
ZONING AND PLANNING LAW REPORT



OCTOBER 2015 | VOLUME 38 | ISSUE 9

FATHER DOES NOT KNOW BEST: A RESPONSE TO JUSTICE ANDERSON'S CONCURRING OPINION IN *RDNT, LLC V. CITY OF BLOOMINGTON*

By John M. Baker* and Edward J. Sullivan**

I. Introduction

A. Background—In early 2014 the Minnesota Supreme Court granted discretionary review of *RDNT, LLC v. City of Bloomington*,¹ a decision of the Minnesota Court of Appeals that dealt, in part, with the relationship of comprehensive plans to conditional use permits (“CUPs”). Both the applicant and project opponents invoked separate provisions in a city’s comprehensive plan in support of their respective positions.² The City Council concluded that the application was in conflict with its plan (and denied it in part for that reason).³ The district court disagreed and reversed the denial, but the Minnesota Court of Appeals overturned that decision.⁴ When the Minnesota Supreme Court agreed to take the case, the parties (and several amici) assumed that the dispute over the proper role of the comprehensive plan had attracted the Court’s interest, though other important issues were present.

In its March 18, 2015 decision, the Minnesota Supreme Court ultimately affirmed the City’s denial, but on grounds unrelated to the comprehensive plan.⁵ Although the court’s opinion therefore provided no meaningful comment about that issue, Justice G. Barry Anderson wrote a lengthy concurring opinion that dealt with the issue of application of comprehensive plans to conditional use permits.⁶ In that concurring opinion, Justice Anderson staked out the position that “the effect of relying on comprehensive plans to deny conditional use permits, and to control individual development, is to empower arbitrary and capricious decision-making by cities and to increase the likelihood that developers that enjoy political favor will be successful and those out of

favor will not.”⁷ No other justice joined the concurring opinion, but its provocative, broad attack invites scrutiny.

We believe that from a national, as well as a Minnesota, standpoint, the concurring opinion embodies a misunderstanding of the role of comprehensive planning and land-use regulation. The opinion’s concern that comprehensive planning promotes arbitrary actions and favoritism overlooks the effect of important safeguards already in place. Moreover, we believe that the outdated stereotypes of planning and zoning represented in the concurring opinion are not only legally incorrect, but perpetuate a patriarchal view of the role of a judge in dealing with planning-law cases. Planning law has earned its rightful place—not as a *sui generis* lump of clay to be molded by judges for the occasion, but as a branch of administrative law that recognizes the relative disadvantages courts possess (compared to other branches of government) in deciding policy issues. The vision for a community is most effectively determined and implemented by those chosen by the affected community. The responsibility of

courts to protect genuine property rights cannot justify an approach under which undue weight can be placed upon judges’ notions of what types of land uses are appropriate in which places.

B. The Case—Applicant RDNT, LLC, which owned an existing care facility overlooking the Minnesota River in a single-family-residential district in Bloomington, wished to expand that use significantly and to add new and more intensive services for seniors. Because its existing and proposed new uses were conditional uses rather than permitted uses in that district, RDNT needed a new conditional use permit. Nearby residents opposed the project and helped to make a record in the public hearing reflecting traffic and safety problems that had arisen after the City Council had granted RDNT its most recent conditional use permit for an expansion. RDNT asserted that it could mitigate those impacts.

Minnesota’s Municipal Planning Act (“MPA”) provides in relevant part that “Conditional uses may be approved by the governing body . . . by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied.”⁸ Among the CUP criteria in Bloomington’s zoning ordinance is the requirement of a finding that “the proposed use is not in conflict with the Comprehensive Plan.”⁹ The land use plan map itself did not provide a designation for the proposed site that conflicted with the proposed use. However, the City Council ultimately concluded that the proposed project would conflict with its plan’s policies because (1) the proposed expansion would make the campus a “larger traffic generator” that is not “adjacent to a collector or arterial street”; (2) the proposed expansion “would negatively impact the character of the surrounding low density neighborhood”; and (3) the proposed expansion consists of high-density housing that is not located near transit, amenities, services, and employment.”¹⁰

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Zoning and Planning Law Report (USPS 013-890), (ISSN 0161-8113), is published Monthly except August, 11 times per year, by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodicals Postage is paid at Twin Cities, MN.

POSTMASTER: send address changes to Zoning and Planning Law Report, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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ISSN 0161-8113

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One of the City's four grounds for denial was *not* based on a conflict with the comprehensive plan. The City's CUP criteria required that a conditional use "will not be injurious to the surrounding neighborhood or otherwise harm the public health, safety, or welfare,"¹¹ and the City found that the traffic impacts, as embodied in traffic studies, the City engineer's testimony, and neighborhood testimony, warranted a finding that the applicant could not satisfy that criteria. However, Justice G. Barry Anderson's concurring opinion dealt with the role of the plan in the review of the denial of the conditional use permit and is the focal point for this article.

