Recent Developments in Comprehensive Planning

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I. Introduction

FOR MANY YEARS THE STATE AND LOCAL GOVERNMENT LAW SECTION of the American Bar Association has reviewed the role of the comprehensive plan (sometimes called the "general" or "master" plan) to determine the weight given that document in evaluating permit applications and land use regulations. In addition, that same report has examined the amendment and interpretation of the plan. This report, surveying the cases between October 1, 2010 and September 30, 2011, continues that examination.

The need for this examination arises from the tradition of assigning most land use policy to the states, so there is no national statute relating to planning or land use regulation. The land use regulatory systems of most states found their basis in a piece of model legislation known as the Standard State Zoning Enabling Act (SZEA),[1] which was adopted by about three-quarters of the states. Section 3 of that model legislation requires that zoning regulations be "in accordance with a comprehensive plan."[2] The same advisory committee that assembled the SZEA also assembled, in 1928, a model act authorizing local government planning, the Standard City Planning Enabling Act.[3]

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1. 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.

2. *Id.*

3. ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT, *available at* http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf.

This model legislation, however, did not use the words "comprehensive plan," although it did use the terms "city plan" and "master plan." The question then arose as to whether the "comprehensive plan" in the SZEA was equivalent to the "master" or "city" plan of the Standard City Planning Enabling Act. This definitional problem, along with the fact that most local governments did not create plans, while they did undertake zoning and other forms of land use regulation, created much difficulty in interpreting the "in accordance with a comprehensive plan" language. Alternatively, if there was a plan, it was not seen as binding on land use regulations or decisions thereunder. Thus, the zoning ordinance became the principal focus of local governments and the courts in land use cases. In effect, the zoning ordinance and its accompanying map *became* the "comprehensive plan," which was always "in accordance" with itself.[4]

The definitional conundrum was explored by Charles Haar in his seminal articles, *In Accordance with a Comprehensive Plan*[5] and *The Master Plan: An Impermanent Constitution*.[6] Haar advocated for a plan that was separate from the zoning ordinance and to which zoning regulations and actions were to be judged. Professor Daniel Mandelker has also advocated this position for the length of his distinguished academic career.[7] One of the authors of this report, Edward Sullivan, has supported this view in articles with others advocating that same position.[8] The purpose of these annual reports is to trace the evolution in perceptions of the comprehensive plan as a limitation on decision making in the formulation and application of land use regulations.

II. The Unitary View

Although the view that the comprehensive plan is found in the zoning ordinance and maps was once the majority view, very few states

4. According to Haar, the leading case is *Kozesnik v. Twp. of Montgomery*, 131 A.2d 1 (N.J. 1957). Harr is generally regarded as the grandfather of comprehensive planning. *See* Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

5. Haar, *supra* note 4.

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

7. *See, e.g.*, Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

8. *See* Edward J. Sullivan & Lawrence Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. LAW. ANN. 33 (1975); Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75 (2003).

continue to adhere to that view. Connecticut has all the cases in this category for the last year and all are at the sub-appellate level.

In *Tagliarini v. New Haven Board of Aldermen*,[9] the requirement that zoning be in accordance with a comprehensive plan was applied to affirm a zone change requested by Yale University to a planned development district (PDD) classification in which the court applied the same test as for "spot zoning," concluding:

> '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 uses of the properties . . . It may be found in the scheme of the zoning regulations themselves . . . It differs from a master plan . . . The basic purpose of requiring conformance to a comprehensive plan is to prevent the arbitrary, unreasonable and discriminatory exercise of the zoning power . . . The requirement serves as an effective brake upon spot zoning.' To come full circle then, compliance with the comprehensive plan dispels the conclusion that any zone change, including the creation of a PDD, is based on arbitrary decision making for the zone change.[10]

The city bound itself under Section 65 of its zoning ordinances to follow its comprehensive plan and the court examined the rezoning for compliance with the policies of that plan, concluding that it did so.[11] Perhaps this decision is a harbinger of things to come in Connecticut. Finally, there are a number of variance cases where a local government must find that the grant of the variance does not "substantially affect" the comprehensive plan.[12] The application of this language has been somewhat tentative in Connecticut. In *Schulhof v. Zoning Board of Appeals*,[13] the court took this language to mean that the variance

9. No. CV1060106990S, 2011 WL 1288638 (Conn. Super. Ct. Mar. 11, 2011).

10. *Id*. at *3-4 (quoting Clark v. Town Council, 144 A.2d 327, 333 (1958)).

