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WHEN WILL THEY EVERY LEARN?—A LAMENT OVER THE OHIO SUPREME COURT DECISION IN APPLE GROUP, LTD V. GRANGER TOWNSHIP BOARD OF ZONING APPEALS

By Edward J. Sullivan* ©

I. Introduction

The recent decision of the Ohio Supreme Court in *Apple Group, Ltd. v. Granger Township Board of Zoning Appeals,*[1] revives a longstanding disagreement over the relationship of planning and land use regulation. Briefly stated, the Ohio Supreme Court sided with a traditional view that the language of the State Standard Zoning Enabling Act (SZEA)[2] which Ohio has substantially adopted with respect to township enabling legislation,[3] that requires zoning regulations to be "in accordance with a comprehensive plan"[4] does not require a document separate from the zoning regulations themselves. One member of the court dissented.[5]

This article contends that the *Granger Township* decision is improvident, both as a matter of statutory interpretation and planning policy. Moreover, the decision postpones the day in which Ohio joins the majority of states in which rational land use regulation is supported by a discrete policy basis found in a comprehensive plan. The result is thus lamentable, as well as wrong.

However as shown below, the *Granger Township* decision was neither unprecedented, nor unexpected. Decisions denigrating or rejecting the role of the comprehensive plan have a long history in American planning law; indeed, at one time such decisions were clearly the majority rule. Although not found in the text of the various opinions that take this view, there is little doubt that consequentialism is a principal motivating factor for the twisted mental gymnastics involved in concluding that the zoning regulations *are* the plan and, both before and after their amendment they are always in accordance with themselves.

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Following a summary of the *Granger Township* decision, that case will be analyzed in terms of its internal coherence and role in the national debate over the relationship between planning and zoning. This article will also look at alternative ways of viewing this relationship and will make some recommendations on how that the courts should view relationship in the absence of more precise legislation.

II. The *Granger Township* Decision

Apple Group, Ltd. ("Apple Group") purchased 88 acres of land in Granger Township ("Township") for residential development in the Township's R-1 Zone, which allowed single family and two-family homes on two-acre lots.[6] Apple Group sought to place 44 homes on one-acre lots, applying for 176 variances to accomplish this end; however, the Township's Board of Zoning Appeals denied the variances.[7] Apple Group filed an administrative appeal and lost,[8] but it also filed a second set of challenges through a declaratory judgment action. In this second challenge, Apple Group alleged that the denials were both unconstitutional and exceeded the township's statutory authority to zone because its zoning regulations were not "in accordance with a comprehensive plan" as required by Ohio statutory law.[9] From this point, the challenges came down to the statutory issue. A trial court magistrate determined that the zoning resolution met the statutory requirements of a comprehensive plan because the zoning ordinance itself "has the essential characteristics of a comprehensive plan; it encompasses all geographic parts of the community and integrates all functional elements."[10] The trial court agreed.[11]

Apple Group took the matter to the Ohio Court of Appeals, which agreed with the trial court's determination that the zoning resolution constituted a comprehensive plan, adding that such a determination was not against the manifest weight of the evidence.[12] As noted by the Supreme Court:

> The court reasoned that the purpose of the requirement in R.C. 519.02 for a comprehensive plan is to prevent piecemeal zoning and ensure that someone purchasing property will be able to determine in advance how the property may be used.[13]

The Ohio Supreme Court stated the issues before it correctly and succinctly from Apple Group's proposed legal propositions, *viz.* whether the zoning regulations and zoning map met the statutory requirement of a comprehensive plan or whether a separate document was required.[14]

Commencing its analysis, the Court determined that township land use regulations were neither inherent, nor specifically granted by the state constitution, but were a creature of statute.[15] Thus the statutory language of RC 519.02(A) was central to the outcome. That language, as noted, was derived from the SZEA, which did not define the term "comprehensive plan."[16] The court noted that:

> The view of the majority of states adopting the SZEA language is that "comprehensive plan-

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> ning requires some form of forethought and reasoned consideration, as opposed to a separate plan document that becomes an overarching constitution guiding development. A minority of states view the comprehensive plan as "an independent document separate from the comprehensive zoning ordinance. "[17]

The Court engaged in a peroration on two Ohio cases dealing with the relationship of planning and zoning that it did not find helpful. In *Cassell v. Lexington Twp. Bd. of Zoning Appeals*,[18] zoning of a one square mile area for farming, residential, commercial and recreational uses, but without specifying which uses could occur on the various properties, nor including a zoning map was not "in accordance with a comprehensive plan" as it provided for arbitrary application of the regulations.[19] More recently in 2009 in *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*,[20] the Supreme Court determined that a township could rely on a county comprehensive plan to meet its statutory duties.[21]