II. The Primacy of the Plan

In this section, we trace briefly the historical relationship between planning and zoning, suggesting that the concurring opinion does not accurately recount that history. We note two very different historical perspectives, (one national, the other limited to Minnesota) which, after initial missteps, appear to converge over time toward a position in which the plan is, at the very least, a factor (and perhaps a significant factor) in evaluating land-use regulations and actions.

A. The National Perspective—The concurring opinion states that "[a]lthough comprehensive planning was advocated as early as the 1920s, modern planning did not exist until the 1940s,"¹² that zoning enabling acts were generally enacted without corresponding planning legislation, and that zoning regulations were carried out with no "large-scale plan."¹³ These statements are only partly true and overlook essential planning components of the *two* model acts from the 1920s on which most American land-use legislation was based. The Standard Zoning Enabling Act (1926),¹⁴ *inter alia* required that zoning regulations be "in accordance with a comprehensive plan."¹⁵ The Standard City Planning Enabling Act (1928) provided for a city or master plan.¹⁶ About

three-quarters of the states adopted the Standard Zoning Enabling Act¹⁷ while those that did not usually had some variation on a similar requirement.¹⁸ Thus, contrary to the concurring opinion's statement that "early state zoning enabling acts were generally enacted without corresponding planning legislation,"¹⁹ legislative recognition of the significance of comprehensive or master plans dates back to the time when zoning enabling acts first became prevalent.²⁰

The concurring opinion is correct in stating that, at least in the early days of land-use law, many states did not give legal effect to the plan. However, that statement should be seen in context. Many local governments did not have plans,²¹ or did not give them credence, so when courts reviewed zoning regulations or actions inconsistent with the plan or in the absence of a plan, they tended to ignore the language requiring plan conformity—most likely in an effort to "save" zoning, finding a separate comprehensive plan unnecessary.²² These actions reflected both the historical priority of zoning over planning in most places, as well as the relative importance ascribed to these two different land-use functions. Thus, it was the courts—not local governments—that had read out the planning aspect of land-use statutes.

More recently however, by statute and by court opinions, states ascribe to the plan a significant, if not dispositive, role in the review of zoning ordinances and land-use actions.²³ Thus, the inquiry on the role of the plan is best informed by a focus upon the paths actually taken by the several states.²⁴

In addition to its discussion of planning history, the concurring opinion states that courts have construed comprehensive plans as advisory and unable to guide specific land-use decisions.²⁵ But in fact, most courts that have reviewed the matter have opted either to treat the plan as a mandatory standard, or as a sig-

nificant factor in the evaluation of land-use regulations and actions.²⁶ Indeed, the concurring opinion concedes that there is a “modern trend . . . to give greater legal effect to the comprehensive plan,” citing *Baker v. City of Milwaukee*²⁷ among other cases, but denigrates the impact of those cases, claiming that although these cases do require that zoning and other implementing measures carry out the plan, they only carry out the “general goals” of the plan and do not provide a basis for denial of a permit.²⁸

In seeking historical support outside Minnesota for a categorical view that comprehensive plans “cannot guide specific land-use decisions,” the concurring opinion conflates decisions addressing distinctly different questions. Three of the decisions cited address whether a plan creates development rights that entitle a property owner to compel a community to grant a rezoning at the time of the owner’s choosing.²⁹ As the Indiana Supreme Court observed in one such case,³⁰ “implementing the plan as regards a given piece of real estate may not be the best course of action for the community on a given day.”³¹ Another addressed the question in which a use that was permitted *as of right* in a particular zoning district could be prevented by reference to a contrary legislative intent embodied in a comprehensive plan’s aspirational language.³² The permitted nature of the use effectively rendered the township’s approval mandatory. Neither situation comes close to determining whether a community may enforce legislative criteria for discretionary land-use permit decisions requiring consistency with a comprehensive plan.

Concluding its analysis of the national scene, the concurring opinion cites *Urrutia v. Blaine County*³³ to warn of the dangers of local government “overreach,”³⁴ claiming that allowing application of plan policies provide a decision-maker “unbounded discretion” to permit it

“effectively rezone land” based on plan policies.³⁵ Of the many cases cited from outside Minnesota in the concurring opinion’s historical analysis, *Urrutia* is the only one in which a court placed a limit on a community’s ability to implement its comprehensive plan in making discretionary land-use decisions.³⁶ We will address the issue of competing plan policies below; suffice it to say, however, that the “harm to health, safety or welfare” criterion deemed acceptable and enforceable in *RDNT* by all justices, including Justice Anderson, presents issues of similar seriousness.

In any event, the conclusion of the survey of the historical relationship between planning and zoning in the concurring opinion, *viz*:

Thus, the history of American municipal planning provides little support, and properly so, for use of the comprehensive plan as vehicle for denying conditional use applications.³⁷

is manifestly not the case.

