1</sup> in the land use regulatory process and addresses cases for the year ending on September 30, 2010. In addition, this report reviews judicial decisions related to interpretations and amendment decisions relating to such plans for that same period.

Approximately three-quarters of the states have adopted the 1926 Standard Zoning Enabling Act,<sup>2</sup> which was state enabling legislation suggested by the United States Department of Commerce to authorize cities to regulate the use of land. Section 3 of that Act requires that zoning be “in accordance with a comprehensive plan.”<sup>3</sup> Many other zoning enabling acts have similar provisions; however, the meaning of those provisions is controversial. The concern is especially pronounced when the plan conflicts with the zoning map or in the grant or denial of a permit or zone change in the absence of a plan.

As has been the case with previous reports, this report divides cases regarding the role of the plan during this period into three categories.<sup>4</sup> The first category, once representing the predominant view, was that

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1. The term “comprehensive plan” includes similar terms such as “General Plan” (the term used in California) and sometimes the term “city plan” or “master plan,” when used as policy for future growth.

2. ADVISORY COMM. ON ZONING, U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926), available at <http://www.smrpc.org/workshops/ZBA%20Workshop%20April%2029%202009/A%20Standard%20State%20Zoning%20Enabling%20Act.%201926.pdf>.

3. *Id.* at 6.

4. Edward J. Sullivan & Laurence Kressel, *Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. LAW. 33 (1975); Charles Haar,

the plan is neither required, nor important. Under this “unitary” view, it is the zoning ordinance that is dispositive and constitutes the “comprehensive plan” under the enabling legislation.<sup>5</sup> A second view, which may now be the majority view, is that the plan, if it exists, is a *factor* (whether dispositive or otherwise) in evaluating the validity or propriety of a zone change or other land use action. Finally, there are those states that, through court decision or (more frequently) legislation, determine that the plan is “an impermanent constitution”<sup>6</sup> that binds the outcome of zone changes or other land use actions.

Following this introduction and a discussion of these three categories of plan application to land use regulatory actions, two additional categories will be examined, *i.e.*, amendments to and interpretations of plans. These additional categories assume that the plan has some legal importance so that its amendment and interpretation are legally significant. The conclusion then summarizes the role of the plan in the land use regulatory process over the past year.

## II. The Unitary View

The longstanding and previously majority view of the plan held that it was simply irrelevant to the validity of a rezoning or land use regulatory action. This view of the plan continues to be an approach used in a significant number of cases.

As in the recent past, Connecticut provides the largest number of cases in this category. This year, all of the Connecticut cases are from lower court decisions and none of them are officially reported. In *Hennen v. Town of Pomfret Planning and Zoning Commission*<sup>7</sup> plaintiff neighbor challenged an amendment of the zoning ordinance to allow certain commercial activities in a home-based business. Connecticut has a Standard Zoning Enabling Act (“SZE”) a statute that requires zoning regulations to be adopted and amended “in accordance with a comprehensive plan.”<sup>8</sup> Finding no separately adopted comprehensive

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*In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) (examining the effectiveness of this statutory requirement, concluding that, notwithstanding the text, the appellate courts of most states neither required a separate plan, nor required conformity of zoning regulations to any plan that was adopted).

5. See *Kozesnik v. Twp. of Montgomery*, 131 A.2d 1 (N.J. 1957).

6. Charles Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).

7. No. WVMCV084007556S, 2010 WL 797184 (Conn. Super. Ct. Feb. 5, 2010).

8. CONN. GEN. STAT. § 8-2-2 (2009).

plan, the court's analysis was as follows: "A determination of the appropriateness of the Commission's action begins with an examination of the Regulations themselves to determine what comprehensive plan is envisioned for land use in the town."<sup>9</sup>

After reviewing the limited scope of the amendments, the fact that the amendments were legislative in nature,<sup>10</sup> and that plaintiff's concern over property values was only one in a "myriad" of factors that must be considered under the enabling legislation,<sup>11</sup> the court upheld the town's actions on the basis of the record without regard to any separate plan. Similarly, in *Rocha v. Ellington Planning and Zoning Commission*,<sup>12</sup> a denial of a resubdivision application by a tie vote was reversed in a decision in which the town sought to defend its decision *inter alia*, on the basis that, because its "Plan of Conservation and Development" ("Plan") was incorporated into the town subdivision regulations and the plan recommended an 80,000 square foot minimum lot size.<sup>13</sup> However, the court found the plan was not binding, but merely advisory, with respect to minimum lot size and that minimum lot size had not been included in the town's land use regulations, which had a 40,000 square foot minimum.<sup>14</sup> Thus, there was no substantial evidence on which to base a denial.<sup>15</sup> Finally, in *NeJane v. Planning and Zoning Commission*,<sup>16</sup> plaintiffs challenged the grant of a zone change *inter alia* as not being in accordance with the local comprehensive plan. The court quoted from *Konigsberg v. Board of Aldermen*,<sup>17</sup>

A comprehensive plan has been defined as a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential use of the properties . . . The requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interests of the entire community . . . It is established that the comprehensive plan is to be found in the zoning regulations themselves and the zoning map, which are primarily concerned with the use of property.<sup>18</sup>

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9. *Hennen*, 2010 WL 797184, at \*3.