In short order, the court rejected Apple Group's contention that "comprehensive plan" was a "term of art" and should be construed in a manner consistent with current planning practice,[22] opting instead for what it called the "plain meaning" of the statute, adding that: "[i]f a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further."[23]

The court inferred, without directly holding, that the statute was clear, found: "Our consideration of the statutory language leads us to conclude that no formally enacted comprehensive plan is required by R.C. 519.02."[24]

The court stated that the functions of a comprehensive plan—whatever it was—included a need to reflect community-wide goals and guard against arbitrariness.[25] But the court turned to an unreported Court of Appeals decision that it found "even more helpful" to its analysis of the "comprehensive plan" language.[26] That case was *White Oak Property Dev., L.L.C. v. Washington Twp.*,[27] a case rejecting a challenge to a township zoning ordinance based on the "in accordance" language. In that case, the challenged ordinance comprehended four zoning districts, addressed a number of topics, including land use, housing and environmental precautions, and had a zoning map that enabled landowners and others to know the permissible uses of properties.[28] Taken in combination, these characteristics were sufficient for the zoning ordinance to constitute a comprehensive plan.[29] The Supreme Court gleaned from *White Oak* certain factors that would validate a finding that the Granger Township Zoning Ordnance constituted a "comprehensive plan":

> We adopt the factors that the White Oak court considered to be Indicative of a comprehensive plan, i.e., that it "(1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put."[30]

After noting that the township plan was over 100 pages long and included a zoning map, the court quoted from the statement of purposes of the ordinance, i.e.:

> [t]o promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granter Township [sic], Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township.[31]

The court then reviewed the Granger Township zoning ordinance and found that its newly adopted factors were met and affirmed.[32] The court concluded:

> A comprehensive plan is defined as one that reflects current land uses within the township, allows for change, promotes public health and safety, uniformly classifies similar areas,

> clearly defines district locations and boundaries, and identifies the use or uses to which each property may be put. Granger's zoning resolution was enacted in accordance with such a comprehensive plan pursuant to R.C. 519.02.[33]

Justice Kennedy dissented and, while agreeing that the power to regulate land uses by zoning was derived solely from statute,[34] the "in accordance" language (which appeared three times in the township zoning enabling legislation)[35] conditioned the exercise of that power on the existence of a separate comprehensive plan.[36] She added that the Supreme Court had on several occasions recognized terms that acquired meaning through understandings and practices over time and chided the majority for failing to accept expert testimony on the meaning of "comprehensive plan."[37] The dissent suggested that, because zoning and planning are referred to in different ways, they cannot be the same thing.[38] Moreover, "in accordance" connotes rigid compliance that is inconsistent with an approach that requires zoning regulations comply with themselves.[39] Justice Kennedy also noted that Ohio cities do not operate under the "in accordance" language and inferred the legislature must have meant something by this distinction.[40]

More importantly, Justice Kennedy noted that the Court did not accept the issue of what constituted a comprehensive plan when it took review of this case, so the use of the *White Oak* factors was not before the Court.[41] Those factors were found in the zoning enabling legislation purposes and parroting them in *White Oak* and in the current decision added nothing to the comprehensive plan requirement.[42] While rejecting the notion that a professional planner must draft such a plan, Justice Kennedy said she would still require a separate plan document.[43] Justice Kennedy's rule of law would provide that the absence of a separate comprehensive plan shifts the burden to the local government to demonstrate that its zoning regulations are a valid exercise of the legislative delegation of the power to zone.

III. A CRITIQUE OF *GRANGER TOWNSHIP*

There are several reasons why the *Granger Township* decision is both incorrect as a matter of law and inconsistent with rational planning policy. In this section, the decision will be analyzed and evaluated.

A. Statutory Interpretation—As noted in the previous section, the Ohio Supreme Court infers, but does not clearly state, its view that RC 519.02(A) is clear, so that there is no need to refer to other interpretive aids.[44] However, the "in accordance" language is anything but clear, unequivocal and definite, as demonstrated by the three cases upon which the court rests its conclusions.

Cassell determined that a zoning ordinance that lacks textual specificity and a map is invalid because it lacks a "comprehensive plan."[45] It appears, based on the *Granger Township* court's view that the essence of this 1955 case was the avoidance of arbitrariness, that *Cassell* was largely concerned with the lack of regulatory specificity and incomplete spatial regulatory coverage of the zoning regulations.

