Recent Developments in Comprehensive Planning

Edward J. Sullivan*
Jennifer Bragar**

I. Introduction

THE STATE AND LOCAL GOVERNMENT SECTION of the American Bar Association undertakes an annual survey of state and federal cases dealing with the role of the comprehensive plan (sometimes called the "General" or "Master" plan) in land use regulation. That survey and this article illustrate trends in the current use of three modes of perception regarding comprehensive plans by state legislatures and state courts. The first mode, the "unitary view," is that planning is neither essential nor possibly even relevant to zoning and land use regulation, and it is the local zoning ordinance that is dispositive.[1] The second view, the "planning factor view," is that a plan is relevant, but not necessarily dispositive of the validity of a land use regulation.[2] The final view, the "planning mandate" view, is that planning is essential to land use regulation.[3] Although many states have similar zoning and planning laws derived from legislation suggested by the United States Department of Commerce in the 1920s (hereinafter sometimes referred to as the model acts),[4] state courts have not been uniform in

* B.A., St. John's University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978.

** B.A., University of California, Santa Cruz, 1998; J.D., Northwestern School of Law, Lewis and Clark College, 2007. The authors are indebted to Jonathan Quinsey, J.D., Lewis & Clark Law School, 2013; B.A., Arizona State University, 2010, for the initial research in the preparation of this article.

1. *See infra* Part II.
2. *See infra* Part III.
3. *See infra* Part IV.
4. About three-quarters of the states enacted legislation based on the Standard Zoning Enabling Act [hereinafter SZEA], written by a "blue-ribbon" committee under the auspices of the United States Department of Commerce. *See* ADVISORY COMM. ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf. About half the states adopted the suggested enabling legislation for planning that was authored by the same committee in 1928 and known as the Standard City Planning Enabling Act.

their interpretation of this legislation and we note that states have seen fit to amend or revise their enabling legislation over time to deal with that relationship.

Some of the confusion is derived from the requirement in a 1926 model act relating to zoning, which requires land use regulations to be "in accordance with a comprehensive plan;"[5] however, the model act relating to planning does not use the words "comprehensive plan," although that suggested legislation uses the terms "master plan" or "city plan."[6] Even greater confusion arises from the fact that zoning regulations (as opposed to plans) have been the object of legal scrutiny because they are written to be regulations, are more precise in their limitations on land use, and apply on a property-by-property basis. As a result, planning was seen to be less essential to the future of a community and might be seen as superfluous or worthy of a lesser priority place in terms of state or local funding or effort. Thus, communities may well have zoning, but no plan, or a plan that is not viewed as binding.

With respect to the relationship between planning and land use regulation, the unitary theory was the dominant view for many years in American planning law history.[7] However, there were voices crying in the wilderness for a more rational approach. The late Charles Haar wrote two important and prophetic law review articles on the subject,[8] and advocated a fundamental rethinking of that relationship. Similarly, Professor Daniel Mandelker, who has examined the cases and statutes, suggests resolving the ambiguities of the two model acts to express the subordination of land use regulation to planning.[9] These scholars, and others,[10] may have had some influence in persuad-

See ADVISORY COMM. ON CITY PLANNING AND ZONING, DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), *available at* http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf [hereinafter Standard City Planning Enabling Act].

5. SZEA, *supra* note 4, at § 3.

6. *See* Standard City Planning Enabling Act, *supra* note 4.

7. The leading case for that view is *Kozesnik v. Montgomery*, 131 A.2d 1 (N.J. 1957).

8. Charles Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955); Charles Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).

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

10. *See* Laurence Kressel & Edward J. Sullivan, *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). The American Planning Association has taken an aggressive role in advocating credence to planning, particularly

ing courts and legislatures to move away from the unitary view, as has been demonstrated in the reports over the last few years.

A final aspect of our report is a discussion on the interpretation of plans and amendment of plans, which both become more important as plans themselves gain credence. The thesis throughout this report is that plans are credible limitations on land use regulations—in some cases, determinative of the result, and in most cases, a factor in the outcome.

II. Unitary View

Although the view that the comprehensive plan is found in zoning ordinances and maps was once the majority view, very few states now adhere to that analysis. Connecticut has the most cases in this category, continuing its trend from the last several years.

In a state where courts consistently find that the zoning regulations and zoning maps comprise the municipal comprehensive plan,[11] it comes as no surprise that a Connecticut appellate court upheld a city's decision to grant a setback variance for development of a boathouse on a small Norwalk Island because it did not substantially affect the city's "comprehensive zoning plan."[12] The case explicitly relies on the "we know it when we see it" philosophy: "[Plaintiffs] ask at what

in its "Growing Smart" legislative initiative. *See Growing Smart*, AMERICAN PLAN. ASS'N (last visited May 21, 2014), http://www.planning.org/growingsmart/.

11. *See* West Lordship Beach Corp. v. Stratford Bd. of Zoning Appeals, No. CV126027976S, 2013 WL 4734876, at *6 (Conn. Super. Ct. Aug. 12, 2013) (approving a variance to permit the reconstruction of a seasonal cottage over an existing footprint); Ferace v. Waterford Zoning Bd. of Appeals, No. CV116009962, 2013 WL 3970232, at *3 (Conn. Super. Ct. July 16, 2013) (finding that a variance must not substantially affect the comprehensive zoning plan); Ciofeletti Constr. Co. v. Danbury Zoning Comm'n, No. LNDCV094064864, 2013 WL 1715705, at *3 (Conn. Super. Ct. Apr. 2, 2013) (denial of a zone change request upheld where 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); E&F Assocs. v. Zoning Bd. of Appeals of Town of Fairfield, No. CV126028919S, 56 Conn. L. Rptr. 334, 2013 WL 3627943, at *5 (Conn. Super. Ct. June 26, 2013) (holding setback variances that would enable construction of a second story consistent with the comprehensive plan where restaurants are permitted uses in the zone and other buildings in the area are multi-storied structures); Amendola v. Zoning Bd. of Appeals for Town of West Haven, No. NNHCV095031710, 2013 WL 3970251, at *7 (Conn. Super. Ct. July 16, 2013) (variances that allowed additional living area and attached garage are in accord with the residential use articulated in the regulations for the property located in the R-2 district and do not substantially impact the comprehensive zoning plan); Allstar Sanitation, Inc. v. Bridgeport Planning and Zoning Comm'n, No. CV106005554S, 2012 WL 6634907, at *1 (Conn. Super. Ct. Nov. 28, 2012) (the court found no injury when the plaintiff had not applied for a rezoning of its property and no vote denied such rezoning).