10. *Id.* at \*6. (stating that Connecticut courts give deference to legislative acts of rezoning authorities); *Malafronte v. Planning and Zoning Bd.*, 230 A.2d 606 (1967).

11. *Hennen*, 2010 WL 797184, at \*6.

12. No. TTDCV094010560, 2010 WL 1224778 (Conn. Super. Ct. March 3, 2010).

13. *Id.* at \*6.

14. *Id.*

15. *Id.*

16. No. DBD-CV-08-4008308-S, 2010 WL 3327866 (Conn. Super. Ct. July 29, 2010).

17. 930 A.2d 1, 9 (Conn. 2007).

18. *NeJane*, 2010 WL 3327866, at \*11 (citation and internal quotation omitted) (quoting *Konigsberg v. Bd. of Aldermen*, 930 A.2d 1, 9 (Conn. 2007)).

The court found the best interests of the community were promoted by the challenged action and was satisfied by the justification given by the town.<sup>19</sup>

In a Minnesota case, *Zweber v. Scott County Board of Commissioners*,<sup>20</sup> plaintiff developer challenged the denial of a subdivision application. Plaintiff argued that the application met all county standards, but defendant had asked him to construct a road to connect nearby lots and when he did not agree, denied the proposal, finding that the proposal was not in accordance with the local plan as required by subdivision regulations.<sup>21</sup> The court found no enforceable standards for the county's denial based on "interconnectivity" grounds and found that the application met all other applicable standards.<sup>22</sup> As to the comprehensive plan, the court stated that such a plan, if adopted, may be implemented by "official controls" such as zoning and subdivision regulations, but unless done so specifically, the plan acts only as a guide,<sup>23</sup> and was seen as such by the county itself.<sup>24</sup> Thus, the plan, without recognized official controls, was not a standard on which to judge the subdivision application.

In a Mississippi case, *Thomas v. Board of Supervisors of Panola County*,<sup>25</sup> a neighbor challenged a county rezoning and special exception for a junkyard despite expert testimony by a planner that the use did not conform to the county's comprehensive plan. The court affirmed the grant, stating that a "good" comprehensive plan is dynamic, rather than static, and that the challenger has the burden to show by clear and convincing evidence that the proposed change is invalid, arbitrary, or unreasonable.<sup>26</sup> However, the case did not distinguish in its analysis between a separate comprehensive plan and the zoning ordinance, but rather concentrated on the zone change alone.<sup>27</sup> There was also a dissent that did not deal with the planned consistency issue.

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19. *NeJane*, 2010 WL 3327866, at \*14; *see also* City of Shelton Planning and Zoning Comm'n v. City of Shelton Bd. of Zoning Appeals, No. CV084010368S, 2010 WL 654880 (Conn. Super. Ct. Jan. 25, 2010); *Miessau v. Bd. of Zoning Appeals*, No. CV084032785S, 2010 WL 2197036 (Conn. Super. Ct. May 3, 2010); *Sullo v. Zoning Bd. of Appeals*, No. CV094011623S, 2010 WL 2681804 (Conn. Super. Ct. May 4, 2010); *Huntington St. LLC v. Zoning Bd. of Appeals*, No. CV094011623S, 2010 WL 4075327 (Conn. Super. Ct. Sept. 22, 2010); *In re Cnty. of Murray Bd. of Adjustment*, No. A09-1852, 2010 WL 2035853 (Minn. Ct. App. May 25, 2010).

20. No. A09-1990, 2010 WL 2733275 (Minn. Ct. App. July 13, 2010).

21. *Id.* at \*2.

22. *Id.* at \*2-5.

23. MINN. STAT. § 394.22 (2008); MINN. STAT. § 394.23 (2008).

24. *Zweber*, 2010 WL 2733275, at \*6.

25. No. 2009-CA-00347-SCT., 2010 WL 3036745 (Miss. Nov. 5, 2010).

26. *Id.* at \*13; *see also* *MBC Realty, LLC v. Mayor of Baltimore*, 993 A.2d 1190 (Md. Ct. Spec. App. 2010).

27. *Zweber*, 2010 WL 2733275, at \*13-20; *see also* *Chicago Area Council, Inc. v. Blue Lake Twp.*, No. 285691, 2010 WL 986500 (Mich. Ct. App. Mar. 18, 2010).