11. *Id*. at *10-24. In *Calise v. Planning and Zoning Commission of Westport*, No. FSTCV115013556S, 2011 WL 5223084 (Conn. Super. Ct. Oct. 13, 2011), an amendment to the Town's zoning regulations to make more multi-family housing available was challenged for alleged non-conformance with the Town's comprehensive plan. The Commission referred to the Town's (non-binding) Plan of Conservation and Development policies to support the amendment, and the court upheld the amendment with that justification and the housing policy found in state enabling legislation. In a supplement to its decision in this same case, the court added that the statutory and local code requirements for plan conformity would be satisfied if "the zoning authority acts with the intention of promoting the best interests of the entire community." Tagliarini v. New Haven BOA, CPC, No. CV1060106992, 2011 WL 1366639 at *1 (citing Konigsberg v. Board of Aldermen of New Haven, 930 A.2d 1, 19 (Conn. 2007)). To the same effect is *Sharpe v. Planning and Zoning Comm'n*, Nos. LLICV106003273S, LLICV106003277S, 2011 WL 5223031, at *3 (Conn. Super. Ct. Oct. 6, 2011). *See also* Westside Package Store, LLC v. Planning & Zoning Comm'n of Torrington, No. LLICV106002537S, 2011 WL 4347201, at *4 (Conn. Super. Ct. Aug. 30, 2011).

12. CONN. GEN. STATS. § 8-6(a)(3) (2011).

13. No. FSTCV106005607S, 2011 WL 4909222 (Conn. Super. Ct. Sept. 22, 2011).

must be "in harmony with the purpose and intent of the zoning regulations in the area" and that the comprehensive plan is "found in the scheme of the zoning regulations and the zoning map."[14] Other variance case law from Connecticut gives no better insight on the role of the plan.[15]

III. The Planning Factor View

Over the past year, there have been a comparatively large number of cases where the plan is a factor in a case involving the validity of a regulation or land use decision.

In an Indiana case, *Wastewater One, LLC v. Floyd County Board of Zoning Appeals*,[16] the zoning ordinance provided that the plan was a "tool to guide and manage growth and development in accordance with [the] vision of [that plan.]"[17] The court upheld the denial of a sewage treatment plant based on broadly-written findings interpreting plan policies.[18]

Idaho cases continue that state's ambivalent view of the effect of the plan. In *Krempasky v. Nez Perce County Planning and Zoning*,[19] the court affirmed the grant of a conditional use permit for a wedding and event center despite alleged incompatibility with the plan.[20] The court said that, while applicable ordinances are binding, a plan is not, as it reflects only the desirable goals and objectives of the county.[21]

14. *Id*. at *12.

15. *See* Saldamarco v. New Haven Bd. of Zoning Appeals, No. CV084033203S, 2010 WL 4517357 (Conn. Super. Ct. Oct. 18, 2010); DeMusis v. New Haven Zoning Bd. of Appeals, No. CV074024234S, 2011 WL 1886684 (Conn. Super. Ct. Apr. 20, 2011); Tweed New Haven Airport Authority v. New Haven Bd. of Zoning Appeals, No. CV074026178S, 2011 WL 2536330 (Conn. Super. Ct. May 31, 2011); Shuster v. Fountain Lake, LLC, No. CV106002924S, 2011 WL 3198764 (Conn. Super. Ct. June 24, 2011); Long Shore, LLC v. Madison Zoning Bd. of Appeals, No. NNHCV 084031857S, 2011 WL 3672021 (Conn. Super. Ct. July 21, 2011).