12. Schulhof v. Zoning Bd. of Appeals, 74 A.3d 442, 452 (Conn. App. Ct. 2013).

point a variance impairs the comprehensive zoning plan. Our answer is: Not in this case."[13] The court was persuaded that under the "comprehensive zoning plan" (actually the overview of the zoning maps), the various setbacks from the mean high water mark overlap due to the small size of the island, and if enforced, would prevent any structure from being built on the island.[14] Further, the court criticized plaintiffs for failing to demonstrate why a small boathouse on the island affects the comprehensive plan any more than the dwelling houses on the larger Norwalk Islands.[15]

In an Ohio case which utilized the unitary view, *State ex rel. Phillips Supply Co. v. City of Cincinnati*,[16] a group of local businesses challenged relocating a homeless shelter for inconsistency with the comprehensive plan.[17] The court found no statutory requirement in Ohio mandating cities to enact a comprehensive community plan.[18] But even if there were such a requirement, the city's allowance of a shelter on the subject property was consistent with the Homeless to Homes Plan, Cincinnati's adopted comprehensive plan for the homeless.[19]

In another Ohio case, *Apple Group Ltd. v. Board of Zoning Appeals Granger Township*,[20] Apple sought a variance to increase residential density on a portion of an 88-acre site (setting aside a portion of the site as open space), rather than meet the minimum two-acre lot requirement of the zone.[21] The variance was denied and Apple appealed, claiming the township's zoning ordinance was unconstitutional because the town did not have a comprehensive plan that is separate from its zoning resolution.[22] The court found that although a comprehensive plan is usually separate and distinct from a zoning ordinance,

13. *Id.* at 451. On the other hand, in *347 Humphrey Street, LLC v. City of New Haven Bd. of Zoning Appeals*, No. NNHCV116020538S, 2013 WL 1943774 (Conn. Super. Ct. Apr. 8, 2013), the failure to make adequate findings with regard to criteria that included reference to the city's comprehensive plan resulted in remand of four variance approvals.

14. *Schulhof*, 74 A.3d at 451.

15. *Id*. at 452.

16. 2012-Ohio-6096, 985 N.E.2d 257 (Ohio Ct. App. 2012).

17. *See id.* ¶ 31. Although the court ultimately found individual standing, the plaintiffs' argument for taxpayer standing was denied because general enforcement of the comprehensive plan is not grounds for taxpayer standing. *Id.* ¶ 23.

18. *Id.* ¶¶ 46-50.

19. *Id.*

20. Nos. 12CA0065-M & 12CA 0068-M, 2013 WL 5437644 (Ohio Ct. App. Sept. 30, 2013).

21. *Id.* ¶ 2.

22. *Id*. ¶¶ 7-9.

it is possible for an ordinance in and of itself to be a comprehensive plan.[23]

Apple further argued that the zoning ordinance did not meet the requirements of a comprehensive plan, and as a result, the township's resolution denying the variance request was not made "in accordance with a comprehensive plan."[24] Again, the court ruled in favor of the township and concluded that the zoning resolution functions as a comprehensive plan because it covers many factors, "including but not limited to land use, commercial development and conditional zoning terms."[25]

A Louisiana court similarly held, in the case of a denial of a truck stop casino permit, that a parish is not prohibited from passing zoning regulations without first approving a comprehensive plan.[26] The court ruled that an ordinance creating a zoning district has been found to qualify as part of a comprehensive plan, and the ordinance in question prohibiting truck stop casinos shared "the requisite relationship to health, safety, and welfare of the public" to constitute comprehensive planning.[27]

In South Dakota, the Supreme Court affirmed a decision of Rapid City to deny a rezone application for a portion of property zoned within the Flood Hazard Zoning District.[28] Here, the city's zoning regulations acted as a comprehensive plan because the floodway was meant to "ensure the community's safety and to minimize property damage" in the event of future flooding.[29]

Thus, in states that continue to adopt the historical unitary view concerning zoning ordinances, and where local regulations focus on public health, safety, and welfare considerations, courts will uphold decisions that conclude such regulations constitute a comprehensive plan.

III. Planning Factor Cases

For many years now, the trend in cases relating to the significance of the comprehensive plan is that in which the plan is at least a factor or

23. *Id.* ¶ 10.
24. *Id.* ¶ 14.
25. *Id.* ¶ 17. "For each district, the zoning resolution sets out use, height, and area restrictions. It defines with certainty the location and boundaries of each zone." *Id.* ¶ 19.
26. Larussa Enters., Inc. v. Gordon, No. 2012 CA 0896, 2013 WL 4806896, at *5 (La. Ct. App. Sept. 9, 2013).
27. *Id.* at *8.
28. Parris v. City of Rapid City, 2013 SD 51, ¶ 1, 834 N.W.2d 850, 852 (S.D. 2013).
29. *Id.* ¶ 19. The flood hazard zone protected upstream property and operated to ensure the "health, safety, and general welfare" of the city's citizens was maintained. *Id.*

consideration in a judicial analysis. This past year has seen a similar trend.