Finally, three Pennsylvania cases all specifically state that the grant or denial of a conditional use permit cannot be predicated upon consistency with a comprehensive plan. In *Aldridge v. Jackson County*,<sup>28</sup> permits for a proposed indoor shooting range and ancillary retail gun and supply store in a rural agricultural district were validly granted, contrary to the local plan's provision that in rural areas only non-commercial recreational uses were permitted.<sup>29</sup> In *Plaxton v. Lycoming County Zoning Hearing Board*,<sup>30</sup> plaintiff objected to a wind energy facility allowed by right under the zoning ordinance on this site.<sup>31</sup> The court pointed to a statute that specifically stated that no governing body action shall be invalid for failure to conform to a comprehensive plan.<sup>32</sup> Finally, in *Briar Meadows Development, Inc. v. South Centre Township Board of Supervisors*,<sup>33</sup> that court cited the same statute to determine that a rezoning consistent with the local plan could nevertheless be denied.<sup>34</sup>

### III. Planning Factor View

The "great middle" at the intersection of plans and land use regulatory actions is illustrated by fewer cases this year, but has become the default position for those states that do not require full plan consistency. This view sees a plan as a factor in weighing the validity of land use regulations and actions.

Interestingly, two of the cases this year are from Mississippi and involve situations in which there was a separate plan. In *Hall v. City of Ridgeland*,<sup>35</sup> neighbors challenged the grant of a conditional use permit and variances to construct a commercial building, the city having found it to be consistent with both the plan and the zoning ordinance.<sup>36</sup> The court focused on the fact that the building was allowed under the zoning ordinance and thus could not be at odds with the plan.<sup>37</sup> In *Collins v. Mayor of Gautier*,<sup>38</sup> plaintiff successfully challenged a rezoning from a single-

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28. 983 A.2d 247 (Pa. Commw. Ct. 2009).

29. *Id.* at 258-59 (citing previous Pennsylvania cases to this same effect).

30. 986 A.2d 199 (Pa. Commw. Ct. 2010).

31. *Id.* at 206.

32. *Id.* at 210 (affirming the decision finding the wind facility consistent with the long range plan in any event); *see also* PA. CONS. STAT. § 1303(c) (2000).

33. 2 A.3d 1303 (Pa. Commw. Ct. 2010).

34. *Id.* at 1306-07.

35. 37 So. 3d 25 (Miss. 2010).

36. *Id.* at 30.

37. *Id.* at 42. The court may well have confused the plan with the zoning ordinance text and map, as a test for "spot zoning," *i.e.*, whether the act was done in accordance with the plan, to illustrate its point. Because the conditional use was allowed in the zone, the court concluded that it complied with the plan.

38. 38 So. 3d 677 (Miss. Ct. App. 2010).

family to a multi-family category. However, a dissent raised the issue of whether the rezoning was in accordance with the plan and whether the city indeed had a plan, noting that these issues were not raised below and appeared on appeal for the first time.<sup>39</sup> Moreover, the justifications of the rezoning, *i.e.*, the changes that had occurred in the neighborhood, could not be evaluated without knowing what the plan was.<sup>40</sup>

In a Missouri case, *JGJ Properties, LLC v. City of Ellisville*,<sup>41</sup> property owners acquired a parcel zoned for residential use but planned for limited commercial use under a state planning scheme under which the plan need not be followed.<sup>42</sup> Plaintiffs alleged the denial of rezoning was arbitrary and unreasonable in light of the city's own plan.<sup>43</sup> The court found the weight of the evidence to favor maintaining the existing zoning<sup>44</sup> and held that there was no equitable estoppel established by the applicant on the basis of statements of the planner or on the issuance of permits for improvements to the site.<sup>45</sup>

Finally, in an unpublished Washington case, *Deer Creek Developers, LLC v. Spokane County*,<sup>46</sup> plaintiff developers contemplated a phased mixed development and constructed the residential units in Phase I at a time when residential uses were permitted under the local zoning regulations, but was denied a conditional use permit for residential units in Phase II because the County now prohibited that use.<sup>47</sup> As to plaintiff's argument that the County erroneously found the proposed development conflicted with the relevant plan policies, the court said:

To the extent a comprehensive plan prohibits a use that a zoning code permits, the use is permitted. But where the zoning code itself expressly requires that a proposed use must comply with both the zoning code and the comprehensive plan, the proposed use must comply with both the zoning code and the comprehensive plan.<sup>48</sup>

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39. *Id.* at 685-86. The dissent added that it was unclear what the plan might be, as the only evidence was a partial description of it supplied by the applicant.

