

PLANNING AND THE LAW

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In this commentary I want to discuss the comprehensive plan and the role of the plan in land use law. This topic is especially important because of Norman Williams' work with the New York City plan and his writing on the comprehensive plan and how it relates to the land use process. Indeed, I think the role of the comprehensive plan in land use administration is still a most critical and vexing problem in land planning law.

Until recently, the cases gave very little weight to the plan in zoning disputes, and the statutes did not really make the plan a binding document. Norman and I could tell many stories about the old cases and how they went their own way. They interpreted the Standard Zoning Act to mean the plan was only advisory,¹ although the Act said zoning was to be "in accordance with" the plan.² The Oregon Supreme Court finally got it right about twenty years ago and required zoning to be consistent with a comprehensive plan.³ Since then, several states have adopted mandatory planning requirements and requirements that zoning be consistent with the plan.⁴

PROBLEMS WITH THE PLANNING REQUIREMENT

Most land use professionals support statutes and court decisions that mandate planning and require zoning to be consistent with a plan. Yet these requirements create a tension in land use regulation that is difficult to resolve. An article some years ago by Robert Rider, a Hawaiian planner, put the problem very well. Although the article has not received enough attention, it is as good a statement of the land use decision-making problem as I have seen.⁵ What Rider said was that the key issue in land use decision-making is the tension between the need for flexibility to make decisions and the need to limit discretion.

These two needs often are difficult to reconcile. A city council must deal with a dynamic political environment and must engage in political

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1. Norman's discussion of the role of the comprehensive plan is classic. See NORMAN WILLIAMS, 1 AMERICAN LAND PLANNING LAW PT. I (1988).

2. *E.g.*, Kozesnik v. Township of Montgomery, 131 A.2d 1 (N.J. 1957).

3. Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973).

4. Rodney L. Cobb, *Mandatory Planning: An Overview*, PAS Memo (American Planning Association Feb. 1994).

5. Robert M. Rider, *Local Government Planning: Prerequisites of an Effective System*, 18 URB. AFF. Q. 271 (1982).

bargaining in which outcomes are unpredictable. Notice that a "political bargaining in which outcomes are unpredictable" requires flexibility and the discretion to shape decisions to problems and opportunities as they arise. A binding comprehensive plan can impede this kind of bargaining by limiting the discretion of decision-makers.

Rider also argued that the adoption of a plan, far from signaling a consensus, more likely signals a new round of negotiation on land use controversies.⁶ This observation should have a sobering effect on those who are interested in the role of the plan in land use controls, because it presents another side of the problem. There is a need to limit discretion in decision-making, but there is a need for flexibility as well.

THE NEED TO LIMIT DISCRETION THROUGH PLANNING

Consider first the need to limit discretion. Years ago I was working with an American Bar Association committee on a study of how land use regulation affects affordable housing. The role of the comprehensive plan was one question we considered, and I wrote the chapter on comprehensive planning.⁷ To get advice on how I should handle this topic, I called Norman and other land use lawyers and professors to get their views on the role of the plan in land use regulation.

The answer I got from everyone was that the most important function of the comprehensive plan is to prevent arbitrary land use decisions. As I remember, Norman quoted a marvelous phrase we had all picked up from Desmond Heap, England's leading land use lawyer, that the law does not like the "mockery of ad hockery." This insight, I believe, is the basis for our belief that the purpose of the plan is to control and limit arbitrary decision-making.⁸

Some examples of arbitrary decision-making may seem surprising. Cases arising under the takings clause are one example. Many of us have believed for some time that the comprehensive plan can help protect land use regulations when landowners attack them under the takings clause. The basis for this belief is the Supreme Court's statement of what it sees as its most important takings clause principle. This principle reads a guarantee of fairness into the takings clause requirement that government may not take property without just compensation. As the Court has made clear, the takings clause is in the Constitution to ensure that government

6. *Id.* at 276.

7. See THE ROLE OF THE COMPREHENSIVE PLAN IN LAND-USE REGULATION IN HOUSING FOR ALL UNDER LAW ch. 5 (Richard P. Fishman ed., 1978).

8. See *supra* note 5.

fairly distributes the burdens and benefits of land use regulation to owners of land.

In several recent takings cases lost by the government in the Supreme Court, the Court struck down land use regulations because they had distributed benefits and burdens unfairly. *Lucas v. South Carolina Coastal Council* is one of these cases.⁹ A taking occurred when the Council denied a permit to build homes on two beachfront lots on the coast when homes existed on adjacent properties. The permit denial did not occur because of a plan or zoning ordinance, but because a beachfront law required a building setback on coastal beaches. The Lucas dwelling would have been within the coastal setback. Why the Council denied a permit to Lucas when adjacent lots were already built on is not clear. I understand Norman went to the Lucas site and stood on the beach and said the permit denial was the most terrible example of land use regulation he had ever seen. The *Lucas* decision illustrates the principle that the purpose of the takings clause is to prevent unfair regulation. A plan that adopts a land use policy for coastal areas could provide a policy basis for coastal land use decisions that can prevent takings problems from arising.