But the *B.J. Alan Co.* case merely stated that a Wayne County township could rely on the comprehensive plan of Wayne County and need not have its own comprehensive plan.[46] However in that case, the county had a *real* comprehensive plan, that met the statutory "in accordance" standard.[47]

Finally, in the unreported *White Oak* case, in which the *Granger Township* court found "useful" factors for determining whether a zoning ordinance constitutes a comprehensive plan, the court rejected a challenge based on the "in accordance" language because the township had a zoning map encompassing its

entire territory (thus avoiding the *Cassell* problem), and an ordinance text that "covered many topics," and allowed for future zone changes.[48] The *Granger Township* court read the *White Oak* decision to find these characteristics sufficient:

> The Twelfth District agreed that the township's zoning resolution and accompanying zoning map constituted a comprehensive plan and that it therefore complied with R.C. 519.02.[49]

The *White Oak* "factors" were added as an additional ground and will be assessed below, but suffice it to say that *White Oak* is the sole case relied upon in *Granger Township* for the proposition that complete territorial regulation plus a zoning ordinance text that "covers many topics" and allows for rezoning is all that is necessary for Ohio townships to regulate the use of land.

The *Granger Township* court correctly states that its decisions in *Cassell* and *B.J. Alan Co.* are not helpful in interpreting the "in accordance" language in the case before it. Indeed neither case addresses the issue. That means that the entire logic of *Granger Township* falls on *White Oak* and that, despite the inference that RC 519.02(A) is clear on its face, the court still resorts to *two* conclusions drawn from *White Oak*, i.e., that the adoption of just about any zoning ordinance will satisfy the "in accordance" language and that the factors used in that case are proof of statutory conformity. It is curious that both propositions are advanced simultaneously. It is even more curious that the *Granger Township* court advanced both propositions, notwithstanding its inference that the "in accordance" statute was clear on its face.

B. Judicial Paternalism (or Control)—One of the stated mainstays for interpreting the "in accordance" language was avoidance of arbitrary local decision making.[50] This end is difficult to square with the result in *Granger Township,* because if the zoning ordinance is the only reference point there is effectively no real basis for judicial review of land use regulations and actions.

The frequent use of the "arbitrary and capricious" substantive due process standard masks the application of the judges' personal public policy preferences (or at best, a goodwill guess as to how the local government may best achieve its objectives) in a free form "interpretation" of local government actions. While substantive due process (once the principal standard for judicial review of land use regulation[51] before the takings clause was utilized) is now rarely used in federal courts,[52] many state courts continue to use this highly malleable concept enabling some judges to play Robin Hood under the guise of constitutional interpretation.

This guise is also evident in the judicial invention of "spot zoning"[53] (among other terms) to provide a check on "bad" rezonings as may be perceived by a judge. You will find no statutory basis for this term, which has devolved into a totemic incantation against local actions that, like Potter Stewart's observation on pornography, are difficult to define for purposes of validity or constitutionality, but one knows it when she sees it.[54] Continuing this fiction of detached constitutional interpretation through a vague constitutional sleight of hand arrogates power to the judiciary and relieves local governments of the responsibility to make reasoned decisions instead of depending for survival on judicial review based on who had the better lawyer or the personal social or political preferences of the judge.

Thus, the contention that the zoning regulations constitute the comprehensive plan because they check arbitrariness is tautological and wrong.

C. The *White Oak* "Factors"—The *coup de grace* of the *Granger Township* conclusion that the zoning regulations constitute the compre-

hensive plan for statutory compliance purposes is found in its adoption of the *White Oak* factors, i.e., that the zoning ordinance "(1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put."[55] The court engages in an "analysis" of each of these newfound factors (which were not provided to the parties beforehand) and pronounces the zoning to be in compliance with the statute.[56]

The dissent, probably correctly, sees these factors as listing those items that must be contained in any zoning ordinance.[57] If so, the factors may be harmless and superfluous, if they did not promise to be a check upon zoning powers. If these factors are present in all zoning regulations that meet the statute, they have no purpose and provide only the illusion of standards. More importantly however, the substitution of these factors for zoning ordinance standards is meaningless and self-serving. Finally, the provenance of the factors is unclear, as is the authority of the court to substitute them for a statute requiring a comprehensive plan separate from the township zoning regulations.

D. Statutory Interpretive Methods—In addition to the *ipse dixit* inferential determination that the "in accordance" language was "clear, unequivocal, and definite,"[58] contradicted by its analysis, the rationale of *Granger Township* is flawed, incoherent, and unsupportable. As the dissent points out, the fact that township zoning regulations must be enacted "in accordance with a comprehensive plan" (a term used three times in the same statute) *must* mean that the statutory object and its standard cannot be the same thing.[59] Moreover, the dissent points out that "in accordance with" means rigid compliance and that failure to give meaning to all words in an interpreted statute constitutes error.[60] Aside from declaring the statute to be clear on its face and contradicting itself by use without notice of factors from an unreported case to declare the law, the majority decision dissembles.

It may well be that the majority sought to "save" zoning from the negligent actions of planners and public officials who reflect the American preference for geographically and regulatory precision in zoning over more ambiguous and policy-laden planning.[61] If so, it is a Pyrrhic victory, for it condemns citizens of Ohio townships to the continuation of standardless local decisions, punctuated by an occasional reversal or remand, depending on standardless judicial review.