40. *Id.* at 686-87. Again it was unclear what the court meant by the "plan." At 686, the court cites MISS. CODE ANN. § 17-1-1(c) finding that a plan required four elements: (1) a twenty or twenty-five year development plan; (2) a comprehensive land use map with specific zoning definitions; (3) a transportation plan; and (4) a community facilities plan. However, the court also uses the "change or mistake" evaluation on rezoning that does not focus on the plan at all.

41. 303 S.W.3d 642 (Mo. Ct. App. 2010).

42. *Id.* at 645.

43. *Id.* at 647.

44. *Id.* at 648.

45. *Id.* at 651. It should be noted that the planner spoke of consistency with the plan, rather than existing zoning.

46. No. 27832-8-III, 2010 WL 2104636 (Wash. Ct. App. May 27, 2010).

47. *Id.* at \*1-2.

48. *Id.* at \*8 (citation omitted). In this case, the court found that the development proposal conflicted with both the applicable zoning regulations, as well as the comprehensive plan.

#### IV. The View of the Plan as an Impermanent Constitution

In this category, consistency with the plan is a necessary attribute of a rezoning or other land use action. In addition to the “usual suspects” (e.g. Florida, Oregon, and Washington), there are some interesting cases this past year from other states as well.

In a Florida case, *Johnson v. Gulf County*,<sup>49</sup> plaintiff neighbor sought declaratory, injunctive and mandamus relief to prevent development of wetlands near his home, *inter alia*, because of alleged violations of the county comprehensive plan that prohibited development within fifty feet of wetlands.<sup>50</sup> On *de novo* appeal from denial of relief from the trial court, the appellate court rejected the view that the city had no permitting authority over “non-jurisdictional” wetlands.<sup>51</sup> The court construed the plan to require a fifty-foot setback from any wetland and concluded that the county must carry out this portion of the plan through a setback regulation in a development order, required for any clearing or filling of wetlands on the property, regardless of its state or federal wetland status.<sup>52</sup>

In an Iowa case, *Marianne Craft Norton Trust v. City Council of Hudson*,<sup>53</sup> the city had adopted a comprehensive plan that designated certain properties for future residential use and granted a landowner a zone change to allow large lot residential development.<sup>54</sup> Plaintiff neighbors challenged that action, *inter alia*, under the standard zoning enabling act language that zoning must be “in accordance with the comprehensive plan.”<sup>55</sup> The court responded that the city had a policy-oriented comprehensive plan, that the plan had been amended by the council for this site without challenge, and that the trial court determination that the city had properly weighed the various plan policies, and thus did not act arbitrarily and capriciously in granting the zone change, should be affirmed.<sup>56</sup>

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49. 26 So. 3d 33 (Fla. Dist. Ct. App. 2009).

50. *Id.* at 35-37. Under Florida law, counties must adopt a comprehensive plan and receive approval of that plan from the State Department of Community Affairs, adopting implementing regulations to implement that plan. FLA. STAT. ANN. § 163.3164-.3215, .3177 (West 2011). Aggrieved landowners may seek declaratory, injunctive or other relief for land uses inconsistent with the local plan. FLA. STAT. ANN. § 163.3215(3) (West 2011).

51. *Johnson*, 26 So. 3d at 41-42.

52. *Id.* at 42-45.

53. No. 08-1704, 2009 WL 337610 (Iowa Ct. App. Oct. 7, 2009).

54. *Id.* at \*1.

55. *Id.* (citing IOWA CODE § 414.3 (West 2010)).

56. *Id.* at \*3-5. The court also agreed that the City had given adequate reasons to support its decision and there was no “spot zoning” in the sense of being inconsistent with the comprehensive plan. *Id.* at \*6-9.

In a New Jersey case, *Heritage at Independence, LLC v. State*,<sup>57</sup> plaintiff developer owned land within the Highlands Preservation Area and sought relief from various housing and environmental restrictions, contending they were both unconstitutional, facially and as applied to its development.<sup>58</sup> The state had created the Highlands Council to protect water and natural resources and authorized the state agency to adopt a regional master plan.<sup>59</sup> Plaintiff contended that the constitutional obligation to assure that each jurisdiction provides for its regional fair share of housing<sup>60</sup> took precedence over environmental considerations; however, the court noted that the Highlands Council was the fourth state agency created to deal with regional planning and that each such agency is required to accommodate affordable housing in its actions.<sup>61</sup>

An Oregon case illustrates a state's view of the relation of a plan to statewide land use policies. In *Citizens Against Annexation v. Lane County Local Government Boundary Commission*,<sup>62</sup> petitioners challenged a Land Conservation and Development Commission order approving annexation to the City of Florence. Petitioners alleged, *inter alia*, that while respondent was required to find that the annexation met the statewide planning goals,<sup>63</sup> the final order addressed only the acknowledged local comprehensive plan.<sup>64</sup> The court resolved the apparent conflict by noting that the goals are incorporated within an acknowledged comprehensive plan.<sup>65</sup>

In a South Carolina case, *Sinkler v. County of Charleston*,<sup>66</sup> defendant's comprehensive plan determined that Wadmalaw Island was an "agricultural area" and designated agriculture as the primary use over a secondary use of residential and adopted a zoning ordinance that set a minimum lot size at between three and fifteen acres. The county later adopted the challenged ordinance that rezoned a portion of Wadmalaw Island as planned development and allowed a one-acre minimum lot size in that area.<sup>67</sup> Although the new zoning district was said to achieve

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57. 2010 WL 4067871 (N.J. Super. Ct. App. Div. Aug. 18, 2010).