A Georgia decision, *City of Suwanee v. Settles Bridge Farm, LLC*,[30] illustrates the point. At trial, plaintiff landowner successfully brought an inverse condemnation suit against a city for amending its zoning regulations to provide that large development projects, which included the subject school, required a special use permit wherein it must be shown that the project is not inconsistent with the overall objective of the comprehensive plan.[31] Previously, schools were an outright permitted use authorized without public review.[32] The Georgia Supreme Court did not reach the taking issue, but rather reversed the judgment in favor of the landowner, finding the additional discretionary evaluative requirement to consider the comprehensive plan through the administrative process established for permit approval precluded the inverse condemnation claim.[33]

In a Kentucky case, *Yocum v. Legislative Body of the City of Fort Thomas*,[34] the court dealt primarily with other issues, but noted a Kentucky statute that required a zoning map amendment to be "in agreement with the adopted comprehensive plan."[35] The local government asserted compliance, but plaintiff contended that one of the plan elements regarding reducing density as slopes increased should govern.[36] But in this instance, the court agreed with respondent that other plan language obviated the slope policy in the area of the subject land use change.[37]

30. 738 S.E.2d 597 (Ga. 2013).

31. *Id.* at 598-99.

32. *Id.* at 598.

33. *Id.* at 601. To similar effect is *J.D. Francis, Inc. v. Bremer County Board of Supervisors*, No. 12-0600, 2013 WL 104541 (Iowa Ct. App. Jan. 9, 2013), where the denial of a zone change consistent with the comprehensive plan was used as part of an inverse condemnation claim. Respondent Board's decision, which the court upheld, included the following:

> The plan itself, in the implementation section, notes that consistency with the plan is only one factor to be considered along with compatibility with surrounding land uses, minimal impact on adjacent property, density of proposed use, impact on traffic generation and flow, and environmental impact, among others.

Id. at *2. The court went on to say that it was legitimate to counterbalance other plan policies and land use designations and that the plaintiff was not automatically entitled to a zone change. *Id.*

34. No. 2011-CA-002191-MR, 2013 WL 375574 (Ky. Ct. App. Feb. 1, 2013).

35. KY. REV. STAT. ANN. §100.213(1) (West 2014).

36. *Yocum*, 2013 WL 375574, at *2-3.

37. *Id.* at *3; *see also* KY. REV. STAT. ANN. §100.213(1)(a), (b) (West 2014); Bell v. Meade Cnty. Fiscal Court, No. 2011-CA-000369-MR, 2013 WL 1091239, at *3 (Ky. Ct. App. Mar. 15, 2013) (noting that an exception to the general statutory requirement

In *Irshad Learning Center ("ILC") v. County of Dupage*,[38] a Muslim religious and educational group sought a conditional use permit to use property in the county for religious services and educational purposes.[39] The county found that ILC failed to show its application was harmonious with the "general purpose and intent of the zoning ordinance, and will not be injurious to . . . the public welfare, or in conflict with the . . . comprehensive plan."[40] However, the court disagreed with the county's conclusions because the record did not support the parade of horribles that objectors believed would cause too many impacts.[41] Rather, the court concluded that ILC specifically limited the number of people who could be on the site to 100, and that the county's denial findings were the product of speculation and factual errors.[42] Moreover, the court concluded that "[a]cting administratively, the County is bound by its Zoning Ordinance, and not the Comprehensive Plan, and thus, the County may not rely on its Comprehensive Plan to justify the decision to deny an application where the

of agreement with the comprehensive plan if the existing zoning classification is "inappropriate" and the proposed classification "appropriate" or that there have been major changes in the area that were not anticipated in the original plan and have "substantially altered the basic character of the area."). Thus, it appears that plan conformity in Kentucky is a factor in the evaluation of some land use permits. Similarly, in *Pittsfield Investors LLC v. Pittsfield Charter Township*, No. 08–000151–CH, 2013 WL 1165247 (Mich. Ct. App. Mar. 21, 2013), a rezoning denial was challenged by plaintiffs who asserted that some of the township's stated interests (including conflicts with its comprehensive plan) were not advanced. The court concluded that a plaintiff must demonstrate that no government interests are advanced, and the trial court finding that there was no question of fact involving whether the comprehensive plan factor, among other factors, were advanced, was upheld. *Id.* at *6.

38. 937 F. Supp. 2d 910 (N.D. Ill. 2013).

39. *Id.* at 914.

40. *Id.* at 945.

41. *Id.* at 946. The "parade of horribles" included concerns related to wedding ceremonies and other special events that may attract more than the maximum occupancy of 100 persons. *Id.* at 918, 945-47. A much more extensive set of findings was given credence by the Minnesota Court of Appeals in *Ruhland v. City of Eden Valley*, No. A13-0110, 2013 WL 3285019 (Minn. Ct. App. July 1, 2013) when a neighbor challenged the rezoning to a residential/commercial reserve classification to accommodate the landowner's landscaping business. The court cited MINN. STAT. §462.352(5) (2012) to the effect that a plan is "a compilation of policy statements, goals, standards, and maps for guiding . . . development." While it is advisory, it is entitled to "some weight." *Ruhland*, 2013 WL 3285019, at *3. In this case, the court found sufficient findings, including those based on the comprehensive plan, to affirm the grant of the rezoning. *Id.*