16. 947 N.E.2d 1040 (Ind. Ct. App. 2011).

17. *Id*. at 1054.

18. *Id*. The findings explained: "This will allow continued service to Highlander Village then seven additional square miles of undeveloped land which will compound congestion of the roadways." *Id*. at 1043.

19. 245 P.3d 983 (Idaho 2010).

20. *Id*. at 989.

21. *Id*. In *Ciszek v. Kootenai County Bd. of Comm'rs*, where a rezoning was challenged, *inter alia*, for nonconformity with the local plan, the court observed: "[T]his court has repeatedly stated that an ordinance need not strictly comply with a comprehensive plan in order to be valid." 254 P.3d 24, 33 (Idaho 2011); *see also* Atherton Dev. Co. v. Twp. of Ferguson, 29 A.3d 1197 (Pa. Commw. Ct. 2011); Feil v. E. Washington Growth Mgmt. Hearings Bd., 259 P.3d 227 (Wash. 2011).

Other states take different views. In Kansas, conformance with the plan is a factor to be considered in evaluating a land use decision.[22] In Maryland, the court treated evidence of "disharmony" with the comprehensive plan as amounting to an arbitrary and capricious decision.[23] In Massachusetts, references to plan policies were sufficient to provide standing to an opponent.[24] In a Montana case involving a rezoning and subdivision plat approval,[25] a remand of that decision was affirmed because the record did not show sufficient consideration of the local plan.[26] In a New York appellate division case involving a rezoning,[27] the burden was placed on a challenger to show a "clear" conflict with the plan under the "fairly debatable" standard applied to legislative land use matters.[28] In an Ohio case,[29] the grant of a conditional use permit was reversed because the underlying zoning ordinance did not comply with the plan.[30]

In Rhode Island, an applicant for subdivision approval is normally required to show conformance with both the plan and zoning ordinance;[31] however, the application in *West v. McDonald*,[32] came after the eighteen-month grace period provided by state law to bring zoning regulations into conformity with the plan, but the court found the eighteen-month time period directory, rather than mandatory.[33] As a

22. *See* 143rd Street Investors, LLC v. Bd. of Comm'rs of Johnson Cnty., 259 P.3d 644 (Kan. 2011) (using the plan as a factor in addition to the factors listed in *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978)).

23. Mills v. Godlove, 26 A.3d 1034, 1044-45 (Md. Ct. Spec. App. 2011). Otherwise, the "fairly debatable" rule applies to findings. *Id.* at 1040.

24. Schiffenhaus v. Kline, 947 N.E.2d 1133, 1135 (Mass. App. Ct. 2011).

25. Heffernan v. Missoula City Council, 255 P.3d 80 (Mont. 2011).

26. The court observed:

> By law, the City was required to be 'guided by and give consideration to' the general policy and pattern of development set out in the Rattlesnake Valley plan. Yet, there are numerous components of the plan that the City did not give *any* consideration to in its findings and conclusions. Moreover, while the City states that it did "consider" other parts of the plan, there is little indication that the City was "guided by" them.

Id. at 104 (emphasis in original) (citations omitted).

27. Ferraro v. Town Bd. of Amherst, 914 N.Y.S.2d 525 (N.Y. App. Div. 2010).

28. *Id.* at 528; *see* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

29. B. J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals, 946 N.E.2d 844 (Ohio Ct. App. 2010).

30. *Id.* at 848-49.

31. R.I. GEN. LAWS §§ 45-22.2-6, 45-24-29, -34, -50 (1956).

32. 18 A.3d 526 (R.I. 2011).