E. Public Policy—*Granger Township* is the first Ohio Supreme Court case to deal with the relationship between planning and zoning under the "in accordance" language. That court had the opportunity to conclude that planning and zoning were two different exercises, reflected in two or more different documents, with planning being a necessary precedent for zoning. The court had the opportunity to dispel the view that planning and zoning were either identical or that planning was unnecessary—that the commands of self-contained land use regulations with no outside reference point on which those regulations could be reviewed was both inherently arbitrary and capricious *and* a violation of the enabling statute. The court had the opportunity to consider and apply the lessons learned from planning practice over nearly 100 years that planning and zoning are not static, and there must be a standard for judicial review of land use regulations and actions other than the personal feelings of the individual judge. The court did not side with rationality, with the words of the statute, with the practice of planning. Instead, it chose to side with the received wisdom of things as they are, with local arbitrary power, and with a system of judicial review that resembles the "thumbs up" or "thumbs down" decisions more

associated with Roman circuses than the courtroom. Indeed, *Granger Township* is more than a lamentable missed opportunity; it signals business as usual for a state that could use planning.

IV.SOME MODEST PROPOSALS

The difficulties that result from the decision in *Granger Township* are judicially caused and the first prospect for resolution of them lays with the Ohio courts, although the more practical response would be legislative in nature. Let us consider what the court might do in these circumstances:

1. The Remedy of the Dissent—Justice Kennedy's dissent is longer than the court's decision and many of its points are included in the critique of that decision. It is the proposed remedy of Justice Kennedy that should be considered:

> In the event, however, that Apple Group is able to prove that Granger Township does not have a comprehensive plan separate from its zoning resolution, even one compiled from several sources, the resolution should not be presumptively deemed invalid. Instead, the burden of proof shifts to Granger Township to establish that the resolution is a valid exercise of the power to zone granted by the General Assembly.[62]

This is strong stuff and it is no wonder that the court declined to consider this option. Granger Township is not alone among Ohio townships in how it plans (or does not plan) and regulates and in its implicit understanding that a separate comprehensive plan is necessary to undertake zoning—an assumption noted as prevalent by the majority.[63] While Justice Kennedy's presumption of invalidity is legally correct, it would likely cause chaos among Ohio townships.

2. Leaving Existing Ordinances in Place by Judicial Fiat—Another judicial invention to prevent "bad" rezonings has been the "change or mistake" rule, under which the existing zoning scheme is presumed valid and constitutional, but a change to that scheme in the form of a single tract rezoning must show a change in physical circumstances or a mistake in the original zoning scheme.[64] While this would substitute one fiction (i.e., the change or mistake test has no basis in zoning enabling legislation)[65] for another (the zoning regulations are the comprehensive plan), the result would be to keep existing zoning regulations in place until a true comprehensive plan were enacted.

Courts could also determine that existing regulations unchallenged for statute of limitation purposes would be deemed valid and constitutional. Like the analogy to the "change or mistake" rule, such a result would keep current zoning regulations in place (though effectively subjecting any proposed change to those regulations to challenge) until a comprehensive plan is adopted.

A variant on this theme would be the use of "planning factor" cases,[66] under which a court would judge the validity a land use regulation or action so that the absence of a plan or inconsistency with the same would be a factor of greater or lesser significance in its review. This approach may encourage local governments to adopt plans or risk invalidity of their land use regulations.

Any of these alternatives invites courts to undertake choices ordinarily made by the legislature and is as illegitimate as the kind of interpretation made by the *Granger Township* majority. Its only justification is temporary expediency.

3. Reallocation of the Burden of Proof—In establishing conformity with state law, which requires, albeit more directly, consistency with a comprehensive plan, the Florida Supreme Court established a shifting burden of proof:

> Upon consideration, we hold that a landowner seeking to rezone property has the burden of

> proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied.[67]

While the Florida system is predicated on the existence of a comprehensive plan, the point is that the court allocated the applicable burdens. Such allocation could be made for Ohio townships so that an application for a land use permit is presumptively valid in the absence of a comprehensive plan. Thus, a denial of the same imposes a burden on the township to demonstrate the denial is not arbitrary, discriminatory, or unreasonable.[68] This alternative provides a significant incentive to undertake comprehensive planning or contract with other public bodies to do so.

4. Legislation—The best way out of these difficulties would be for the Ohio General Assembly to act. That body could define "in accordance" (perhaps in terms of "consistency")[69] provide a time period for townships to make their zoning regulations consistent with plans of other public agencies, such as happened in *J. B. Alan Co.*, or adopt their own plan or plans. In any event, townships would have a politically responsible body providing for planning policy, as well as the assurance that there would be some limits to their regulatory authority through forced inaction or plan enactment.