42. *ILC*, 937 F. Supp. 2d at 947. Interestingly, the court had earlier in the opinion denied RLUIPA challenges even though the record included contentions from the objectors that ILC was synonymous with the Alavi Foundation and had connections to terrorist organizations, and intended to use the property to spread radical-jihadist Islamic ideology. *Id.* at 930-949. The county, at least in the court's view, did not base its decision on this testimony when it applied the code to the decision. *Id.*

proposed use is recognized as a Conditional Use by the Zoning Ordinance."[43] The court granted IRC summary judgment because the county improperly denied the application based on conflict with the comprehensive plan and the county could have reasonably conditioned approval of the use.[44]

In *Roundstone Development, LLC, v. City of Natchez*,[45] the Mississippi Supreme Court affirmed the city's denial of an affordable housing proposal because it was not in accord with the general plan for development.[46] As a prerequisite to plaintiff's development proposal, the city determined that a zone change would be required because the proposed use did not fit within the general plan's open-land designation.[47] The court determined that by requiring reclassification of the property to a single-family zoning designation, the city was able to "ensure that the proposed use fits within the City's general plan of development."[48] The court further determined that denying plaintiff's rezoning request was reasonable because in its practice of requiring zoning reclassification before a large project, the City was able to ensure that the proposed use fits within the City's general plan of development.[49]

In an unpublished Minnesota case, the court affirmed a city's approval of a requested rezoning of property from a designation as a single and two-family residential zoning designation to commercial reserve to enable the applicant to use the site for his landscaping business.[50] The court affirmed, finding that: "[a]lthough entitled to some weight, a comprehensive plan is 'generally viewed as advisory and the city is not unalterably bound by its provisions.' "[51] Nonetheless, the court recognized that rezoning to a commercial reserve was sup-

43. *Id.* at 952. Similarly, in a Wyoming case, "[f]indings on a project's general compatibility with the Comprehensive Plan are no substitute for specific findings required by the county's own land development regulations," and the county's decision was remanded for to consider a development's improvement to scenic views. Wilson Advisory Comm. v. Bd. of Comm'rs., 2012 WY 163, ¶ 55-58, 292 P.3d 855, 869-70 (Wy. 2012).

44. *ILC*, 937 F. Supp. 2d at 955. In contrast, a Washington court upheld a city's decision not to extend water outside the urban services boundary because such extension would be inconsistent with the comprehensive plan. Governors Point Dev. Co. v. City of Bellingham, 175 Wash. App. 1008, at 14 (Wash. Ct. App. 2013).

45. 105 So. 3d 317 (Miss. 2013).

46. *Id.* at 318.

47. *Id.* at 320.

48. *Id.* at 321.

49. *Id.* at 322.

50. *Ruhland*, 2013 WL 3285019.

51. *Id.* at *3.

ported by the plan's policy of encouraging commercial development along highway corridors.[52]

In a Montana case, *Helena Sand and Gravel, Inc. v. Lewis and Clark County Planning and Zoning Commission*,[53] plaintiff landowner alleged that defendant county engaged in "reverse spot zoning" in adopting zoning for an area so that mining was disfavored.[54] The court said that conformity to a comprehensive plan is relevant to the spot zoning analysis.[55] The court sent the matter back on other issues; however, conformity to the comprehensive plan appeared to be a principal determinant of the reverse spot zoning analysis.

Three minor and unreported New Jersey cases also point to the plan as a factor in evaluating land use decisions in that state. In *Laborim v. Mehnert*,[56] the court upheld the grant of a variance, noting that applicants must demonstrate, *inter alia*, that an approval will not "substantially impair the intent and purpose of the zone plan and zoning ordinance," and declaring the memorialization of the municipal grant decision sufficient for that purpose.[57] In *Riya Cranbury Hotel, LLC v. Zoning Board of Adjustment for the Town of Cranbury,*[58] the appellate court applied the same statute and the Board's evaluation of a use variance, but referred to the town's adopted master plan as the standard, without reference to the zoning ordinance.[59] Finally, in *Malashevitz v. Governing Body of the Township of Little Egg Harbor*,[60]

52. *Id.* In a New Mexico Court of Appeals decision, *Pecos River Open Spaces, Inc. v. Cnty. of San Miguel,* 2013-NMCA-029, ¶¶ 12-13, 2013 WL 309847, at *4 (N.M. Ct. App. 2013), the court agreed that appellants could use the comprehensive plan's purposes for open space protection to establish a use as charitable for purposes of that state's tax code.

53. 290 P.3d 691 (2012).

54. *Id.* at 694-95.

55. *Id.* at 700. The court said that compliance with the comprehensive plan or growth policy is "especially relevant" to the analysis. *Id.* at 704.

56. No. A-6332-11T2, 2013 WL 3762892 (N.J. Super. Ct. App. Div. July 19, 2013).

57. *Id.* at *5; *see* N.J. STAT. ANN. § 40:55D-70(c)(2) & (d). It is quite possible that the words "zone plan" evince an improper conflation of planning and zoning. In a condemnation context, whether the use of eminent domain is in the "public interest" included contemplation of the consistency of the use with the zoning ordinance. Norfolk S. Ry. Co. v. Intermodal Props., LLC, 71 A.3d 830, 843 (N.J. 2013).

58. No. A-3803-11T4, 2013 WL 375564 (N.J. Super. Ct. App. Div. Feb. 1, 2013).

59. *Id.* at *5-6.

60. No. A-2143-11T1, 2013 WL 2338607 (N.J. Super. Ct. App. Div. May 30, 2013). In contrast, in *Rosa v. Billerica Planning Board*, No. 09 MISC 392811 (HMG), 2013 WL 3776958, at *6-7 (Mass. Land Ct. July 15, 2013), the court explained that rules and regulations must be comprehensive, and reasonably definite enough so that owners may know in advance what is required, and that the Planning Board overstepped in its denial of a variance for a misreading of the town's Zoning Bylaw.

plaintiff challenged the grant of subdivision and site plan review to a Wal-Mart development because of concerns regarding its effects on the town's master plan.[61] The trial court and the town had found the proposal "substantially consistent" with the housing and land use elements of the master plan, and thus the grant was affirmed.[62] However, the New Jersey statutes have other criteria,[63] so the plan is not the final word on validity.