33. *Id.* at 533-35. In a South Dakota case, *M. G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011), the denial of a conditional use permit for an on-sale liquor establishment and as part of a planned video lottery casino was overturned, *inter alia*, because there was no discussion of the city's plan as part of the decision.

result, the failure to amend the code within eighteen months did not eviscerate the requirements of the comprehensive plan.[34]

IV. The Planning Mandate View

These cases are generally from states that require conformance to comprehensive plans by law, so the plan is viewed as a requirement for land use regulations or decisions.

Two California cases deal with the central role of the plan in that state. In *Clover Valley Foundation v. City of Rocklin*,[35] a case under the California Environmental Quality Act, the use of open space land for a roadway was alleged to violate the city's General (Comprehensive) Plan.[36] The city responded that it had historically allowed roadways and bike trails to be constructed in open space and that if the road were moved, it would have had to clear some oak trees.[37] The court said California law requires that a project be compatible with the "objectives, policies, general land uses, and programs specified in the general plan"[38] and found no "fundamental" inconsistency with the plan.[39] In *Wollmer v. City of Berkeley*,[40] the use of a density bonus met the plan, but allegedly violated the zoning ordinance. However, the court found the process set out in the plan to calculate density on a district-wide basis, rather than a parcel-by-parcel basis, was valid.[41]

Like California, the primacy of the plan is long-recognized and reflected in case law in Florida. In *Katherine Bay, LLC v. Fagan*,[42] a developer challenged the denial of a rezoning to accommodate a recreational vehicle park because of an alleged inconsistency with the future land use policy in the plan requiring compatibility of uses.

34. *West*, 18 A.3d. at 535.
35. 128 Cal. Rptr. 3d 733 (Cal. Ct. App. 2011).
36. *Id*. at 762.
37. *Id*.
38. *Id*.
39. *Id*. at 763. To the same effect are *Toorvald v. City of West Hollywood*, No. B225583, 2010 WL 5175496 (Cal. Ct. App. Dec. 22, 2010), *Citizens for Responsible Growth v. City of Bakersfield*, No. F059202, 2010 WL 4355790 (Cal. Ct. App. Nov. 4, 2010), and *Pfeiffer v. City of Sunnyvale City Council*, No. H036310, 2011 WL 5138637 (Cal. Ct. App. Oct. 28, 2011).
40. 122 Cal. Rptr. 3d 781 (Cal. Ct. App. 2011).
41. *Id*. at 791-92. On the other hand, in *Parks Legal Defense Fund v. City of Huntington Beach*, No. G043109, 2010 WL 5066160 (Cal. Ct. App. Dec. 13, 2010), the court affirmed a trial court decision that found a conditional use permit for a senior center in a park violated the City's General Plan, which incorporated the City's parks plan and was a "constitution for all future development." *Id*. at *8.
42. 52 So. 3d 19 (Fla. Dist. Ct. App. 2010).

However, reading the competing policies in context, the court determined that future development of some environmentally sensitive areas is to be expected.[43] In *Arbor Properties, Inc. v. Lake Jackson Protection Alliance, Inc.*,[44] the grant of a planned unit development was successfully challenged in the trial court for inconsistency with a county comprehensive plan,[45] but on *de novo* review the appellate court applied a deferential standard of considering the plan's "reasonableness" under Florida statutory law:[46]

> The Florida Legislature has established that in reviewing consistency, a court may consider 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.'[47]

Thus, while the plan in Florida is supreme, the courts are given broad powers of review.

Two Maryland cases are of interest, as that state has given new credence to the comprehensive plan. In *Naylor v. Prince George's County*,[48] construction of a "less than one percent" growth share for certain rural portions of the County in 2025 was found to be binding and must be addressed if raised;[49] however, the court quoted a dispositive holding from a similar case that governed the outcome in this case:

> Although it is mandatory that the Planning Board consider the numeric residential growth objective, it has leeway in that regard, especially where the 2025 horizon selected in the growth objective remains relatively distant at the present time. Even assuming residential growth in the Rural Tier in the short term may be in excess of the long term objective, the Board is not compelled necessarily to deny all residential subdivision applications coming before it in the Rural Tier until the desired equilibrium is attained.[50]