V. Conclusion

Granger Township contains a statutory analysis of the "in accordance" language that is seriously deficient in its analysis, inconsistent with the statue it allegedly interprets and illogical in its application. The Ohio Supreme Court must clear up the confusion it has wrought and require, as the relevant statute provides, that Ohio townships have plans in place before seeking to regulate the use of land.

ENDNOTES:

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[1]Apple Group, Ltd. v. Granger Twp. Bd. of Zoning Appeals, 144 Ohio St. 3d 188, 2015-Ohio-2343, 41 N.E.3d 1185 (2015).

[2]A Standard State Zoning Enabling Act (1926), United States Dept. of Commerce available at https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf. Section 3 of the Standard Act provides:

> Such regulations shall be made *in accordance with a comprehensive plan* and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements, Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. (emphasis supplied)

This model legislation was intended for cities and is based on the New York City Zoning Resolution of 1916, which itself was based on a study; however, neither the township nor Medina County, in which the township is located, has any such study. Nor is it likely there

will be such a requirement imposed by the Ohio legislature in the near future. (Personal Communication from Stuart Meck, November 22, 2015).

[3]Ohio RC 519.02(A) states in material part:

> (A) Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees may regulate by resolution, *in accordance with a comprehensive plan*, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, *in accordance with a comprehensive plan*, may regulate the location of, set back lines for, and the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building materials in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board may regulate by resolution, *in accordance with a comprehensive plan*, for nonresidential property only, the height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, sizes of yards, courts, and other open spaces, and the density of population in the unincorporated territory of the township. For all these purposes, the board may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

According to Stuart Meck, co-author of Ohio Planning & Zoning Law (2013), Ohio municipalities claim "home rule" authority under the Ohio Constitution in 1912 and did not require enabling legislation to zone, so they have no "in accordance" obligation as do townships under their1947 enabling legislation. Ironically, only Ohio county and regional bodies may plan and township zoning commissions must obtain a county or regional recommendation before acting on a rezoning request (Personal Communication from Stuart Meck, November 22, 2015).

[4]Id.

[5]2015 WL 3774084 at *7 (Ohio, 2015). (Kennedy, J. dissenting).

[6]2015 WL 3774084 at 3 (Ohio, 2015). The Township also had an R-2 zone that allowed homes on two or three homes per acre, if water and sewer services were available.

[7]2015 WL 3774084 at 3 (Ohio, 2015).

[8]2015 WL 3774084 at 3-4 (Ohio, 2015).

[9]2015 WL 3774084 at 4 (Ohio, 2015). The statute involved the "in accordance" language. *See* RC 519.02(A).

[10]2015 WL 3774084 at 4 (Ohio, 2015).

[11]2015 WL 3774084 at 4 (Ohio, 2015).

[12]2015 WL 3774084 at 4 (Ohio, 2015).

[13]Apple Group Ltd. v. Board of Zoning Appeals, Ohio App. nos. 12CA0065-M and 12CA0068-M, 2013-Ohio-4259, summarized at 2015 WL 3774084 at 4 (Ohio, 2015).

[14]2015 WL 3774084 at 4 (Ohio, 2015). The Court stated those issues as follows:

> For purposes of a township's exercise of its statutory zoning power, the "zoning plan" that R.C. Chapter 519 empowers townships to adopt by resolution, which includes the zoning regulations and a zoning map, is not identical to or a substitute for the "comprehensive plan" identified in R.C. 519.02, with which R.C. 519.02 requires the "zoning plan" to be "in accordance." A township's zoning regulations, adopted by resolution under R.C. Chapter 519, are, standing alone, insufficient as a matter of law to establish that such regulations are "in accordance with a comprehensive plan," as R.C. 519.02 requires.

[15]2015 WL 3774084 at 4 (Ohio, 2015). This analysis is consistent with "Dillon's Rule," that local governments must derive their powers from specific legislative grants of authority or necessary inferences therefrom. As noted by

the National League of Cities:

> Dillon's Rule is derived from the two court decisions issued by Judge John F. Dillon of Iowa in 1868. It affirms the previously held, narrow interpretation of a local government's authority, in which a substate government may engage in an activity only if it is specifically sanctioned by the state government.

See http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority.

[16]2015 WL 3774084 at 5 (Ohio, 2015). The Ohio legislature did not provide for such a definition either in RC 519.02(A).

[17]2015 WL 3774084 at 3 (Ohio, 2015). (internal citation omitted). The Court cited Sullivan & Richter, Out of the Chaos: Towards a National System of Land-Use Procedures, 34 Urb. Law. 449, 454 (2002) for the majority rule and Bienintendi, Comment, The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View, 17 U. Dayton L. Rev. 207, 217 (1991) for the minority rule and Ohio views.

[18]Cassell v. Lexington Tp. Bd. of Zoning Appeals, 163 Ohio St. 340, 56 Ohio Op. 313, 127 N.E.2d 11 (1955).