In a New York case involving the appraisal of real estate taken for a commuter rail station and parking lot, *In re Metropolitan Transportation Authority v. Longridge Associates, LP,*[64] the likelihood of the realization of more intense future commercial uses in the comprehensive plan map appeared to be a significant factor in the just compensation.[65]

Finally, a South Carolina case, *Dunes West Golf Club, LLC v. Town of Mount Pleasant*,[66] involved the denial of rezoning a portion of a golf course that was previously placed in a special zoning district, the Conservation Recreation Open Space (CRO) District.[67] Rezoning requests were governed by several local code factors, including its relationship with the local comprehensive plan.[68] In reviewing and upholding the denial, the South Carolina Supreme Court found the town did not gain any economic advantage over the golf course due

61. *Malashevitz,* 2013 WL 2338607, at *1.

62. *Id.* at *3-4; *see also In re* State Highlands Water Prot. & Plan. Council, 2013 WL 401274 (N.J. Super. Ct. App. Div. Feb. 28, 2013) (council review of ordinance amendments only applies when the adopted regional plan is applicable).

63. For example in *Malashevitz*, the court found that the purposes of the New Jersey Municipal Land Use Law, set out in N.J. STAT. ANN. § 40:55D-2(2) (2014), must be met and that the plan must comport with constitutional constraints on the zoning power and the municipality must follow procedural requirements for ordinance adoption. *Malashevitz*, 2013 WL 2338607, at *3. The variance criteria applicable in *Laborim* and *Riya* also required that the variance relate to a specific piece of property, advance the purposes of the state's Municipal Land Use Law, and be granted without substantial detriment to the public good, that the benefits of a grant substantially outweigh any detriments. *Laborim*, 2013 WL 3762892; *Riya Cranbury Hotel*, 2013 WL 375564; *see also* GM Hock Penn LLC v. Zoning Hearing Bd. of Scott Twp., No. 557 C.D. 2012, 2013 WL 3946279 (Pa. Commw. Ct. Feb. 1, 2013) (finding that proposed uses in a challenged zoning action were not inconsistent with the township's comprehensive plan which had a policy of encouraging commercial developments at the I-80 Interchange, which could have been fulfilled in many ways).

64. 961 N.Y.S.2d 359 (N.Y. Sup. Ct. 2012).

65. *See id.* at *10-14. In another New York case, *Greater Huntington Civic Group v. Town of Huntington*, 2012 N.Y. Slip Op. 52146(U) (2012), a supreme court judge affirmed a rezoning to a higher residential density, *inter alia*, rejecting a challenge that the same constituted spot zoning and violated the town's comprehensive plan. The court noted that the plan itself recommended high density residential development between existing commercial or industrial uses and residential uses.

66. 737 S.E.2d 601 (S.C. 2013).

67. *Id.* at 606.

68. *Id.* at 607.

to the CRO designation, but merely preserved the golf course's conservation and recreational uses set forth by the town's comprehensive plan.[69] Furthermore, the court acknowledged that the golf course CRO designation was subject to later evaluation of rezoning proposals to convert such land if appropriate.[70]

Over the past year, these decisions, in which planning is a factor in evaluating a land use regulation or action, are consistent with results in similar cases of this nature.

IV. The Planning Mandate View

The notion that a comprehensive plan governs land use regulations and actions is still a minority view, but in those states taking such position through statute or case law, the implications are profound.

In California, the General Plan is the basis for a "consistency" determination for land use plans and actions.[71] The reach of that general requirement was at issue in *LA Neighbors United v. City of Los Angeles*.[72] The appellate court determined that the city's Community Plan Implementation Overlay Ordinance (CPIO) to carry out individual community plans was adopted under the General Plan rather than the California Environmental Quality Act (CEQA), and therefore did not require an environmental impact report.[73]

In Florida, another state with a statutory consistency requirement,[74] an attempt to allow a use prohibited by the Palm Beach County

69. *Id.* at 620-21. The principal issue in this case was whether a taking had occurred. The court used the plan as part of the balancing test used in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978), but the case did not turn solely on the plan designation.

70. *Dunes W. Golf Club*, 737 S.E.2d at 620-21.

71. CAL. GOVT. CODE §§ 65300-02 (West 2014).

72. LA Neighbors United v. City of L.A., No. B238769, 2013 WL 1099017, at *1 (Cal. Ct. App. 2013).

73. *See id.* at *7. The court said, "[b]ecause it is subordinated to the community plans it is intended to implement, the CPIO ordinance is not 'an essential step leading to an ultimate environmental impact' . . . The community plans are." *Id.* at *6. Perhaps a more typical case involving the consistency requirement is *Sierra Club v. Cnty. of Tehema*, No. CO66996, 2012 WL 5987582, at *1 (Cal. Ct. App. 2012), in which a plan update was allegedly inconsistent with the remaining provisions of the General Plan. Both the trial court and the District Court of Appeals found the county's update to be consistent against a host of challenges. *Id.*

74. FLA. STAT. §163.3215 (2002). The extent to which the plan is the governing document in Florida is also illustrated in *Bee's Auto, Inc. v. City of Clermont*, 927 F. Supp. 2d 1318 (M.D. Fla. 2013) in which a 2007 plan amendment would have allowed plaintiff's auto repair shop and storage facility to continue despite its inconsistency with the plan if the landowner applied for a conditional use permit. Plaintiff refused to do so and brought a number of equitable and constitutional claims which were dismissed. *Id.* at 1335; *see also Town of Ponce Inlet v. Pacetta*, 120 So. 3d 27 (Fla.