While the plan controlled, the Planning Board had some administrative leeway in administering that plan.[51] In *HNS Development, LLC v. People's Counsel for Baltimore County*,[52] the court affirmed the county's denial of an amendment to a subdivision plan for inconsistency

43. *Id.* at 29-31.
44. 51 So. 3d 502 (Fla. Dist. Ct. App. 2011).
45. *Id.* at 503.
46. *Id.* at 505. The court applied FLA. STAT. §§ 163.3194(3)(a), (4)(a) (2005).
47. *Arbor Properties*, 51 So. 3d at 505.
48. 27 A.3d 597 (Md. Ct. Spec. App. 2011).
49. *Id.* at 606-07.
50. *Id.* at 606 (citing Md. Nat'l Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n, 985 A.2d 1160 (Md. 2009)).
51. *Id.* at 612.
52. 24 A.3d 167 (Md. Ct. Spec. App. 2011).

with the local master (comprehensive) plan.[53] After an extensive analysis, the Court of Special Appeals concluded that respondent's code made the master plan binding on subdivision plans and was not a mere "guide."[54]

These cases herald a trend in which the words of a plan govern the adoption or application of land use regulations, or making of land use decisions and illustrate the consequences of that trend.

V. Plan Amendments

As plans become more significant to land use regulations and actions, changes to those plans, whether to undertake a new policy or permit new uses, become more important, as the larger number of cases on this subject over the past year illustrates.

California weighed in with affirming the efforts of one county to mitigate the loss of farmland under its Farmland Mitigation Program (FMP) by conditioning conversions of agricultural lands to residential use on securing agricultural easements on other farmland in the county.[55] The court determined that the FMP bore a reasonable relationship to the burden caused by residential development,[56] and did not run afoul of statutory limits on the use of conservation easements.[57] Similarly, in *South Orange County Wastewater Authority v. City of Dana Point*[58] the creation of a new zoning district to accommodate a sewage treatment plant did not render the plan internally inconsistent, nor violate that plan.[59]

53. *Id*. at 174. The County's adopted 2010 Master Plan explained that its statements were intended to guide the county in its land use activities. *Id*. at 182.

54. *Id*. at 187-90 (quoting BALT. CODE § 24-121(a)(5)).

55. Building Industry Ass'n. of Cent. Cal. v. Cnty. of Stanislaus, 118 Cal. Rptr. 467, 471 (Cal. Ct. App. 2011).

56. *Id*. at 474-77.

57. *Id*. at 477-83. In a case involving inaction on a plan amendment request, *Ayres v. Cnty. of Mendocino*, No. A129542, 2011 WL 2518707 (Cal. Ct. App. June 23, 2011), defendant first adopted, then rescinded a motion amending a plan. The rescission was upheld as neither arbitrary or capricious, nor lacking in evidentiary support under California's traditional mandamus statute. *Ayers*, 2011 WL 2518707, at *4-5. Moreover, the court found no enforceable duty to amend the plan at all. *Id*. at *7.

58. 127 Cal. Rptr. 3d 636 (Cal. Ct. App. 2011).

59. *Id*. at 647-49. In a rare Texas case, *City of Laredo v. Rio Grande H20 Guardian*, the city passed two ordinances contrary to a Texas statute (TEX. LOC. GOV'T CODE ANN. § 211.004(a) (West 2011)) which required such ordinances to be adopted in accordance with a comprehensive plan, if one existed. No. 04–10–00872–CV, 2011 WL 3122205 (Tex. App. July 27, 2011). The city's belated response to amend the plan following adoption was unavailing to its position. *Id*. at *10.