[19]2015 WL 3774084 at 5 (Ohio, 2015).

[20]B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals, 124 Ohio St. 3d 1, 2009-Ohio-5863, 918 N.E.2d 501 (2009).

[21]2015 WL 3774084 at 6 (Ohio, 2015).

[22]2015 WL 3774084 at 5 (Ohio, 2015). The court added that neither Ohio nor the rest of the states had accepted such propositions.

[23]2015 WL 3774084 at 5 (Ohio, 2015), citing Columbus City School Dist. Bd. of Edn. v. Wilkins, 101 Ohio St. 3d 112, 2004-Ohio-296, 802 N.E.2d 637 (2004).

[24]2015 WL 3774084 at 7 (Ohio, 2015).

[25]2015 WL 3774084 at 7 (Ohio, 2015).

[26]2015 WL 3774084 at 6 (Ohio, 2015).

[27]White Oak Property Dev., L.L.C. v. Washington Twp., 2012-Ohio-425, 2012 WL 368254 (Ohio Ct. App. 12th Dist. Brown County 2012).

[28]2015 WL 3774084 at 7 (Ohio, 2015).

[29]In reviewing the "factors" taken from the *White Oak* decision, the court said:

> We accordingly conclude that the [zoning] resolution satisfies the requirements of R.C. 519.02 that it be enacted "in accordance with a comprehensive plan." 2015 WL 3774084 at 7 (Ohio, 2015).

[30]2015 WL 3774084 at 7 (Ohio, 2015). The court noted the Granger Township zoning ordinance was over 100 pages long and included a zoning map, but did not elaborate on the legal significance of either of these facts.

[31]2015 WL 3774084 at 7 (Ohio, 2015). The court went even further by citing the stated purpose of the zoning ordinance, viz

> "to promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granter [sic] Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township."

The court then stated that this statement demonstrated that the zoning resolution was intended to be the comprehensive plan for the entire township.

[32]"Thus, the zoning resolution is intended to be a comprehensive plan for the entire township. And all six White Oak points are met. "2015 WL 3774084 at 7 (Ohio, 2015).

[33]2015 WL 3774084 at 7 (Ohio, 2015). The court may not have appreciated the irony of defining the comprehensive plan in this way (when the legislature failed to define it at all) in terms of requirements for a zoning resolution, a sort of judicial doppelganger.

[34]2015 WL 3774084 at 8 (Ohio, 2015).

[35]R.C. 519.02(A).

[36]The dissent added;

> Because the unambiguous language in R.C. 519.02(A) demonstrates the General Assembly's intent to strictly limit a township's zoning authority to zoning regulations enacted" in accordance with a comprehensive plan," I dissent from the majority opinion's determination that a township's zoning resolution and a comprehensive plan can be one and the same.

2015 WL 3774084 at 8 (Ohio, 2015).

[37]2015 WL 3774084 at 8 (Ohio, 2015). Justice Kennedy took particular aim at the majority's consideration of current planning practice:

> The majority defines a term that has acquired a particular meaning without reliance on authoritative or expert knowledge in a manner that is incongruous with the expert testimony presented in this matter, without consideration of

the unique needs of Granger Township.

Id.

[38]2015 WL 3774084 at 9-10 (Ohio, 2015).

[39]2015 WL 3774084 at 10 (Ohio, 2015).

[40]2015 WL 3774084 at 10 (Ohio, 2015).

[41]2015 WL 3774084 at 11-13 (Ohio, 2015). This was important as the majority decision claimed to use these factors in future cases.

> Lastly, the White Oak factors are nothing more than the General Assembly's statutory limitations on township trustees' authority to regulate land use. See

R.C. 519.02(A) ("in the interest of the public health and safety," "percentages of lot areas that may be occupied," "sizes of yards, courts, and other open spaces [and] the density of population," "the uses of land for trade, industry, residence, recreation, or other purposes," and the "board may divide all or any part of the * * * township into districts or zones of such number, shape, and area as the board determines"). Land use is a component of, but not synonymous with, a comprehensive plan.

2015 WL 3774084 at 12 (Ohio, 2015).

[42]2015 WL 3774084 at 15 (Ohio, 2015).

[43]2015 WL 3774084 at 13-14 (Ohio, 2015).

[44]Note the interpretive transition by the court in the following passage:

> "'[i]f a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further.' *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 802 N.E.2d 637 (2004). Our consideration of the statutory language leads us to conclude that no formally enacted comprehensive plan is required by R.C. 519.02.