58. *Id.* at \*1.

59. See N.J. STAT. ANN. § 13:20-2 (West 2004).

60. See *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975), *cert. denied*, 456 A.2d 390 (N.J. 1983).

61. *Heritage*, 2010 WL 4067871, at \*7.

62. 226 P.3d 711 (Or. Ct. App. 2010).

63. *Id.* at 716.

64. *Id.* The plan is "acknowledged" when it meets the statewide planning goals. See OR. REV. STAT. §§ 197.250, 197.625(1)-(2) (West 2011).

65. *Citizens Against Annexation*, 226 P.3d at 716-17.

66. 690 S.E.2d 777 (S.C. 2010).

67. *Id.* at 778.



the objectives of the plan through innovative site planning, such site planning was found not to exist here and the trial court reversal of the rezoning action was affirmed.<sup>68</sup>

Finally, *Kelly v. County of Chelan*,<sup>69</sup> was a Washington case involving whether a shoreline development permit was required to be consistent with the county's comprehensive plan.<sup>70</sup> The court decided that such a requirement existed in the county code and affirmed the trial court judgment to that effect.<sup>71</sup>

## V. Plan Amendments

Last year's report noted that Florida's proposed Amendment 4, requiring a popular vote for the adoption and amendment of a comprehensive plan, had qualified for the 2010 ballot.<sup>72</sup> Following a vigorous debate, Amendment 4 was defeated by a 2-1 margin.<sup>73</sup> Nevertheless, interesting cases regarding plan amendments abounded last year.

California had two cases in this area. In *Howard v. County of San Diego*,<sup>74</sup> plaintiff appealed from the denial of an inverse condemnation claim against defendants for refusing to process plans for a metal barn in the footprint of a proposed road under the county's transportation plan.<sup>75</sup> The county alleged that plaintiff could have asked for a general (comprehensive) plan amendment.<sup>76</sup> The court of appeals distinguished plan amendments, which it characterized as legislative and political, from administrative actions and determined that a general plan amendment was not required to exhaust administrative remedies when the action was legislative in nature.<sup>77</sup> In *Citizens for Responsible Equitable Environmental Development v. City of San Diego*,<sup>78</sup> plaintiff challenged a shopping center expansion *inter alia* because it asserted that inad-

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68. *Id.* at 781-82.

69. 237 P.3d 346 (Wash. Ct. App. 2010).

70. *Id.* at 351.

71. *Id.*

72. Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 42 URB. LAW. 665, 673 (2010).

73. See *Florida Comprehensive Land Use Plans, Amendment 4*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Florida\\_Comprehensive\\_Land\\_Use\\_Plans,\\_Amendment\\_4\\_%282010%29](http://ballotpedia.org/wiki/index.php/Florida_Comprehensive_Land_Use_Plans,_Amendment_4_%282010%29) (last modified Apr. 15, 2011).

74. 109 Cal. Rptr. 3d 647 (Cal. Ct. App. 2010).

75. *Id.* at 649-50. The county's position was that an amendment to the transportation element of the general plan was insufficient—an amendment to the general plan itself was required and plaintiffs would thus be responsible for all studies and processing costs to evaluate that proposal.

76. *Id.*

77. *Id.* at 654-55.

78. 109 Cal. Rptr. 3d 702 (Cal. Ct. App. 2010).

equate notice of the general (comprehensive) plan amendment had been given.<sup>79</sup> The court quoted the notice and affirmed the trial court decision finding it to be sufficient.<sup>80</sup>

In a Minnesota case, *Goerisch v. City of Brooklyn Park*,<sup>81</sup> plaintiffs owned lands designated residential under the city's planning and zoning ordinance and sought concept plan approval for a commercial use as the first step of securing a plan amendment and zone change, but were denied on grounds of untimeliness of services and nonconformity with the plan.<sup>82</sup> Plaintiffs then brought a takings claim, the dismissal of which was affirmed on the basis of the plan's use of a growth staging process (which focused capital improvements serially to various parts of the city) and because there were other lands available for commercial use in other areas of the city.<sup>83</sup> The court added:

The city has at least four valid, rational reasons for denying appellants' concept plan. Appellants' proposed development does not comply with Brooklyn Park's comprehensive plan. It does not comply with the city's zoning ordinances. It is not serviced by utilities or adequate roadways. And the city has more than 400 acres of other land ready for development. For these reasons, the city's decision to deny approval of appellants' concept plan is reasonable, and the district court did not err by granting summary judgment to the city on this claim.<sup>84</sup>

In a Nevada case, *City of Reno v. Citizens for Cold Springs*,<sup>85</sup> the city conditionally amended its master plan before receiving approval of an amendment to the Truckee Meadows Regional Plan.<sup>86</sup> The Nevada Supreme Court found the city correctly processed the amendments, conditioned upon subsequent approval by the regional planning commission.<sup>87</sup>

In a similar case from New Jersey, *RG-2 Associates, LLC v. Jackson Township Planning Board*,<sup>88</sup> the appellate division upheld the trial court action dismissing a complaint that defendant unlawfully vacated its prior approval of plaintiff's project because its master plan had not been certified by the New Jersey Pinelands Commission.<sup>89</sup> The court

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79. *Id.* at 705. The Notice did state that an amendment to the General Plan was before the County Council.

80. *Id.* at 715.

81. No. 27-CV-08-31732, 2010 WL 2900248, at \*7 (Minn. Ct. App. July 27, 2010).

82. *Id.* at \*1-2.

83. *Id.* at \*5.

84. *Id.* at \*7.

85. 236 P.3d 10 (Nev. 2010).

86. *Id.* at 12.

87. *Id.* at 16.

88. No. L-394-08, 2009 WL 4547128, at \*3 (N.J. Super. Ct. App. Div. Dec. 4, 2009).

89. *Id.* at \*1.

found certification to be a jurisdictional requirement, rather than a technical one, and upheld the board's action.<sup>90</sup>

*1000 Friends of Oregon v. Land Conservation and Development Commission*,<sup>91</sup> an Oregon case, involved a joint amendment to a city and county comprehensive plan to provide for more residential and industrial land within Woodburn, Oregon's urban growth boundary.<sup>92</sup> In such cases, respondent Land Conservation and Development Commission ("LCDC") was required to find compliance with a number of statewide planning goals including Goal 9 (economy of the state) and 14 (urbanization).<sup>93</sup> Because respondent LCDC approved a "market factor" in excess of the city's need for industrial lands over the planning period, that action violated a portion of the urbanization goal that required an "efficient" urban growth boundary.<sup>94</sup>

Washington had several plan amendment cases in this period. In *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*,<sup>95</sup> respondent board validated Kitsap County's plan on petition by the tribe and others.<sup>96</sup> The court remanded the validation as it was not shown that urban and rural densities met the state's Growth Management Act, particularly as the board used a "bright line rule" to determine which densities were urban or rural, as opposed to reviewing local circumstances.<sup>97</sup> The matter was thus remanded. In *Shaw Family LLC v. Advocates for Responsible Development*<sup>98</sup> the issue was whether the state's Growth Management Act<sup>99</sup> or the individualized process for challenging plan amendments provided by the state's Land Use Petition

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90. *Id.* at \*4, \*7. In *365 Spotswood/Englishtown Road, LLC v. Zoning Board of Adjustment*, the appellate division declared that a successful applicant no longer was required to comply with a plan policy that had been superseded. No. L-2376-08, 2010 WL 4117065, at \*5-8 (N.J. Super. Ct. App. Div. Aug. 12, 2010).

91. 239 P.3d 272 (Or. Ct. App. 2010).

92. *Id.* at 216-20.

93. *Id.* at 225-27.

94. *Id.* In *Montgomery v. City of Dunes City*, respondent was found ineligible for the "small city exception" from meeting affordable housing needs when its own plan demonstrated that need. 236 P.3d 750 (Or. Ct. App. 2010).

95. 235 P.3d 812 (Wash. Ct. App. 2010).

96. *Id.* at 816-17.

97. *Id.* at 825-26 (holding that because the respondent Board did not possess rule making powers, it could not establish a "bright line" rule). At another point in the decision, the court also pointed out that respondent was required to enter findings on compliance of the county's plan with state affordable housing standards, which it failed to do. *Id.*; see also *Gold Star Resorts, Inc. v. Futurewise*, 222 P.3d 791, 796-97 (Wash. 2009) (holding that when differentiating between urban and rural densities, the Board cannot employ bright line rules (citing *Thurston Cnty. v. Western Wash. Growth Mgmt. Hearings Bd.*, 190 P.3d 38 (Wash. 2008))).

98. 236 P.3d 975 (Wash. Ct. App. 2010).