The leading court decision recognizing the importance of a plan in takings cases is *Golden v. Planning Board*,¹⁰ a New York case decided more than twenty years ago. A growth management plan postponed development in some areas for as much as twenty years. The court believed the comprehensive growth management plan the town adopted, and its commitment to necessary public facilities, justified the delay in development the plan created.

Another group of cases where courts are concerned with fairness is state cases that apply the arbitrary and capricious decision rule to strike down zoning restrictions. The Missouri cases are a good example.¹¹ Although the constitutional basis for the arbitrary and capricious rule is not always obvious, it clearly has a constitutional basis in the Equal Protection Clause. The rule also has a basis in the takings clause if a zoning restriction is arbitrary because it imposes a severe loss on a property owner.

State courts use the arbitrary and capricious rule to strike down zoning restrictions in upzoning cases where a landowner proposes a more intensive use not allowed by existing zoning. The court will look at the area surrounding the site on which the landowner proposes a more

9. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

10. *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

11. *E.g., White v. City of Brentwood*, 799 S.W.2d 890 (Mo. Ct. App. 1990).

intensive use to decide whether the zoning on the site is fair. If a landowner plans apartments on a site zoned single family that is surrounded by apartments, for example, the court will hold the single family zoning on the landowner's site arbitrary and capricious.

So the Supreme Court takings cases, and the state court cases holding zoning restrictions arbitrary and capricious, are examples of cases that invalidate unfair land use regulations. A comprehensive plan that determines in advance what landowners can do with their land can avoid decisions of this kind because it will prevent the unfairness problem from arising.

THE NEED FOR FLEXIBILITY IN DECISION-MAKING

The need to avoid arbitrary decisions makes the case for planning, but Rider's article also made a case for flexibility, for negotiation, and for tolerance of unpredictable results. There is a planning justification for this acceptance of political realities, and it lies in the truism that time is not cast in stone. An early criticism of planning claimed it was inflexible and rigid, that it did cast time in stone, and that it was impossible to make necessary changes. Changes in the planning process since then have tried to remedy these problems, but the need for flexibility in planning is still something we need to be concerned about.

Despite these changes in the planning process, the political concerns Rider identified demand attention. A healthy political process contemplates and encourages negotiation in decision-making that makes outcomes uncertain. This is why the plan often is an invitation to negotiation and not a consensus. It encourages negotiation and decision-making that leads to unpredictable results. Why is this so? This role of the comprehensive plan is best explained by a theory of democratic behavior known as process theory. Law professors and others developed this theory to explain the basis for decision-making at different governmental levels.¹²

Some critics dislike process theory and discredit it. I do not find their criticisms convincing. I am not suggesting that process theory is the only way in which we should model and understand the local government political process. But I am saying that process theory accurately describes how local government politics should work. What process theory argues is that a healthy democratic political process is pluralistic. It is one in which a variety of interest groups operate in a political arena where coalitions shift over time. It is this constant shifting in political bargains

12. The seminal work is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

that creates uncertainty in the planning process. At one point in time, for example, the dominant coalition may favor growth. At another point in time the dominant coalition may not favor growth and adopt land use programs that limit new development.

Political bargains change over time, but the essential prerequisite to healthy bargaining is the presence of interest groups that have comparable weight in the process that produces these bargains. In this situation, coalitions shift so that gradually a consensus emerges. Of course, coalitions need not shift back and forth frequently for the political process to be pluralistic and healthy. There can be a comparatively permanent coalition that supports a particular consensus for a substantial length of time. A community can be politically healthy although coalitions do not change every year. So the call for discretion in political decision-making is really a call for the normal political bargaining that is healthy in the political process. However, this type of bargaining does not guarantee decisions that are consistent with a comprehensive plan.

BALANCING PLANNING WITH POLITICS

So how do we resolve the tension between the need to limit arbitrary decision-making, and the need for bargaining in a political process that can lead to unpredictable outcomes? Let us start from the political side and see what we can do to resolve this problem.

First, what if pluralism fails? An interest group that does not fairly represent all of the interests in a community may capture a town council and refuse to follow a plan that was produced by a balanced political coalition. Examples are an interest group that comes to dominate the legislative body and disregards the interests of minority groups in the community, or an interest group opposed to growth that captures a community and votes down all development projects. Developers are unable to get any projects approved although the comprehensive plan shows the council should approve them. What can be done about situations like this?