2015 WL 3774084 at 5 (Ohio, 2015).

[45] Cassell v. Lexington Tp. Bd. of Zoning Appeals, 163 Ohio St. 340, 56 Ohio Op. 313, 127 N.E.2d 11 (1955). The *Granger Township* court summarized its reading of the case as follows:

> Thus, by implication, a comprehensive plan consists of something more than zoning a section of a township to allow farming, residential, commercial, and recreational uses without specifying which portions of the section can be used for any of those purposes. In Cassell, we expressed concern over leaving the administration of zoning to the "unwarranted whim or caprice" of enforcement officials.

2015 WL 3774084 at 4 (Ohio, 2015).

[46]2015 WL 3774084 at 5 (Ohio, 2015). As noted below, The County plan had multiple land use policies separate and apart from any local zoning ordinance. Indeed, Stuart Meck, an authority on Ohio planning, points out that townships have no planning powers and may have to rely on county or regional plans for the basis for zoning powers. Stuart Meck, personal communication with author. November 15, 2015.

[47]The court observed;

> This plan is general in nature and yet it recommends specific direction and magnitude to urban growth and retention of rural lands. * * * This will provide an equitable basis for staff recommendations and Commission decisions on public and private investment policies. *It also provides a basis for zoning and subdivision decisions which are not possible without an adopted plan.* (Emphasis supplied).

2015 WL 3774084 at 4 (Ohio, 2015).

In fact the court emphasized the validity of the Township's reliance as follows:

> R.C. 519.02 does not require that a township create its own comprehensive plan—it requires only that a zoning resolution be "in accordance with a comprehensive plan." (Emphasis added.) To require each township to create its own comprehensive plan is to read additional language into R.C. 519.02.

2015 WL 3774084 at 5 (Ohio, 2015).

[48]2015 WL 3774084 at 5 (Ohio, 2015).

[49]2015 WL 3774084 at 4 (Ohio, 2015).

[50]Indeed, the *Granger Township* court quoted from *Cassell*:

> "The absence of any comprehensive plan in the regulation involved * * * open[ed] the door to an arbitrary and unreasonable administration of the regulation." Id. at 346,127 N.E.2d 11.

2015 WL 3774084 at 4 (Ohio, 2015).

> *Cassell* stands for the proposition that a comprehensive plan serves to protect against the arbitrary and unreasonable administration of a zoning regulation.

2015 WL 3774084 at 5 (Ohio, 2015).

[51]The first United States Supreme Court cases on land use were substantive due process cases. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926) and Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

[52]See e.g., U.S. v. Carolene Products Co.,

304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) and Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[53]The term "spot zoning" is not directly derived from statute, but is a judicial invention. When pressed, some courts find a constitutional basis for this tool in substantive due process or equal protection. See Daniel Shapiro, Understanding Spot Zoning at http://plannersweb.com/2013/11/understanding-spot-zoning-2/. Julian Jurgensmeyer and Thomas Roberts in Land Use Planning and Development Regulation Law (3rd ed., 2013) at Sec. 2.14, note 61, have observed that the term may have come from the "piecemeal zoning" comment to the "in accordance" language in Section 3 in the SZEA.

[54]Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

[55]2015 WL 3774084 at 6 (Ohio, 2015). The *Granger Township* majority adopted the factors that the *White Oak* court considered to be indicative of a comprehensive plan.

[56]2015 WL 3774084 at 6 (Ohio, 2015). However, even before engaging in this analysis, the court found compliance:

> Granger's Zoning Resolution is an exhaustive document, which consists of more than 100 pages and incorporates an attached zoning districts map.
>
> The resolution's stated purpose is to promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granter Township, Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township.
>
> Thus, the zoning resolution is intended to be a comprehensive plan for the entire township. And all six White Oak points are met.
>
> 2015 WL 3774084 at 6 (Ohio, 2015).

[57]The dissent's point is telling:

> Lastly, the White Oak factors are nothing more than the General Assembly's statutory limitations on township trustees' authority to regulate land use. See R.C. 519.02(A) ("in the interest of the public health and safety," "percentages of lot areas that may be occupied," "sizes of yards, courts, and other open spaces [and] the density of population," "the uses of land for trade, industry, residence, recreation, or other purposes," and the "board may divide all or any part of the * * * township into districts or zones of such number, shape, and area as the board determines"). Land use is a component of, but not synonymous with, a comprehensive plan. See B. J. Alan, 124 Ohio St.3d 1, 2009-Ohio-5863, 918
>
> 2015 WL 3774084 at 11 (Ohio, 2015).

[58]2015 WL 3774084 at 5 (Ohio, 2015).

[59]2015 WL 3774084 at 67, 8. 10 and 14 (Ohio, 2015). The dissent also suggests that the statutory analysis would have been assisted by the expert testimony presented as to the complimentary roles of planning and zoning, which the court's decision discounted, finding the statute clear on its face. 2015 WL 3774084 at 7, 8, 10, 11, 12 and 14 (Ohio, 2015).