99. WASH. REV. CODE § 36.70A.010 (1990).

Act<sup>100</sup> was appropriate for this review. The county plan was amenable to the Growth Management Act review undertaken here, so the court reviewed the board's action in remanding a portion of the plan.<sup>101</sup>

## VI. Plan Interpretations

As plans play a more significant role, the interpretation of plan policies and maps will become more decisive in determining the outcome of cases. The variety of cases over the past year bears out this proposition.

Two California cases are noteworthy. In *Homebuilders Ass'n v. City of Lemoore*,<sup>102</sup> plaintiffs challenged revised city parkland impact fees, some of which depended on consistency with the city's general plan, but the court upheld them.<sup>103</sup> Similarly, the plan identified the nature and costs for new municipal facilities and the court upheld those fees as well.<sup>104</sup> In *Hines v. California Coastal Commission*,<sup>105</sup> neighbors challenged the grant of a coastal permit for a residence and use permit allowing reduction of a riparian setback, as well as the Coastal Commission's refusal to exercise jurisdiction.<sup>106</sup> In this case, the county applied a plan "certified" by the commission under the California Coastal Zone Management Act<sup>107</sup> and interpreted that plan to allow for the challenged permit, which the court upheld.<sup>108</sup>

There were two Florida cases as well. In *Keene v. Zoning Board of Adjustment*,<sup>109</sup> a county grant of a special use permit for a horseback riding school and related uses was reversed when the appellate court noted that recreational uses must be "resource-based" for commercial agricultural-related uses, the court interpreting those plan categories so as not to include the proposed uses.<sup>110</sup> *Nassau County v. Willis*<sup>111</sup> involved

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100. WASH. REV. CODE § 36.70C (1995).

101. 112 Cal. Rptr. 3d 7 (Cal. Ct. App. 2010) (finding on the other hand, a decision not to amend the Plan is subject to the Land Use Petition Act which must be filed within 21 days of the refusal); see also *Stafne v. Snohomish Cnty.*, No. 62843-7-I, 2010 WL 2028748, at \*9 (Wash. Ct. App. May 24, 2010).

102. *Homebuilders Ass'n.*, 112 Cal. Rptr. 3d at 7.

103. *Id.* at 19-20 (finding the higher number of acres was justified and not inconsistent with State law, CAL. GOV'T. CODE § 66477(a)(2) (West 2011), which set a three acre limit per 1,000 residents as the limit for parkland acquisitions, but also set a test for raising that average for up to five acres per 1,000 residents).

104. *Id.* at 18-20.

105. 112 Cal. Rptr. 3d 354 (Cal. Ct. App. 2010).

106. *Id.* at 362-64.

107. CAL. PUB. RES. CODE §§ 30512(c), 30513 (West 2010).

108. *Hines*, 112 Cal. Rptr. 3d. at 369-71.

109. 22 So. 3d 665 (Fla. Dist. Ct. App. 2009).

110. *Id.* at 671-74. There was a vigorous dissent which argued that the county interpretation, upheld by the trial court, was persuasive and should have been upheld.

111. 41 So. 3d 270 (Fla. Dist. Ct. App. 2010).

an island development plan that allegedly would have allowed higher density and intensity of uses in excess of that allowed by the local comprehensive plan and included a provision that if certain lands were not jurisdictional wetlands, they could be developed at the intensity of the adjacent land use.<sup>112</sup> The court reviewed the county's interpretation *de novo* and found the words of the plan policy were clear, brushing aside opponents "absurd results" objections.<sup>113</sup>

In an Iowa case, *Francis v. Bremer County Board of Supervisors*,<sup>114</sup> the denial of a zone change from an agricultural to a residential classification was challenged, with the land owners arguing that a subject site was located in a "planned growth area" under the plan.<sup>115</sup> The trial court found that denial did not violate the plan and the appellate court affirmed that decision, stating that the plan should be followed, but the Board of Supervisors could consider "other factors" in reaching its decision of denial, such as availability of other lands for residential uses.<sup>116</sup>

In a Maryland case, *Maryland-National Capital Park and Planning Commission v. Greater Baden-Aquasco Citizens Ass'n*,<sup>117</sup> neighbors challenged the grant of a subdivision plat and the trial court remanded the matter because it found the planning commission failed to address adequately a local plan policy setting a numeric growth objective for a rural tier of development.<sup>118</sup> The court discussed the comprehensive plan as follows:

The terms "Master Plan" and "General Plan," as guides to growth and land development, while distinct under most land use statutes and regulations, do not possess universal meanings nationally and are often used interchangeably. Since there are many shades of opinion among planners as to the precise content, the specific emphasis, and the degree of particularity, not all would agree on a definition of such a plan. For purposes of general discussion of land use plans, the terms "Master Plan" and "General Plan" frequently are conflated in the broad term "comprehensive plan." Generally, a comprehensive plan is described as "a general plan to control and direct the use and development of property in a [locality], or a large part thereof, by dividing it into districts according to the present and potential use of the property. It usually is more than a detailed zoning map and should apply to a substantial area, be the product of long study, and control land use consistent with the public interest. An

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112. *Id.* at 273-74.