Comprehensive Plan was annulled in *United States Sugar Corporation v. 1000 Friends of Florida*,[75] where the court stated:

> Whether a development order is consistent with a comprehensive plan is determined by comparing what the order *permits*, not what the current holder *intends* to do under the order. The current order permits general commercial mining, a use prohibited under the comprehensive plan. The burden is on the applicant to show that the development *order* conforms strictly to the comprehensive plan. . . The adopted order is inconsistent with the plan. If in fact U.S. Sugar wants to mine in a manner consistent with the plan, then it should reapply and limit its application so that any order which grants the application would be properly consistent with the comprehensive plan.[76]

Another example of the ramifications of plan consistency is found in a Court of Federal Claims case arising in Florida, *Childers v. United States*,[77] in which the court was called upon to determine damages over a former railroad easement converted into a public way under the Rails-to-Trails Act.[78] Florida requires plan consistency,[79] so the extensive opinion dealt with the impacts of the future land use plan on valuation for 13 separate properties. The court accepted testimony that a zone change conforming to the future land use plan is "automatic."[80]

In Delaware, variances must be justified in terms of consistency with the local comprehensive plan.[81] In Minnesota, the denial of a cer-

Dist. Ct. App. 2013) where a property rights claim based on equitable estoppel was rejected because the town's comprehensive plan did not allow the use plaintiff desired, regardless of any discussions had with local officials.

75. 134 So. 3d 1052 (Fla. Dist. Ct. App. 2013).

76. *Id.* at 1053; see also *Seminole Tribe of Fla. v. Hendry Cnty.*, 114 So. 3d 1073 (Fla. Dist. Ct. App. 2013) in which state power plant siting statutes (FLA. STAT. §§ 403.501-.518 (2014)) required a determination of local plan consistency. The applicant in this case, however, deliberately applied for local land use approval before filing under the siting act, received that approval, and then convinced the trial court that it could not review that determination because it was preempted. *Seminole Tribe of Fla.*, 144 So. 3d at 1074. The appellate court determined, however, that the siting act did not apply to land use applications filed locally before a similar application was filed with the state's power plant siting agency and remanded the case for a determination as to the validity of the local government determination of plan consistency. *Id.* at 1077-78.

77. 112 Fed. Cl. 617 (2013).

78. *Id.* at 626; Rails to Trails Act, 16 U.S.C. § 1247(d) (2012).

79. FLA. STAT. § 163.3215 (2002).

80. *Childers*, 112 Fed. Cl. at 640. Similarly, in *Etzion v. Etzion*, 972 N.Y.S.2d 143 (N.Y. Sup. Ct. 2013), a domestic relations case, the adoption of a new plan that had a significant effect on marital assets was a matter of public record and could not be the basis of a later motion to reopen the marital estate.

81. H. Fletcher Brown Mansion v. City of Wilmington, C.A., No. N12A-05-006RRC, 2013 WL 4436607, at *5-8 (Del. Super. Ct. July 26, 2013). Rhode Island takes a similar approach with special-use permits. *See* Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078 (R.I. 2013), MCF Commc'ns, LLC v. Town of Portsmouth, C.A., No. 11-011-M, 2012 WL 6706935 (D. R.I. Dec. 26, 2012). In a District

tificate of appropriateness for a change to a historically designated building was also governed by plan consistency requirements.[82] Similarly, a Missouri case reinforced a statutory requirement that urban renewal plans be consistent with the local comprehensive plan.[83]

In a Hawaii case, *Kauai Springs, Inc. v. Planning Commission of the County of Kaua'i,*[84] the Hawaii Supreme Court affirmed an Intermediate Court of Appeals decision from 2013 which found the plan to be the "guide" to development,[85] agreeing with the robust view of the role of the plan, as the county had done in its code: "All actions and decisions undertaken by the County Council and the County Administration, including all county departments, agencies, boards and commissions, shall be guided by the vision statement, policies, and the implementing actions of the General Plan."[86]

In Maryland, a complex case involving the role of the plan, as well as its interpretation, brings to light the issue of plan consistency. In *Pringle v. Montgomery County Planning Board*,[87] petitioner challenged a development project with a "big box" component as inconsistent with the "Germantown Employment Area Sector Plan" adopted by the Maryland-National Capital Park and Planning Commission. The county's zoning ordinance requires development under the "TMX" (Transit Mixed Use) zone to be "consistent with the recommendations of the applicable master or sector plan."[88] The Board found substantial consistency with the sector plan, even though the approved project allowed a "big box" store a few blocks from a transit stop, and did

of Columbia case, *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 252 (D.D.C. 2013), the issue of plan consistency was avoided because jurisdiction of that issue was with the District's Zoning Commission, to which plaintiff did not resort.

82. 500, LLC v. City of Minneapolis, 837 N.W.2d 287 (Minn. 2013) (citing MINNEAPOLIS, MINN., CODE OF ORDINANCES §§ 599.350(a)(6), (c)(2) (2013), enacted pursuant to MINN. STAT. § 462.357 (2013)). The court held that the plan was "the primary land use control for cities and supersedes all other municipal [ordinances] when [the ordinances] are in conflict with the plan . . . ." In *City of Lake Elmo v. Nass*, No. A12-2008, 2013 WL 3491161 (Minn. Ct. App. July 15, 2013), the court affirmed an administrative law judge determination to allow detachment of property from a city based on the uses allowed in that plan.

83. Smith v. City of St. Louis, 395 S.W.3d 20 (Mo. 2013); *see also* MO. REV. STAT. § 99.810.1(2) (2014)

84. 324 P.3d 951 (Haw. 2014).