B. The Minnesota Perspective—The lower appellate court’s decision in this case rested in part on the Minnesota Supreme Court’s recognition thirty-five years earlier that “a municipality may weigh whether the proposed use is consistent with its land-use plan in deciding whether to grant a special-use permit.”³⁸ The concurring opinion conceded that the Minnesota Legislature “has given municipalities broad authority to create ‘standards and criteria’ for granting or denying a conditional use.”³⁹ Yet it concluded that “even under the current legislative framework, neither the municipal nor the metropolitan planning act supports using a comprehensive plan to grant or deny a conditional use application.”⁴⁰ It is also asserted that “the Legislature has never made clear the legal effect of comprehensive plans,” but instead “has made hash out of the intersection of comprehensive planning, zoning, and property rights law.”⁴¹

The concurring opinion’s attack on the

legislature and on cities' legislative authority was surprising. Although the parties disputed the way that Bloomington had applied the zoning ordinance's CUP standard requiring applications to be consistent with its comprehensive plan, no party to the case—including the well-represented applicant—questioned whether Bloomington had a statutory duty to adopt official controls that are consistent with its comprehensive plan, or to consider a comprehensive plan in CUP decisions.⁴²

The concurring opinion's view that the Legislature "has never made clear the effect of comprehensive plans"⁴³ is difficult to square with the Minnesota Supreme Court's 2006 explanation in *Mendota Golf v. City of Mendota Heights* of "the supremacy of the comprehensive plan vis-à-vis the zoning ordinance."⁴⁴ In that case, the court explained that

[S]ince 1995, the [Metropolitan Land Planning Act, or MLPA] has provided that the comprehensive plan constitutes the primary land use control for cities and supersedes all other municipal regulations when these regulations are in conflict with the plan. The MLPA further prohibits cities from adopting any official control which is in conflict with its comprehensive plan, including any amendment to the plan.⁴⁵

(Although the MLPA does not apply outside of the seven-county Twin Cities Metropolitan Area, the cities in both cases were metro-area cities.) And although Justice G. Barry Anderson concurred and dissented in *Mendota Golf*, he did not dissent from the court's description in that case of the role of the city's comprehensive plan.⁴⁶

It is not surprising to see modern courts analyzing questions of land-use authority by taking a fresh look at the actual text of the statutes. However, it is surprising to see a judicial opinion overlook actual statutory text to the degree reflected in the concurring opinion in *RDNT*. That opinion's account of cities' statutory planning authority stated that

a comprehensive plan "may be implemented *only* by adopting zoning ordinances and other regulations that conform with the plan."⁴⁷ Strikingly, the word "only," and the underlying concept, do not appear in any statement of authority in either of the statutory sections cited.⁴⁸ To the contrary, the Municipal Planning Act provision cited actually provides that the means by which a planning agency might propose to implement the plan "*include, but are not limited to*" the items that the statute specifies.⁴⁹ The section of the MLPA cited imposes a duty to adopt official controls as described in the plan, a prohibition on adopting official controls or fiscal devices "in conflict with" the plan, and a deadline for resolving conflicts between them, without addressing whether and how the *discretion* provided elsewhere in Minnesota's planning acts may be used to further improve the chances that new development occurs in places and in ways that further the plan.⁵⁰ Minnesota's planning statutes are not perfectly clear on many points, yet at least those applicable to the Metropolitan region in this case provide clearer answers regarding municipalities' authority regarding comprehensive planning than the concurring opinion acknowledges.

III. The Hobgoblin of Plan Consistency

In addition to opposition to requiring plan consistency, there are other concerns, implicit and explicit, in the concurring opinion warranting a response.

The concurring opinion suggests that the very application of a plan to land-use decisions invites arbitrariness.⁵¹ At one point the concurring opinion states:

The effect of relying on comprehensive plans to deny conditional use permits, and to control individual development, is to empower arbitrary and capricious decision-making by cities and to increase the likelihood that developers that enjoy political favor will be successful and those out of favor will not. The traditional

deferential standard of review compounds this problem.⁵²

In support of this view, the concurring opinion reflects concerns that a local government may use “countless reasons” from plan policies to defeat an application.⁵³ Fears over application of more recent typical plan policies to permits appear to be particularly worrisome:

I have no difficulty envisioning a comprehensive plan that, depending on the political or ideological inclinations of the drafters, could include buzzwords such as ‘low carbon footprint’ or ‘environmental sensitivity,’ or vague references to the promotion of economic development or any similar formulation. *See, e.g., id.* at 2.1.2.2 (promoting ‘sustainable development.’).⁵⁴

We find this reasoning unconvincing. Minnesota courts, in particular, give property owners a special degree of protection against the enforcement of ambiguous local land-use standards, by employing an approach to their interpretation that generally gives property owners the benefit of ambiguities. Moreover, administrative law, of which planning law is a part, has dealt with these issues for years. For one thing, courts have obligated administrative agencies to set out and apply their policies through rules, use of precedent, and articulated findings. And judicial review, whether under the “arbitrary and capricious” standard or otherwise, has forced local governments to apply zoning-ordinance criteria and factors to individual fact situations without the world coming to an end. Let us look at each of these well-established checks on arbitrariness by public agencies.