113. *Id.* at 278-80. There were two dissents, one of which disagreed with the majority over the density allowed and finding that the amount granted in the development plan violated the requirements for amendments of plans.

114. No. 08-1583, 2009 WL 3369263 (Iowa Ct. App. Oct. 21, 2009).

115. *Id.* at \*1.

116. *Id.* at \*1-2. There was a concurring opinion that expressed concern over the scant reasons for denial, but ultimately agreeing that denial could be upheld on the basis of the record before the court.

117. 985 A.2d 1160 (Md. 2009).

118. *Id.* at 1164-65.

important characteristic of a comprehensive plan is that it be well thought out and give consideration to the common needs of the particular area.<sup>119</sup>

Following the review of the multiple plans applicable to this development, the court concluded that the numeric growth objective of the Prince George's County General Plan must be addressed in a subdivision proceeding<sup>120</sup> and that the county code provision relating to the purposes of subdivision regulations, including that of guiding development in the area in accordance with the general plan and master plan, was sufficient as a basis to use the plan in bolstering the decision for denial.<sup>121</sup> The county's requirement that the master plan be consistent with the general plan (which included the numeric growth objectives, which was at the heart of this controversy), required that objective to be considered and addressed.<sup>122</sup>

An Ohio case, *B.J. Alan Co. v. Congress Township Board of Zoning Appeals*,<sup>123</sup> dealt with the SZEA-type requirement that zoning be "in accordance with the comprehensive plan."<sup>124</sup> The court also addressed whether that requirement was satisfied by conformity to the applicable county plan rather than the existence of a township plan.<sup>125</sup> The court concluded that the county plan, which indicated that the area would continue to be rural, was an adequate basis for the denial but the court remanded the case to determine whether the township's single agricultural zone was in accordance with the county's plan.<sup>126</sup>

Finally, in a Washington case, *Feil v. Eastern Washington Growth Management Hearings Board*,<sup>127</sup> certain orchardists challenged a county "recreational overlay district" to allow a pedestrian and bike trail in a rural agricultural area.<sup>128</sup> The court agreed with the county's characterization of the new designation as overlays rather than zoning map changes and said they were not subject to review by respondent.<sup>129</sup>

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119. *Id.* at 1167 (citations and quotations omitted).

120. *Id.* at 1174-76.

121. *Id.* at 1178-79. Three judges concurred, but saw the numeric growth objective as more than a consideration if its numeric limits were exceeded. *Id.* at 1182-83.

122. *Id.* at 1177-78. In *Schiffenhaus v. Kline*, defense of the values set forth in the local plan were sufficient to confer standing on the plaintiffs. No. 08 MISC 383621(GHP), 2010 WL 1424723 (Mass. Land Ct. Apr. 12, 2010).

123. 918 N.E.2d 501 (Ohio 2009).

124. OHIO REV. CODE ANN. § 519.02 (West 2006).

125. *B.J. Alan Co.*, 918 N.E.2d at 503.

126. *Id.* at 506-07.

127. 220 P.3d 1248 (Wash. Ct. App. 2009).

128. *Id.* at 1250-51.

129. *Id.* at 1252-53. The court added that the overlays do not change either the plan or the zoning designations, but allow for use not otherwise provided for in the underlying zone. Even if it were a plan amendment, a challenge must have been filed within 60

The court also rejected petitioner's contentions that the overlay was not "site specific" for rezoning nor authorized by the plan by noting that Washington law requires only general rather than strict, conformance with the plan and that there was no change in the planning or zoning designation in any event.<sup>130</sup> Lastly, the court found the trail system did not conflict with general state laws protecting agricultural land—these goals are met by limiting non-agricultural uses, rather than by prohibiting them.<sup>131</sup>

## VII. Conclusion

The cases regarding the relationship of comprehensive planning and zone changes and other land use actions over the past year reflect a continuing emphasis on the plan as a factor in judicial review—in many cases the dominant factor—and the importance of the plan is emphasized by the number and importance of those cases dealing with plan amendments and interpretations.

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days of adoption, something that was not done in this case. *Id.* at 1254. Jurisdiction over these matters was in the superior court under the Land Use Petition Act. WASH. REV. CODE ANN. § 36.70C.030 (West 2010).

130. *Feil*, 220 P.3d at 1255 (noting that there was a plan policy for preservation of agricultural land, but also there was another such policy dealing with encouraging a "developing trail system" as an alternative mode of transportation, among other trail-friendly plan policies).

131. *Id.* at 1258.