85. Kauai Springs, Inc. v. Planning Comm'n of Kauai, 312 P.3d 283, 301 (Haw. Ct. App. 2013).

86. 324 P.3d at 979 and n.19 (citing KAUA'I COUNTY CODE § 7-1.4(a) (2000)); *see also* 324 P.3d at 986-87, 989 n.46 (discussion of the role of the county general plan in land use controls).

87. 69 A.3d 528 (Md. Ct. Spec. 2013).

88. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-14.213(a) (2013).

not follow every site design recommendation provided by the Sector Plan.[89]

The court noted that whether a plan is a guide or binding depends on both statute and precedent. It concluded that where "the local government has enacted a statute, ordinance, or regulation that links planning and zoning, 'the status of comprehensive plans [is elevated] to the level of a true regulatory device.' "[90] The court observed that when words such as "should" or "encourage" are used in a binding plan, the respondent planning board need not view those words as binding, but did place a burden on the board to explain why an objective that was "encouraged" was not implemented.[91]

Together, these cases illustrate a focus on the comprehensive plan as the standard for review of local decisions when such an approach is required by law.

V. Plan Interpretation

As plans become more significant, their interpretation becomes more important, as the following cases demonstrate.

In a District of Columbia case, *Durant v. District of Columbia Zoning Commission*,[92] the issue of plan interpretation in the evaluation of a planned unit development was complicated by what appeared to be conflicting plan policies.[93] The court determined that the respondent commission must balance the "occasionally competing policies and goals" of the plan and that, if those policies and goals are addressed, the court would not substitute its judgment for that of respondent.[94] Because the Commission did not address three policies in making that balance, the court remanded the matter.[95]

89. *Pringle*, 69 A.3d at 531-33.

90. *Id.* at 534 (citing Maryland-National Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n, 985 A.2d 1160, 1166 (Md. 2009)).

91. *Pringle*, 69 A.3d at 534-35.

92. 65 A.3d 1161 (D.C. 2013).

93. *Id.* at 1169-70. Under local law, the District's Comprehensive Plan "[d]efine[s] the requirements and aspirations of District residents" and "[g]uides executive and legislative decisions on matters affecting the District and its citizens." *Id.* at 1172 n.1; *see* D.C. CODE §1-306.01(b)(1)(2) (2012 Supp.).

94. *Durant*, 65 A.3d at 1167-68.

95. *Id.* at 1168-72. The court concluded that "[i]n light of what we see as the Commission's failure expressly to address these contested issues, we conclude that a remand for further consideration is required. In so concluding, however, we do not suggest that the Commission must exhaustively review, or even cite, every policy in the entire Plan; we hold only that it is insufficient to recite that a particular action is consistent with the Plan as a whole: 'bare conclusion[s]' will not do . . . Our precedents

An important issue in plan interpretation cases is jurisdiction–which officer or body is charged with making or reviewing interpretations. That point was made in a Florida case, *Seminole Tribe of Florida v. Hendry County*,[96] where an Indian tribe challenged a Planned Unit Development rezoning designation that allowed construction of a natural gas power plant and solar energy farm, which was allegedly in violation of the local comprehensive plan. But because the challenge was not made in the correct statutory manner,[97] the court affirmed the dismissal of that claim.[98]

In a Kentucky case, *Masonic Homes of Kentucky v. Louisville Metro Planning Commission*,[99] a statutory requirement mandates that the Commission review a cell tower application "in light of its agreement with the comprehensive plan and locally adopted zoning regulations."[100] The court found that, despite its limited jurisdiction, the commission's decision was not arbitrary, and summarily affirmed the grant of the permit.[101]

require the Commission, when presented with a material contested issue, to address that issue and to explain its conclusion." *Id.* at 1171.

96. 106 So.3d 19 (Fla. Dist. Ct. App. 2013).

97. FLA. STAT. §§ 163.3215(1), (3)-(4) (2011) require consistency challenges to be made to a development order in a *de novo* proceeding for declaratory or other relief, instead of certiorari proceedings, which are the usual vehicle for review of local development decisions. A similar result occurred in Oregon in *Grabhorn, Inc. v. Washington Cnty.*, 297 P.3d 524 (Or. Ct. App. 2013), where the Court affirmed the dismissal of a challenge to a land use compatibility statement because it was brought in a court of general jurisdiction, but Oregon statutory law (OR. REV. STAT. § 197.825) vests exclusive jurisdiction over land use decisions with the Oregon Land Use Board of Appeals.

98. *Seminole Tribe*, 106 So.3d at 22-23. In other Florida cases, such as *Beyer v. City of Marathon*, No. 3D12-777, 2013 WL 5927690 (Fla. Dist. Ct. App. Nov. 6, 2013), an inverse condemnation claim was made against respondent, which denied a development for a dwelling, asserting that the recreational use of plaintiff's island under the city's plan precluded a finding that all economically beneficial use of the land was precluded. However, in *Galleon Bay Corp. v. Bd. of Cnty. Comm'rs*, 105 So.3d 555 (Fla. Dist. Ct. App. 2012), petitioners were successful in reversing a determination that it would be "highly inequitable" for it to meet the current plan, given their commitments and expenditures, because the provisions of the plan were balanced with those commitments and expenditures in the landowner's favor.

99. No. 2011-CA-002041-MR, 2013 WL 462345 (Ky. Ct. App. Feb. 8, 2013).

100. KY. REV. STAT. ANN. § 100.987 (West 2014).

101. *Masonic Homes*, 2013 WL 462345, at *1. The court concluded: "[a]fter reviewing the record, it is clear the Commission's decision was supported by substantial evidence. Although Masonic presented evidence opposing the tower, [the applicant] presented a variety of evidence to show that its application was in agreement with the objectives of the comprehensive plan and local zoning regulations. . . Given the amount of evidence supporting the Commission's action, we can find no error with the circuit court's decision to affirm." *Id.* at 13. In *Pecos River Open Spaces*, 2013 WL 309847, the court affirmed a trial court decision that determined that a comprehensive plan designation of open space entitled the landowners to a charitable use and exemption from property taxes.