One answer is to enforce the plan through litigation. If a developer comes in for approval and the council turns her down because it is dominated by an antigrowth coalition, she can go to court. There she can argue the plan controls, and that the council should approve her development because it is consistent with the plan. The difficulty with this approach is that either a court must require consistency between zoning decisions and the plan, or the state legislature must impose this requirement in order to make the policies of the plan binding. Even if consistency with the plan is required, a court may not be willing to compel

a rezoning at a developer's request when the plan shows her development is consistent with the plan.¹³ The reason is that legislative decision-making is discretionary, and a court may believe it violates separation of powers to compel a legislative rezoning even if the plan shows it should be done.

Another difficulty with this solution is that the interest group that captured the zoning process will most likely capture the planning process over a period of time. It will go back to the plan and amend it to reflect its point of view on what development should occur. We simply have the captured and now unhealthy political process taking over the planning process and revising the plan to carry out its program. If political capture by a minority interest group is our concern, merely calling for a mandatory comprehensive plan does not necessarily solve this problem.

A remedy for dealing with capture problems does not come easy, but either a legislative or judicial solution is possible. If there is a concern that planning at the local level should reflect a politically healthy decision-making process, the legislature can amend the planning statute to prevent capture from occurring. For example, an amendment to require an affordable housing element can help remedy problems that arise when a coalition that captures a community adopts a restrictive and exclusionary plan. Many states, notably California, have required affordable housing elements for comprehensive plans for this reason.

Legislation may not be enough. Municipalities can ignore legislative planning mandates, and it is essential to provide judicial and perhaps administrative remedies to enforce legislative requirements. Effective administrative or judicial review requires legislation to confer standing to enforce legislative mandates. It also requires legislation authorizing an effective scope of judicial review once a case challenging a plan gets to court. A court must be able to invalidate a plan that does not comply with mandatory legislative requirements. Shifting review of plans to the courts, of course, does displace the legislative process that developed the plan. Some may not agree with this shift in responsibility or may not believe that courts can effectively supervise the planning process.

Courts may have to discipline the planning process even if the legislature does not impose mandatory planning requirements. In a recent article, Professor Dan Tarlock and I outlined those cases in which courts should discipline planning and zoning decisions by shifting the presumption of constitutionality against municipalities.¹⁴ Ordinarily, any land use decision at the local government level enjoys a presumption of

13. See *Marraci v. City of Scapoose*, 552 P.2d 552 (Or. Ct. App. 1976).

14. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1 (1992).

constitutionality, which means the burden is on the person attacking the ordinance to show it is unconstitutional. If the presumption shifts against government, the burden shifts to the municipality to justify its decision.

A presumption shift is a major change in the way in which courts review planning and zoning decisions, and I do not have the space here to make all of the arguments for it. A presumption shift should occur, however, when a captured political process produces a plan that does not represent all of the interest groups in a community. The burden should shift to the municipality to justify its planning policies in this situation.

The discussion so far has considered cases in which pluralism does not succeed in local politics. But what if pluralism succeeds and produces a consensus on land use policy, but a zoning outcome occurs that is contrary to the plan? This situation occurs because a community may adopt a plan at one point in time when one type of coalition dominates the political process. The coalition may then shift and no longer support the plan or follow it in their land use decisions. Amendments to the plan that support the new political consensus may avoid a full confrontation with the plan for a time, but cumulative amendments may eventually bring about a major change in the plan's land use policies.

For example, the plan may show a major shopping center in a particular area, but the council (reflecting its negotiated consensus) may vote down a rezoning for a shopping center at that location. Which should take precedence, the plan or the zoning decision? Both arguably are correct if both are the products of a pluralistic political process that reaches a consensus. If the zoning process that produced the zoning denial is politically healthy but the decision is inconsistent with the plan, what should the outcome be?

The solution may again be judicial. The Florida Supreme Court solved this problem with a presumption shift, and the presumption shifts against a zoning decision if it is contrary to a plan.¹⁵ This solution favors the plan over the zoning decision. It makes sense if controls on arbitrary decision-making are considered more important than a political process in which flexibility in decision-making can produce decisions that do not carry out planning goals.

CONCLUSION

We have completed a full circle in our discussion of the comprehensive plan as it affects the zoning process, an issue that is still critically

15. *Snyder v. Board of County Comm'rs*, 627 So. 2d 469 (Fla. 1993).

important in land use law. The purpose of the comprehensive plan is to prevent arbitrary decision-making, but closer inspection shows that what appears arbitrary may simply be the product of a normal and healthy democratic process. The problem is to strike a proper balance between reliance on a plan to prevent arbitrary decisions, and flexibility in decision-making that can lead to outcomes inconsistent with the plan.