1. Minnesota’s approach to interpreting local land-use regulations—When zoning laws were first adopted, courts generally viewed such laws with suspicion, because they were in derogation of the common law.⁵⁵ One such place embodying this suspicion was a canon of interpretation that construed ambiguities in land-use regulations against the government and in

favor of the owner of the property regulated.⁵⁶ In several states, this canon gave way over time⁵⁷—but not in Minnesota. In *Frank’s Nursery Sales Inc. v. City of Roseville*, in 1980, the Minnesota Supreme Court adopted a three-part approach to interpreting local land-use regulations that tends to treat zoning regulations like insurance-policy provisions.⁵⁸ Under the *Frank’s Nursery* standard, courts must construe the language of a zoning ordinance according to its plain and ordinary meaning, but where the words are ambiguous, a Minnesota court should “give weight to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the property owner to use his land as he wishes.”⁵⁹ (The court also must consider the language in light of its underlying policy, but in practice that factor is seldom decisive.). The hypotheticals posed by the concurring opinion all involve, in one way or another, ambiguities in comprehensive plans. Firm application of the *Frank’s Nursery* test provides substantial protection against the prospect that denial of an otherwise valid CUP application will be sustained because it conflicted with imprecise language in a plan.

2. Rulemaking—Legislatively adopted criteria for CUP decisions are mandatory in Minnesota and elsewhere.⁶⁰ By announcing policy in advance through generally applicable rules, most public agencies avoid the charge of *ad hoc* and arbitrary adoption of policy, even if those rules are broadly stated. Standards like “compatibility with the neighborhood,”⁶¹ “encouraging the most appropriate use of land,”⁶² and the like⁶³ are routinely upheld and applied as zoning criteria.⁶⁴ The rationale is equally applicable to binding plans.⁶⁵

3. Administrative Precedent—Similarly, although there is little in the way of a statutory requirement, public agencies may also inspire greater confidence in their decisions by courts and the public by acting consistent with previ-

ous decisions on an issue, or by explaining the deviation or establishment of a new policy. This may be done through the application of the “arbitrary and capricious” standard or similar standard that favors consistency and reason in decision-making.⁶⁶

4. Articulated Findings and Reasoned Decisions—The Minnesota Supreme Court has also prescribed that, in “any zoning matter,” the municipal body “must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion.”⁶⁷ For quasi-judicial land use decisions (including CUP decisions) these expectations often even greater.⁶⁸ Courts require administrative agencies to articulate the reasons for their decisions by way of findings that articulate the facts found, the policies applied, and the rationale for the decision in terms of the facts and applicable law.⁶⁹

5. Competing Standards—For those situations in which a plan contains competing policies, principles of administrative law allow courts to require an administrative agency to enter findings articulating the relative weight given to competing plan policies when reaching the overall conclusion to grant or deny a permit. In the land-use field, the Oregon Court of Appeals recently dealt with this issue in *Columbia Riverkeeper v. Clatsop County*⁷⁰:

On review, intervenors argue that the case law allows a balancing of approval standards for a land use decision so as to allow approval when most of the standards are met. We conclude that the adopted findings overstate the “balancing” principle that can be used in the construction and application of local land use ordinances. We have held that a locality may need to reconcile facially inconsistent provisions of its land use regulations in making a land use decision. That was the case in *Waker Associates, Inc. v. Clackamas County*, 111 Or. App. 189, 193–94, 826 P2d 20 (1992). There, a county ordinance conditionally allowed golf courses in areas zoned for agricultural uses, subject to a showing of plan consistency. The

plan policies both promoted and precluded golf courses. Application of the plan policies that would have precluded golf courses would negate the zoning provision allowing those conditional uses.⁷¹

Indeed, in *RDNT*, all justices specifically upheld a finding under a broad standard of “injury to the neighborhood” and “harm to the public health, safety and welfare.”⁷² One may well ask why it should be fine for a court to allow, without compunction, a city’s denial based on such broad standards, while its use of standards and objectives set forth in an existing plan should be viewed with such suspicion.

The principal problem of broad standards is that they allow for a full range of decision-making and rationales for the same. This can be checked by the time-honored administrative-law mechanisms discussed above that may be reinforced through statutory expectations.

IV. The Plan as a “Hedge” against Arbitrariness

The concurring opinion’s view that permitting consideration of comprehensive plans in CUP decisions will “increase the likelihood that developers that enjoy political favor will be successful and those out of favor will not,”⁷³ is precisely the opposite of the way that the Minnesota Supreme Court has viewed the relationship between comprehensive planning and arbitrary or irrational favoritism. The court’s 1984 decision in *Amcon v. City of Eagan* viewed a comprehensive plan as a “hedge” against those risks.⁷⁴ In *Amcon*, the site’s designation in the city’s comprehensive plan for “roadside business” was consistent with the use proposed in the applicant’s planned-development application, yet it was denied.⁷⁵ In reversing based in part on the importance of the plan’s consistency with the proposed new use in this setting, the supreme court emphasized that “a common objection to zoning flexibility devices is that their administration is

subject to so many varied pressures that a curb on their discretionary use is essential.”⁷⁶ Then, quoting from a New York court, it explained that “recent cases have emphasized even more the comprehensive plan aspect as a hedge against ‘special interest, irrational *ad hocery*.’”⁷⁷ The *Amcon* decision also reflects that giving effect to a comprehensive plan is not inherently at odds with property rights (or even the interests of the property owners). Thus, stripping comprehensive plans of most of their legal effect would present problems for applicants, and not simply for opponents or decision makers.