In a case where the county plan was implicated in removal of coquina rock formations that protected the subject development from beach erosion, a North Carolina appellate court supported the state's approval of a sandbag project for The Riggings development to protect it from further erosion.[102] Although the state's coastal management plan generally does not allow permanent revetments, the court ruled that the substantial private property interests of the homeowner outweighs the competing public interest to not place permanent sandbag revetments on the beach.[103] This decision allowed the state to grant a variance and avoid a takings claim.[104]

Finally, in a Washington case, *Chinn v. City of Spokane*,[105] petitioner challenged a rezoning approval to redesignate an eight-lot block to allow taller buildings, claiming that the action violated a city requirement of conformity to a comprehensive plan.[106] However, the trial court decision dismissing the challenge was affirmed, because the plan language relied upon by the petitioner was framed in precatory terms ("should," "encourage," "as a general rule") and was not a valid basis for challenging the rezoning.[107]

Plan interpretation cases in this period follow the generally accepted rules applicable in statutory interpretation, and thus provide a modicum of predictability to planning law.

VI. Plan Amendments

As with plan interpretation cases, plan amendment cases reflect the increasing significance of plans, as the cases over the past year indicate.

In *Latinos Unidos de Napa v. City of Napa*,[108] a California court rejected a challenge to plan amendments for the housing element of the city's General Plan.[109] Plaintiff alleged that the changes required an

102. Riggings Homeowners, Inc. v. Coastal Res. Comm'n, 747 S.E.2d 301 (N.C. Ct. App. 2013).

103. *Id.* at 312.

104. *Id*. at 315.

105. 293 P.3d 401 (Wash. Ct. App. 2013).

106. *Id.* at 404; *see* SPOKANE MUN. CODE §§ 17G.060.170(C)(1), (2), (5) (2010).

107. *Chinn*, 293 P.3d at 407. However, in *SSHI LLC v. City of Olympia*, No. 43300-1-II, 2013 WL 5436406 (Wash. Ct. App. Sept. 24, 2013), an extensive set of plan consistency findings in support of a denial of a residential development was upheld by both the trial and appellate courts, which awarded attorney fees to respondents. The same result was obtained in *North Kelsey v. City of Monroe*, 174 Wash. App. 1077 (Wash. Ct. App. 2013).

108. 164 Cal. Rptr. 3d 274 (Cal. Ct. App. 2013).

109. *Id.* at 277. In *Coalition for Adequate Review v. City and Cnty. of San Francisco*, No. A131487, 2013 WL 1912521 (Cal. Ct. App. May 9, 2013), the California First District Court of Appeals also denied relief under CEQA and substantive plan-

environmental impact report (EIR), but the court found that a previous EIR anticipated the amendments and zoning changes.[110] Therefore, the amendments were upheld because they complied with the California Environmental Quality Act (CEQA) requiring such reports be prepared prior to agency approval.[111]

Hawaii recently dealt with plan amendments when it invalidated a local charter amendment to amend its General Plan to limit the number of transient accommodation units.[112] The court concluded that the Hawaii Constitution provided the state legislature with authority to enact laws of statewide concern, and such laws included those dealing with the adoption, amendment, and administration of a local general plan.[113]

Washington has dealt with the effects of a subsequent plan invalidity determination on permits issued based on that plan in *Town of Woodway v. Snohomish County*.[114] The court held the issue was controlled by a statute granting the Growth Management Hearings Boards (which hear appeals on plan and land use ordinance amendments, but not permits)[115] with authority to determine whether the amendments were invalid, and finding invalidity only when the noncompliant amendment substantially interfered with goals of the state's Growth Management Act.[116]

These cases further the assertion that state courts are increasingly viewing plans as a significant tool to help regulate land use.

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ning law regarding an amendment to the city's General Plan to approve a project to rezone lands along the Market Street Corridor near Octavia Boulevard and to redevelop 22 vacant parcels created by the removal of the elevated Central Freeway. *See also* Cal. Clean Energy Comm. v. City of San Jose, 164 Cal. Rptr. 3d 25 (Cal. Ct. App. 2013).

110. *Latinos Unidos de Napa*, 164 Cal. Rptr. 3d at 283.

111. CAL. PUB. RES. CODE, § 21001.1 (2014).

112. Kauai Beach Villas-Phase II, LLC v. Cnty. of Kauai, 955 F. Supp. 2d 1156 (D. Haw. 2013).

113. *Id.* at 1172-75.

114. 291 P.3d 278 (Wash. Ct. App. 2013).

115. *Id.* at 286; *see also* WASH. REV. CODE § 36.70A.302 (2010). Washington law divides jurisdiction over land use matters depending on the subject, so that a quasi-judicial decision to change a plan designation and grant a zone change may not be challenged before a Growth Management Hearings Board. *See* Spokane County LLC v. E. Wash. Growth Mgmt. Hearings Bd., 309 P.3d 673 (Wash. Ct. App. 2013). However, if a quasi-judicial rezoning is not authorized by a comprehensive plan, it is deemed a development regulation and subject to review by the Growth Management Hearings Board. WASH. REV. CODE § 36.70B.020(4) (2014).

116. *Town of Woodway*, 291 P.3d at 285.

VII. Conclusion

The trend in caselaw for 2012-13 demonstrates increased respect for comprehensive planning, less tolerance for the view that zoning regulations are isolated from their planning roots, and more emphasis on the role of planning when plans are amended or interpreted.