Florida has also had a number of plan amendment cases. *Payne v. City of Miami*[60] reversed the grant of a small-scale plan amendment to allow a developer to convert land designated a commercial boatyard and marina to allow a mixed use project with a high-rise condominium.[61] In an extensive and thoughtful decision, the court analyzed the various applicable plans and found the map amendment inconsistent with the plan policies.[62] The nature of the planning process was at issue in *Town of Ponce Inlet v. Pacetta, LLC*,[63] where a charter amendment to freeze existing development regulations on a site failed, as the action was not legislative in nature, so was ineligible for use of the referendum process.[64]

Oregon's decisions also reflect the importance given to plans. In *Gunderson, LLC v. City of Portland*,[65] petitioners appealed their own victory at the Land Use Board of Appeals (LUBA)[66] in their challenge to a series of plan amendments for a stretch of river along the Willamette River.[67] The court remanded the matter to LUBA to determine whether the city had adequately inventoried lands along the Willamette River Greenway in planning for future uses.[68] In *1000 Friends of Oregon v. Land Conservation and Development Commission*,[69] the Oregon Court of Appeals invalidated approval of an urban growth boundary expansion by the state's Land Conservation and Development Commission (LCDC).[70] The court found LCDC failed to interpret

60. 52 So. 3d 707 (Fla. Dist. Ct. App. 2010).

61. *Id*. at 710-12.

62. *Id*. at 715-36. There is a lengthy dissent, beginning at 52 So. 3d at 712, which also relied on plan policies as grounds to uphold the administrative decision of the hearings officer. On the other hand, in *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19 (Fla. Dist. Ct. App. 2010), a hearing officer's decision on a plan amendment that had both interpretive and evidentiary flaws was reversed and remanded. See also *Village of Pinecrest v. GREC Pinecrest*, 47 So. 3d 948 (Fla. Dist. Ct. App. 2010) where a denial of a plan amendment, zone change and site plan approval was successfully challenged, resulting in a court-ordered approval of those applications.

63. 63 So. 3d 840 (Fla. Dist. Ct. App. 2011).

64. *Id*. at 841-42.

65. 259 P.3d 1007 (Or. Ct. App. 2011).

66. LUBA is an administrative agency that hears most land use appeals from local governments and some from state agencies. *See* OR. REV. STAT. §§ 197.805-.850 (2012).

67. LUBA had determined the plan amendments were deficient for failure to follow various statewide planning goals and implementing administrative rules. *See* LUBA Final Order Nos. 2010-039 to -041, *available at* http://www.oregon.gov/LUBA/docs/Opinions/2011/01-11/10039.pdf?ga=t.

68. *Gunderson*, 259 P.3d at 1014-18.

69. 259 P.3d 1021 (Or. Ct. App. 2011).

70. *Id*. at 1023. LCDC is the state agency charged with adoption and enforcement of those goals, which are implemented by local comprehensive plans. *See* OR. REV. STAT. §§ 197.005.796.

state statutes, goals, and administrative rules correctly and remanded the matter for reconsideration.[71]

Washington, another state that takes the plan seriously, has had a number of cases involving plan amendments. The Washington Supreme Court in *Kittitas County v. Eastern Washington Growth Management Hearings Board*[72] found portions of the county's plan revision to be noncompliant with the state's Growth Management Act (GMA).[73] In particular, the court affirmed the Board's determination that the county had not justified the rural plan element so as to protect rural areas, provide for a variety of rural densities, protect agricultural land, and protect water resources;[74] however, it did reverse the Board's decision on compliance of its airport zone with the GMA.[75]

The jurisdiction of hearings boards, as opposed to courts, to hear plan amendments in Washington is also an important matter. The boards generally hear challenges to the adoption of or annual amendments to plans while courts hear site-specific changes. In *Spokane County v. Eastern Washington Growth Management Hearings Board*,[76] an annual series of amendments included a parcel appealed by neighbors to the respondent board.[77] The court determined that, even though the resolution included several sites, the hearings board had jurisdiction because Washington's GMA requires challenges to comprehensive plan amendments to be brought before a hearings board, rather than superior court.[78]

71. *Id*. at 1030-48; *see also Central Oregon Landwatch v. Deschutes Cnty*., 262 P.3d 1153 (Or. Ct. App. 2011) (involving an unsuccessful challenge to the mapping of eligible properties for destination resorts).