V. The Vacuum of Planning if Judges Diminish the Importance of Comprehensive Plans in Day-to-Day Land-Use Decision Making

Because a comprehensive plan is a community’s vision of its future,⁷⁸ it embodies policy judgments, which courts should be especially reluctant to override.⁷⁹ If cities and counties effectively lose the authority to base land-use decisions on whether the proposed use is consistent with a comprehensive plan, or if courts override local governments’ reconciliation of competing policy objectives in the plan, it may have the practical effect of substituting the court’s own value judgments for those of the community’s elected representatives. That is because a failure to defer will create a vacuum that will be filled by the judges’ own premises and assumptions about the kinds of places that would be appropriate for certain developments.

Judges are in a relatively poorer position to recognize the best vision for a community’s future—particularly because that a judge may have little or no connection to that community. For example, the justices of the Minnesota Supreme Court—each elected on a statewide basis—live disproportionately in urban and suburban areas. (Indeed, at the time that the Court ruled in the *RDNT* case, only one jus-

tice—Justice G. Barry Anderson, author of the concurring opinion—lived outside the state’s most urban counties.) To those who live in urban and suburban areas, the perspective of whether a particular spot in a rural area is a fine place for loud or foul activities may lack the sensitivities of those who actually have to live near such uses, or who aspire to have their community transcend uses that serve densely populated areas where they would not be welcome.

IV. Conclusion

The application of comprehensive plans to discretionary regulatory decisions of local government is neither novel nor unfair. Moreover, the requirement of stating and correctly applying land-use policy as part of a comprehensive plan appropriately lays the responsibility for these political responsibilities at the feet of locally elected officials and properly assigns courts to their roles of review of local decisions under established administrative-law principles. Vague constitutional incantations about property rights should not obscure the protective role that longstanding elements of land-use regulation—including the plan—have served.

ENDNOTES:

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¹ *RDNT, LLC v. City of Bloomington*, 2014 WL 30382 (Minn. Ct. App. 2014), review granted, (Mar. 18, 2014) and *aff’d*, 861 N.W.2d 71 (Minn. 2015).

²*RDNT*, No. A13-0310, 2014 WL 30382, at *2-3.

³RDNT, 861 N.W.2d at 74.

⁴RDNT, No. A13-0310, 2014 WL 30382, at *1.

⁵ RDNT, 861 N.W.2d at 75 n.3.

⁶RDNT, 861 N.W.2d at 79-88 (Anderson, J., concurring).

⁷RDNT, 861 N.W.2d at 86 (Anderson, J., concurring).

⁸Minn. Stat. § 462.3595, subd. 1.

⁹Bloomington, Minn., City Code § 21.501.04(e)(1).

¹⁰RDNT, No. A13-0310, 2014 WL 30382, at *2.

¹¹Bloomington, Minn., City Code § 21.501.04(e)(5).

¹²RDNT, 861 N.W.2d at 80 (Anderson, J., concurring).

¹³RDNT, 861 N.W.2d at 80 (Anderson, J., concurring).

¹⁴United States Dep't of Commerce, Standard State Zoning Enabling Act (1926), <https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

¹⁵United States Dep't of Commerce, Standard State Zoning Enabling Act § 3 (1926); see Charles M. Harr, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154, 1156 n.9 (1955).

¹⁶United States Dep't of Commerce, Standard City Planning Enabling Act (1928).

¹⁷R. Knack, S. Meck & I. Stollman, Commentary: The Real Story behind the Standard Planning and Zoning Acts of the 1920s, Land Use Law and Zoning Digest, at 8 (Feb. 1996), puts the number at 30 by 1930. In S. Meck, Planning and Urban Design Standards at 589 (American Planning Association 2006), it is said that all 50 states adopted some version of the Standard Zoning Enabling Act, but it is noted that the Standard City Planning Enabling Act was less popular.

¹⁸In 1916, several years before the Standard Acts, the New York Legislature amended the New York City Charter to allow for zoning. New York Laws, 1914, Ch. 470; see New York General City Law sec. 20(25); New York Secretary of State, Zoning and the Comprehensive Plan (2011), http://www.dos.ny.gov/lg/publications/Zoning_and_the_Comprehensive_Plan.pdf. In 1919, Oregon followed the New York enabling legislation as its own, where it

remained largely unchanged until 1975. 1919 Or. Laws 539 (1919).

¹⁹RDNT, 861 N.W.2d at 80 (Anderson, J., concurring).

