

Room for Discretion

Zoning changes should be evaluated by more than their consistency with the comprehensive plan.

In the United States, local governments control the use of land through zoning ordinances that prescribe limitations on each parcel of land in a jurisdiction. Unless subject to application for change, and subsequently changed, zoning ordinances are static. Municipalities are not required to ensure development feasibility of all properties. Comprehensive plans, which identify and allocate potential property development opportunities and constraints, provide direction for zoning. Such plans are not perfect, however, and were not intended to be so static and inflexible as to inhibit change in response to unanticipated community trends and needs.

The increasing tendency to give nearly exclusive weight to the consistency of a zoning action with the comprehensive plan precludes the plan from serving as a flexible guide in the exercise of discretion. In order for zoning decisions to reflect consideration of other important factors, including regional needs, not always evaluated in a comprehensive plan, such discretion is needed.

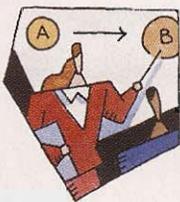
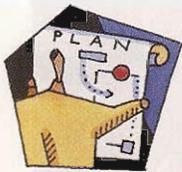
The Standard Zoning Enabling Act, which was passed in 1924 and is the basis of most state zoning laws, provides that zoning be "in accord with a comprehensive plan." When the issue arose as to what type of planning had to be done to satisfy that requirement, numerous courts rejected the requirement of a planning document or process. When plans were adopted, courts often considered them to serve as nonbinding guides. The requirement could have been rendered superfluous by the interpretation that it simply meant that zoning laws be reasonable. Increasingly, however, courts and legislatures require, appropriately, that planning be conducted prior to and apart from the enactment of zoning regulations. In many states, a plan, once adopted, is no longer a guide. Instead, the comprehensive plan becomes a mandate or even the legal equivalent of a constitution for future land use and development within a community. Such quasi-constitutional status gives comprehensive plans greater importance than envisioned by early zoning proponents.

As a constitution for future land use and development (as opposed to the advisory status originally intended), the comprehensive plan raises the question of what role zon-

ing is left to play. If the comprehensive plan is raised to the level of law by statute or judicial declaration, the validity of local land use zoning decisions could depend solely on whether they are consistent with the comprehensive plan. The failure to conform to a comprehensive plan would doom a zoning change.

While the trend has been in favor of comprehensive plans having quasi-constitutional status and, therefore, proving decisive in the evaluation of land use regulations, the majority rule currently does not require local governments to prepare a comprehensive plan separate from zoning regulations. Examples of states not requiring a separate comprehensive plan include Illinois and New York. The Illinois enabling act provides that such "plans shall be advisory and . . . shall not be construed to regulate or control the use of private property in any way." Accordingly, under the majority rule, the comprehensive plan is merely one factor considered in a zoning change decision or court case. Some states such as Missouri, Montana, and New Jersey consider the comprehensive plan as a factor, but not a decisive or exclusive one, in evaluating land use regulations. The increasing number of states that give comprehensive plans quasi-constitutional status in evaluating land use regulations include California, Florida, Oregon, and Washington. In California, for instance, the state legislature mandated consistency between zoning and the plan such that a land use regulation inconsistent with the plan is invalid or must be made to conform to the plan.

A comprehensive plan's disclosure of municipal objectives may be necessary for equal treatment of similarly situated property owners within the municipality. As such, comprehensive plans serve a useful function by providing some consistency and impartiality in local administrative decisions. The validity of local land use zoning decisions, however, should not be measured only by their consistency with the municipal plan. A comprehensive plan may be just as arbitrary and irresponsible as the municipal zoning ordinance if the plan reflects nothing more than the municipality's arbitrary desires, or is so fixed as to be unresponsive to unforeseen or shifting land use needs and preferences. Most state statutes do not adequately define the requirements of a comprehensive plan, or even require that they be kept up to date, or specify how a comprehensive plan and zoning ordinance interrelate. So long as a community adheres to the comprehensive plan, a plan is equally legally viable



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whether it is five, ten, 15, or 20 years old. Because plans can be whatever local governments want them to be, regional needs can be ignored, regional growth and development patterns distorted, and negative externalities imposed on adjoining communities.

Inconsistency with the comprehensive plan trumped all other judicially developed factors when the board of trustees of a northern Chicago area suburb recently overruled the community's planning commission by denying a developer's request for a zoning change from office to residential use. The trustees did not

disagree with the results of an office market study that found it would be years, if ever, before office space could be viably developed on the site. Support for the finding included the 28 percent vacancy rate, obtainable rents well below replacement costs, and, among other competitive disadvantages, the fact that the site was located in a jurisdiction with very high taxes, just across the street from one with low property taxes. Vacant buildings or already available sites for office space in the low-tax jurisdiction could accommodate at least ten years' worth of robust demand.

Nor did the trustees dispute the finding of an acute need for housing for empty nesters, which the developer proposed to provide, and the absence of any vacant land in the community for residential uses. While zoning is not required to ensure the development feasibility of all properties in a jurisdiction, fostering feasibility is a proper purpose of zoning, and in this case, rezoning of the site from office to residential use would have had that effect. The testimony of residents expressing support for the project, including some who wished to buy units for themselves or their parents, was unusual, as was the absence of objections from adjoining property owners and the limited number of objections from community residents.

The board of trustees justified its opposition to the requested zoning change on the grounds that it would be inconsistent with the comprehensive plan. The board also was concerned that the residential uses would not generate as much revenue as office uses would. If it was feasible to develop office space, housing for empty nesters—given the additional sales and property taxes it would have generated—would not have had an adverse fiscal impact. In addition, notwithstanding nearby residential neighborhoods on the other side of the street, the trustees felt that residents of the units would be isolated from the rest of the community.

The justifications that the trustees used to deny the zoning change, while not unusual, and the sustainable legislative zoning reasons for denial, are troublesome. The customary fiscal contention to justify the resistance to residential development implies that each municipality has the right to reject an increased number of residential uses simply because they would require additional public services. This practice by many local governments has caused a housing shortage.

The denial of the zoning change precluded freedom of choice in a situation where the housing opportunity would not have imposed harm on others. As a result, the needs of empty-nester households will not be met in the community.

The insistence that comprehensive plans be consistent with zoning may reflect the attitude that it is possible to eliminate the need for zoning changes by developing a perfect, long-term plan for future development. Instead of becoming devices to control discretion, such plans are used to eliminate it in a growing number of states following the legal precedent set in California. Unlike zoning, which is static, a plan should be a flexible guide that facilitates the exercise of discretion—not serve as a straitjacket. ■