72. 256 P.3d 1193 (Wash. 2011).

73. WASH. REV. CODE § 36.70A.

74. *Kittitas*, 256 P.3d at 1196-1206.

75. *Id*. at 1206-11. There were concurring and dissenting opinions, illustrating the uncertainty over the level of deference to be given the Boards and the county in their respective portions of the planning process. The intricacies of the GMA are further illustrated in *Clallam Cnty. v. Dry Creek Coalition*, 255 P.3d 709 (Wash. Ct. App. 2011), another decision involving a Growth Management Hearings Board review of a county plan. In that case, the Washington Court of Appeals found the Board must determine whether sufficient state funding was available to justify changes to the county's capital improvements plan and the scope of potential challenges to the plan when the county failed to revise its population figures for an urban growth area. *See also* Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Bd., 254 P.3d 862 (Wash. Ct. App. 2011).

76. 250 P.3d 1050 (Wash. Ct. App. 2011).

77. *Id*. at 1052.

78. *Id*. at 1055; *see also Thurston Cnty. v. Western Washington Growth Management Hearings Board*, 240 P.3d 1203 (Wash. Ct. App. 2010), where issues of mootness and collateral estoppels arose in a second challenge; *Davidson Serles & Associates v. City of Kirkland*, 246 P.3d 822 (Wash. Ct. App. 2011), where superior court

The number of cases involving plan amendments over the past year is much higher than in previous years, possibly indicating increased scrutiny of plan amendments.

VI. Plan Interpretations

As with plan amendments, cases involving plan interpretations have become more numerous over the past year, probably because of the increasing importance of the plan.

In *Arbor Properties, Inc. v. Lake Jackson Protection Alliance*,[79] a Florida Court of Appeals reversed a trial court order invalidating a development order because the trial court improperly interpreted a plan provision prohibiting stormwater runoff into Lake Jackson.[80] The plan did not provide for exceptions for situations like those in the current case, where there was no such runoff into the lake.[81]

Oregon cases illustrate the importance that state gives to plans and their interpretation. In *Columbia Riverkeeper v. Clatsop County*,[82] the Oregon Court of Appeals affirmed LUBA[83] in remanding a county decision interpreting its plan and certain statewide planning goals too narrowly in determining the scope of "development" affected[84] and whether the decision would "protect" certain resources and activities.[85]

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jurisdiction of State Environmental Policy Act (SEPA) claims accompanying requests for plan amendments and zone changes were mixed with summary judgment questions; *Brinnon Group v. Jefferson Cnty*., 245 P.3d 789 (Wash. Ct. App. 2011), in which SEPA, GMA, and planning enabling act claims were joined together; and *Davidson Serles & Associates v. City of Kirkland*, 244 P.3d 1003 (Wash. Ct. App. 2010), where the same parties in the other case of that name once again dealt with the relationship between SEPA and the GMA.

79. 51 So. 3d 502 (Fla. Dist. Ct. App., 2011).

80. *Id*. at 504-05.

81. *Id*. at 506. The court explained its reasoning:

> Here, the trial court's order incorrectly reviewed the development order and the Plan by neglecting to consider the "reasonableness of the comprehensive plan, or element or elements thereof." By reviewing the applicable provisions of the Plan as a whole, the most reasonable and holistic interpretation, based on both the text and the synthesis of the document, we have no doubt that the development order is consistent with the Plan. This is necessarily so, because when read *in pari materia*, it is clear that the Plan and its elements provide that within certain Zones that actually discharge rainwater runoff into Lake Jackson, Leon County has established much more stringent development limitations for one primary purpose: to protect Lake Jackson from polluted rainwater runoff.

Id. at 505.

82. 243 P.3d 82 (Or. Ct. App. 2011).

83. *See supra* note 66.

84. *Columbia Riverkeeper*, 243 P.3d at 89-90.