²⁰Moreover, the authors of the standard zoning-enabling acts did not conceive of the concept of zoning according to a comprehensive plan; they simply adopted it from states where it was already in place. As the California Supreme Court had already observed: "Zoning in its best sense looks, not only backward to protect districts already established, but forward to aid in the development of new districts according to a comprehensive plan having as its basis the welfare of the city as a whole." Zahn v. Board of Public Works of City of Los Angeles, 195 Cal. 497, 513, 234 P. 388, 395 (1925), aff'd, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 (1927).

²¹Charles M. Harr, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154, 1157 (1955) (observing, in 1955, that "[f]or the most part, however, zoning has preceded planning in the communities which now provide for the latter activity, and indeed, nearly one half the cities with comprehensive zoning ordinances have not adopted master plans at all").

²²See Edward Sullivan & Laurence Kressel, Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement, 9 Urban Law Annual 33, 36, n.15 (1975).

²³In an oft-cited case, Gangemi v. Berry, 25 N.J. 1, 134 A.2d 1 (1957), the New Jersey Supreme Court opined:

The comprehensive plan embraced by an original zoning ordinance is of course mutable. If events should prove that the plan did not fully or correctly meet or anticipate the needs of the total community, amendments may be made . . . and if the ordinance as thus amended reveals a comprehensive plan, it is of no moment that the new plan so revealed differs from the original one.

²⁴One of the authors of this response has been involved in annual reports on the status of the comprehensive plan in land-use law. These reports conclude that both the legislatures and appellate courts now accord an increasing role to the comprehensive plan, so that while there are still states that follow the Kozesnik view, more states consider the plan as a factor (and some states view the plan as the dispositive factor) with regard to land-use regulations or actions. See, e.g., Recent Devel-

opments in Comprehensive Planning, 45 Urban Lawyer 727 (2013).

²⁵RDNT, 861 N.W.2d at 80 (Anderson, J., concurring).

²⁶Charles M. Harr, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955).

²⁷Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975) (rejected by, West Hill Citizens for Controlled Development Density v. King County Council, 29 Wash. App. 168, 627 P.2d 1002 (Div. 1 1981)).

²⁸The concurring opinion in RDNT notes that Baker required strict conformity of zoning with planning, but then follows that authority with a 1968 Washington case, Shelton v. City of Bellevue, 73 Wash. 2d 28, 435 P.2d 949 (1968), that follows the Kozesnik view that plans are unnecessary, and other cases to the same effect. See RDNT, 861 N.W.2d at 80-81 (Anderson, J., concurring). These older cases do contain statements supporting this view but which are at odds with more recent statutory and judicial views of the role of the plan. For example, Washington has completely revamped its land-use enabling legislation since the Shelton decision. The other case cited, Forks Tp. Bd. of Sup'rs v. George Calantoni & Sons, Inc., 6 Pa. Commw. 521, 297 A.2d 164, 166-67 (1972), gives no credence to the plan in the face of a zoning regulation. A more recent case, Lyons v. Zoning Hearing Bd. of Borough of Sewickley, 108 A.3d 202 (Pa. Commw. Ct. 2015), for text, see, 2015 WL 5123636 (Pa. Commw. Ct. 2015), appears to take a very different view of the role of the plan. Thus, the presentation of opposing authority is neither clear, nor fair.

²⁹See City of Gainesville v. Cone, 365 So. 2d 737, 739 (Fla. 1st DCA 1978) (rejecting property owner's claim that adoption of a land-use plan created a vested right to approval of a rezoning request); Borsuk v. Town of St. John, 820 N.E.2d 118, 121-122 (Ind. 2005) (reversing intermediate appellate court's determination that property owner was entitled to compel approval of a rezoning consistent with a comprehensive plan absent a compelling reason to deny it); Iverson v. Zoning Bd. of Howard County, 22 Md. App. 265, 322 A.2d 569, 571 (1974) (affirming denial of a rezoning request challenged by reference to the consistency of the proposed new use to a master plan). Moreover, in Iverson, the court described the effect of a planning commission's master

plan, which it contrasted with a duly adopted comprehensive plan duly adopted by a city council.

³⁰Borsuk v. Town of St. John, 820 N.E.2d 118, 121-22 (Ind. 2005).

³¹Borsuk, 820 N.E.2d at 121.

³²Forks Twp. Bd. of Sup'rs, 297 A.2d at 166-67 (rejecting a township's argument that, despite a zoning ordinance's inclusion of residential use as permitted in the relevant commercial zoning district, the planned unit development application for a residential use was improper because the comprehensive plan reflected an intention to locate residential uses in residential zones). Similarly, City of Louisville v. Board of Ed. of Louisville, 343 S.W.2d 394, 395 (Ky. 1961), and Platt v. City of New York, 276 A.D. 873, 93 N.Y.S.2d 738, 739 (2d Dep't 1949), involved denials of building permits for a use that was neither a prohibited nor conditional use.

³³Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000).