[60]2015 WL 3774084 at 8-9 (Ohio, 2015). The dissent also finds the statutory mandate clear, but also that it requires a quite different outcome:

> Moreover, while the majority reads the phrase "in accordance with" out of the statute, under our rules for statutory interpretation, we are required to give each word effective meaning. "Accordance" is defined as "agreement, accord" and is "now used chiefly in the phrase "in accordance with." Webster's at 12. Another definition states, "To be in accordance is to be in conformity or compliance." (Italics sic.) Garner, A Dictionary of Modern Legal Usage 14 (2d.ed. 1995). We also recently noted that "in accordance with "connotes rigid compliance. * * *
>
> Once we strictly apply rules of statutory interpretation to R.C. 519.02(A), its meaning is clear and unambiguous. The General Assembly's language refers to two distinct items: a comprehensive plan and a zoning resolution. Therefore, the General Assembly granted townships the authority to zone, but required that the authority be exercised only in compliance with a comprehensive plan. The zoning resolution cannot comply with itself.
>
> Accordingly, the requirement of rigid compliance, coupled with the fact that "resolution" and "comprehensive plan" are distinct terms, conveys the meaning that they are separate documents.

[61]That preference may be seen in the priority in time in the adoption of the standard acts, in their adoption by then number of states of each of them and, loser to home, in the name of this journal—*Zoning and Planning Law Reporter*.

[62]2015 WL 3774084 at 8 (Ohio, 2015). Justice Kennedy also noted B.J. Alan Co. v.

Congress Twp. Bd. of Zoning Appeals, 124 Ohio St. 3d 1, 2009-Ohio-5863, 918 N.E.2d 501 (2009) allowed a county comprehensive plan to be sufficient for the township in that case, noting:

> We avoided any discussion of the phrase "in accordance with," stating, "[W]e have not determined today * * * whether the * * * Township zoning ordinance is indeed 'in accordance' with the * * * County Comprehensive Plan." (Cite)

Moreover, Justice Kennedy also noted that *B.J. Alan Co. did* appear to demonstrate the differences between zoning regulations and a comprehensive plan:

> We did not examine whether the resolution was intended by the township to be a comprehensive plan, but instead remanded for the trial court to determine whether the resolution complied with the separate and distinct county comprehensive plan, thus implicitly recognizing that a zoning resolution and a comprehensive plan are separate and distinct.

2015 WL 3774084 at 10 (Ohio, 2015). At all times, however, Justice Kennedy insisted that the plan was a document separate from the zoning resolution.

[63]2015 WL 3774084 at 8 (Ohio, 2015). The principal case on this issue is Kozesnik v. Montgomery Tp., 24 N.J. 154, 131 A.2d 1 (1957). The view held by the New Jersey court in that case is reflected by the *Granger Township* decision.

[64] Under the rule, the party supporting a change in zoning for a particular property or area must demonstrate that there has been either a substantial change in circumstances since the initial zoning designation was adopted, or that there was a bona fide mistake in that designation significant enough to warrant a correction.

Hirokawa, Making Sense of a 'Misunderstanding of the Planning Process': Examining the Relationship Between Zoning and Rezoning Under the Change-or-Mistake Rule, 44 Urb. L. 295, 296-97 (2012).

[65] However, some states, notably Maryland and Kentucky, have subsequently recognized the change or mistake rule by statute. Hirokawa, Making Sense of a "Misunderstanding of the Planning Process": Examining the Relationship Between Zoning and Rezoning Under the Change-or-Mistake Rule, 44 Urb. L. 295, 329 (2012).

[66]See Sullivan and Kressel, Twenty Years After: Renewed Significance of the Comprehensive Plan Doctrine, 9 Urb. L. Ann. 33 (1975), which finds three schools of thought in dealing with the relationship of planning and zoning, i.e. a "unitary view" similar to the decision in Granger Township which finds the comprehensive plan requirement fulfilled in the zoning regulations, the "planning factor" cases, described below, and the view of a plan as a quasi-constitutional document to which zoning and other land use regulations and actions must be consistent. The "planning factor" view does not require a plan, nor always require consistency with any plan that may exist; however, the absence of a plan or inconsistency with the same may lead a court to invalidate the land use regulation or action under review. Id. at 41.

[67] Board of County Com'rs of Brevard County v. Snyder, 627 So. 2d 469, 476 (Fla. 1993).

[68] The notion that courts may reallocate burdens and presumptions in land use cases was championed by two distinguished academics in planning law, Professors Daniel Mandelker and Dan Tarlock in Shifting the Presumption of Constitutionality in Land Use Law, 24 Urb. L. 1 (1992). These reallocations are significantly easier when statutory interpretation is involved.

[69]See e.g., Let the Courts Guide You: Planning and Zoning Consistency, American Planning Association, Zoning Practice, November, 2005 at https://law.wustl.edu/landuselaw/Articles/Consistency,BrianOhm.pdf.