85. *Id*. at 91-96. Nevertheless, in *Friends of Yamhill County v. City of Newberg*, 247 P.3d 767 (Or. Ct. App. 2011), that same court affirmed LUBA's determination

In *Setniker v. Polk County*,[86] that court also found that the county had misapplied the state's Transportation Planning Rule[87] in approving a sand and gravel facility because the applicant provided sufficient transportation capacity to deal with its own use, but did not address additional capacity deficiencies at the end of the planning period in 2030 as the rule requires.[88]

A Pennsylvania case, *Main Street Development Group, Inc., v. Tinicum Township Board of Supervisors*,[89] involved protection of the values of agricultural lands and facilitation of reasonable development including housing—goals required to be carried out by the enabling legislation[90] which was, as it turned out, incorrectly interpreted by a local government, resulting in unlawful *de facto* exclusive agricultural zoning which caused unreasonable restrictions on the plaintiff developer.[91]

Washington also has had a number of cases involving plan interpretation over the last year. In *Phoenix Development, Inc. v. City of Woodinville*,[92] denial of rezoning and subdivision approval was affirmed based on the deference given to the local government in interpreting its plan to the effect that there was no "demonstrated need" for the development[93] and that the development violated a plan policy to "preserve our Northwest Woodland Character."[94] In *Whatcom County*

that gave a local government more leeway in framing its "economic opportunities analysis," in providing for additional commercial and industrial lands over the planning period.

86. 260 P.3d 800 (Or. Ct. App. 2011).

87. Or. Admin. R. 660-012-0060, *available at* http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_012.html. That rule generally requires that plan amendments and zone changes resulting in uses which "significantly affect" transportation facilities to have sufficient capacity available to meet the additional traffic or to limit the uses to that capacity available.

88. *Setniker*, 260 P.3d at 806-09. In this case, the developer seeking review of the LUBA decision raised its appeal points in the local, LUBA and appellate court proceedings. However, in *Waste Not of Yamhill Cnty. v. Yamhill Cnty.*, 246 P.3d 493 (Or. Ct. App. 2011), a developer who lost at LUBA could not raise a new, and perhaps more effective, argument for the first time on judicial review.

89. 19 A.3d 21 (Pa. Commw. Ct. 2011).

90. 53 PA. CONS. STAT. §§ 10301, 10601, 10603(j).

91. 19 A.3d at 29. However, in *Donnelly v. City of Dover*, No. 10A–03–00, 2011 WL 2086160 (Del. Super. Ct. April 20, 2011), approval of a development was effectively affirmed. Even though the local plan designated a site for recreational use, the plan text added that no zoning would occur as a result of the designation and that the City would decide later which of the recreationally-designated lands it would rezone. As the subject site was located in a recreation zone that provided for residential development as a conditional use, the site could lawfully develop residentially.

92. 256 P.3d 1150 (Wash. 2011).

93. *Id.* at 1154-58. The court also determined substantial evidence existed in the record for that conclusion. *Id.* at 1158.

94. *Id.* at 1158-59. The City interpreted that term in its order and the court deferred to that interpretation. *Id.*

Fire District No. 21 v. Whatcom County,[95] a county code provision requiring a concurrency letter from the appropriate fire district regarding service levels was not overcome by a plan policy that allegedly found services to be adequate and available if certain improvements were made.[96] The plan provision in this case was a necessary but not a sufficient requirement.

The cases in this category point to a more solicitous and sophisticated understanding of the role of the plan in the development process.

VII. Conclusion

The cases in the past year on the role of the plan as a check on land use regulations and actions show a continuing trend away from ignoring the plan in those contexts and towards using the plan as an evaluative factor, if not the dispositive criterion. Moreover, the increasing number of cases on plan amendments and interpretation over the last year all lead to the conclusion that the plan continues to gain credence in the development process.

95. 256 P.3d 295 (Wash. 2011).
96. *Id.* at 297-99.