³⁴RDNT, 861 N.W.2d at 80 (Anderson, J., concurring).

³⁵Urrutia, 2 P.3d at 743-44, cited in RDNT, 861 N.W.2d at 81 (Anderson, J., concurring).

³⁶See Notes _____ and _____, supra. The federal district court's decision in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 867 (N.D. Ill. 1979), judgment aff'd, 616 F.2d 1006 (7th Cir. 1980), involved the application of heightened scrutiny as part of a Fair Housing Act disparate-impact analysis.

³⁷RDNT, 861 N.W.2d at 82 (Anderson, J., concurring).

³⁸Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712, 717 (Minn. 1978).

³⁹RDNT, 861 N.W.2d at 84 (Anderson, J., concurring) (citing Minn. Stat. § 462.3595, subd. 1).

⁴⁰RDNT, 861 N.W.2d at 84 (Anderson, J., concurring).

⁴¹RDNT, 861 N.W.2d at 82 (Anderson, J., concurring).

⁴²In its reply brief to the Minnesota Supreme Court, the applicant denied it was arguing "that the Comprehensive Plan can never be considered in CUP determinations," explaining that "a comprehensive plan may be considered in the determination of a CUP, but

the provisions relied upon must relate to the land at issue or be enacted by official controls.” Appellant’s Reply Brief and Addendum at 2.

⁴³RDNT, 861 N.W.2d at 82 (Anderson, J., concurring).

⁴⁴Mendota Golf, LLP v. City of Mendota Heights, 708 N.W.2d 162, 175 (Minn. 2006).

⁴⁵Mendota Golf, 708 N.W.2d at 175 (quotations and citations omitted).

⁴⁶Instead, in Mendota Golf, Justice G. Barry Anderson dissented “from that portion of the majority opinion that holds that the City of Mendota Heights had a ‘rational basis’ for the city’s denial of Mendota Golf’s application for an amendment to the city’s comprehensive plan.” *Mendota Golf*, 708 N.W.2d at 183

⁴⁷ RDNT, 861 N.W.2d at 84 (Anderson, J., concurring).

⁴⁸See Minn. Stat. §§ 473.865, 462.356, subd. 1.

⁴⁹Minn. Stat. § 462.356, subd. 1 (emphasis added).

⁵⁰Minn. Stat. § 473.865.

⁵¹Although it is not specified directly, the concurring opinion RDNT, LLC v. City of Bloomington, 861 N.W.2d 71, 80 (Minn. 2015) suggests that Respondent City of Bloomington has advanced an alarming argument which has “constitutional implications,” but the specific constitutional right “implicated” is never named.

⁵²RDNT, 861 N.W.2d at 86 (Anderson, J., concurring) (footnote omitted).

⁵³RDNT, 861 N.W.2d at 87 (Anderson, J., concurring).

⁵⁴These concerns over more recent planning and policy views are consistent with a comment at the end of the concurring opinion to the effect that zoning is constitutional “for good or ill.” RDNT, 861 N.W.2d at 88 (Anderson, J., concurring).

⁵⁵“Even though in case of necessity such [zoning] laws are properly within the exercise of the police power, the whole and each and every of the parts must be given a strict construction since they are in derogation of common-law rights.” 440 East 102nd Street Corporation v. Murdock, 285 N.Y. 298, 34 N.E.2d 329, 331 (1941).

⁵⁶440 E. 102nd St. Corp., 34 N.E.2d at 331.

⁵⁷“In a number of jurisdictions, including

New Jersey, South Dakota, Oregon, Washington, Wisconsin, and the District of Columbia, court decisions demonstrate a tendency toward liberal construction of zoning ordinances in favor of a municipality.” Rathkopf’s *The Law of Zoning and Planning* § 5:16 at 5-38 (2010 ed. (footnotes omitted)).

⁵⁸Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980).

⁵⁹Frank’s Nursery, 295 N.W.2d at 608-09.

⁶⁰See Minn. Stat. §§ 462.3595 (cities), § 394.301 (counties).

⁶¹Anderson v. Peden, 30 Or. App. 1063, 569 P.2d 633, 640 (1977), judgment aff’d, 284 Or. 313, 587 P.2d 59 (1978) (“compatibility with the established neighborhood” standard is valid).

⁶²Anderson, 569 P.2d at 640.

⁶³Novi v. City of Pacifica, 169 Cal. App. 3d 678, 681, 215 Cal. Rptr. 439, 440 (1st Dist. 1985) (“injurious or detrimental to property and improvements in the neighborhood or to the general welfare of the city” standard is valid).

⁶⁴Chandler v. Kroiss, 291 Minn. 196, 206, 190 N.W.2d 472, 478 (1971) (“Plaintiff also claims that [the village’s special-use-permit] ordinances are unconstitutional because they are too uncertain, imprecise, and vague. That claim is without compelling merit.”). The special-use-permit criteria upheld in Chandler required the city council to consider “the advice and recommendations of the Planning Commission and the effect of the proposed use upon the health, safety, morals, general welfare of occupants of surrounding lands, existing and anticipated traffic conditions, including parking facilities on adjacent streets and land, and the effect on the values of property and scenic views in the surrounding area, and the effect of the proposed use on the comprehensive municipal plan.” 291 Minn. at 198, 190 N.W.2d at 474.

⁶⁵In his *Administrative Law Treatise*, sec. 6.8 (2015 supp.), Richard Pierce sets out several reasons for rulemaking:

- Higher quality standards resulting from formal rulemaking proceedings
- Enhanced political accountability
- Efficiency advantages
- Avoidance of evidentiary hearings on legislative facts
- Avoidance of duplicate hearings

- Greater facility of enforcement
- Greater appearance of fairness and broader public participation
- Superior notice
- Reduction of discretion and enhancement of interdecisional consistency

⁶⁶In section 11.5 of his *Administrative Law Treatise* (2015 supp.), Richard Pierce observes:

Over the centuries, the main method the courts have used for protection against excessive judicial discretion has been to build bodies of case law to guide decisions in individual cases. That is a good method, as good for the future as for the past, and almost as good for agencies as for courts. The needed elements are (1) reasoned opinions, (2) accessibility of prior decisions, both to the tribunal and to parties, and (3) treating precedents as binding unless they are overruled.

In *Holland v. City of Cannon Beach*, 154 Or. App. 450, 962 P.2d 701 (1998), the court of appeals said, in reaching its decision:

We do not categorically foreclose the possibility that, as LUBA concluded, there may be circumstances under which a city governing body may appropriately change a previous interpretation as to whether a particular provision is an approval standard during its proceedings on a particular application. However, no such circumstance was shown to be present here. The only explanation in the city council's present order for its departure from the Chapman Point interpretation is that it had also departed from that interpretation in denying petitioner's intervening partition application. We accept, at least as an abstract proposition, the premise that a local government may "correct" its earlier interpretations of its legislation. However, where ORS 227.178(3) applies, its emphasis is on consistency, not correctness.

The statute referred to in the court's decision was OR. REV. STATS. 227.173(1), discussed below, which prohibited changing the approval standards from those that existed when the application was filed.

⁶⁷*Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981).

⁶⁸See, e.g., *City of Barnum v. Carlton County*, 386 N.W.2d 770, 775 (Minn. Ct. App. 1986) ; *Kennecott Exploration Co. v. Aitkin Cnty. Planning Comm'n*, No. A06-1078, 2007 WL 1894152, at *4 (Minn. Ct. App. July 3, 2007) .

⁶⁹Indeed, Oregon requires such a process

forcities. OR. REV. STATS. 227.173(1):

(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

See also OR. REV. STATS. 215.416(8)(a), (9), applicable to Oregon counties.

⁷⁰*Columbia Riverkeeper v. Clatsop County*, 238 Or. App. 439, 243 P.3d 82 (2010).

⁷¹The Court added, however:

We held that a balancing of those plan policies was "necessary in county actions on conditional use applications":

"It follows that county decision-makers will often be confronted with situations, like this one, where a use is compatible with some of the goals and incompatible with others. It is not possible to approve or disapprove a use in those situations without engaging in a balancing exercise. Although the effect on and consistency of a proposed use with each of the goals must be considered, the weight to be given a goal and the magnitude of the effects that particular proposed uses will have on the values that different goals protect will inevitably vary from case to case.

Id. at 194, 826 P2d 20.

A county, however, is not free to disregard a standard that precludes approval of a land use application merely because other standards favor, but do not compel, its allowance. In that case, it is " possible to approve or disapprove a use * * * without engaging in a balancing exercise." It is only when the standards themselves are incompatible in operation-by requiring both approval and disapproval of any generic application-that an overarching reconciliation of clashing standards is necessary. Intervenor's do not argue, and the county did not find, that *all* industrial development of the Bradwood area would be precluded by application of the protection policies. In this case, the plan policies that generally support industrial development of the Bradwood area or that work to minimize environmental impacts of development in general are not facially inconsistent with policies that protect traditional fishing areas and wildlife habitats from particular developmental impacts. As such, the poli-

cies need no balancing in their application.

Columbia Riverkeeper., 243 P.3d at 92-93.

⁷²RDNT, 861 N.W.2d at 76.

⁷³RDNT, 861 N.W.2d at 86 (Anderson, J., concurring).

⁷⁴Amcon Corp. v. City of Eagan, 348 N.W.2d 66, 75 (Minn. 1984).

⁷⁵Amcon Corp., 348 N.W.2d at 72-75.

⁷⁶Amcon Corp., 348 N.W.2d at 75 (citing Note, *The Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 Minn. L. Rev. 973 (1965)).

⁷⁷Amcon Corp., 348 N.W.2d at 75 (quoting *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155, 159 (1973) (emphasis in *Town of New Bedford*)).

⁷⁸Mendota Golf, 708 N.W.2d at 167.

⁷⁹Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 630-31 (Minn. 2007); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981).

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