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Coates' Canons Blog: A Statutory Modification for Plan Consistency Statements

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Cities and counties routinely consider proposals to amend their zoning ordinances. Amendments vary from the rezoning of a single parcel of land to major rewrites of the whole ordinance. The decision of whether or not to make a particular amendment is a legislative policy choice left to the good judgment and discretion of the elected governing board.

A variety of factors are considered by the governing board in making these decisions. For the past decade in North Carolina, one of the factors that must be considered is how the proposal relates to previously adopted plans. Under the General Statutes a zoning amendment is not required to be consistent with the plan, but both the planning board and governing board are required to consider the plan and to document that consideration with a written statement approved by the board. For the most part this has become a routine and noncontroversial step in the zoning amendment process. But there has been enough confusion about this requirement that the General Assembly has amended the plan consistency statement requirement, with the changes to take effect for *applications for* zoning amendments made on or after October 1, 2017.

When a local government adopts development regulations, there must be a rational basis for determining what those regulations should be. Zoning regulates where various land uses can be located and at what density and intensity of use. To make rational and informed choices in adopting and later amending these regulations, there should be careful consideration of many factors, including what infrastructure is needed to support development, how the land uses relate to one another, what the community's goals, objectives, and vision for the future are, and so forth.

Plan Consistency Statement Requirement

It has always been presumed that a comprehensive plan or land use plan is an essential tool to produce the data analysis, community engagement, and policy direction needed to allow rational choices in applying zoning. From the earliest days of zoning, statutes across the country have required that zoning be undertaken "in accordance with a comprehensive plan." Some states, by statute or case-law, require zoning regulations to be in substantial compliance with an adopted plan.

That is not the case in North Carolina. Our courts have not mandated that zoning be consistent with a comprehensive plan. However, in 2005 the North Carolina planning statutes were amended to require that planning boards and the governing board review and consider any adopted plan when a zoning amendment is proposed. That plan consistency statement requirement is discussed in more detail in this 2011 **blog post**.

The statute only requires that the plan be considered, not that it be followed. Some zoning ordinances make plan compliance a mandatory factor for individual permit decisions, typically for a special use permit. But when a legislative decision is being made on a proposed zoning amendment, the statutes are clear that the plan is advisory in nature. A zoning amendment that is inconsistent with an adopted plan is legal, so long as the governing board was aware of what advice and guidance the plan offers. The statutory requirement is that the governing board's awareness must be documented by a statement describing plan consistency that is approved at the time the zoning amendment is adopted.

Subsequent Litigation

One might think that a simple statutory requirement that planning boards and governing boards pull out their adopted plans and think about what, if any, useful guidance the plan provides before making a decision on a pending zoning amendment would be straight-forward and non-controversial. After all, the boards are not required to take action consistent with the plan, only to know and consider what it says. In most instances that has indeed proven to be the case. But there has been confusion and controversy about plan consideration in a few high profile zoning disputes that led to

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litigation.

In the first case addressing the plan consistency statement requirement, the City of Kannapolis was considering a proposal to rezone a large recently annexed parcel from low-density residential to a district that would allow retail, office, and light industrial uses. The staff prepared an analysis of the compatibility of the proposed uses with the adjacent area and concluded the rezoning was consistent with the long-range goals of the city. The staff report was presented to the city council and the rezoning was approved.

Opposing neighbors challenged the rezoning. The court in Wally v. City of Kannapolis, 365 N.C. 449 (2012), sided with the neighbors. The court held the statutory requirement for the council to approve a statement addressing plan consistency is clear and mandatory. The fact that a staff analysis was available for the board's review is not the same as the governing board itself approving a statement on plan consistency. This case is discussed in more detail by my colleague Rich Ducker in this **blog post**.

The Wally case makes the fairly simple point that when the statute says the board must approve a statement, it means the board must really approve a statement, not just have a staff report in its meeting packet. While the substance of the statement is not subject to judicial review, whether it was formally approved by the governing board is subject to review. If the statement did not exist or was not clearly approved by the board, the statute is violated and the zoning amendment is invalid.

The second case addressing the plan consistency statement requirement arose when Queens University in Charlotte sought a zoning amendment to facilitate construction of a parking deck. Adjacent residents in the Meyers Park neighborhood objected. The city's zoning commission found the proposed amendment to be consistent with city plans and recommended approval. The city council agreed and adopted a statement that "this petition is found to be consistent with adopted policies."

In Atkinson v. City of Charlotte, 235 N.C. App. 1 (2014), the court found this conclusory statement failed to meet the requirement of the statute that the governing board statement describe how the action is consistent with adopted plans and explain why it is reasonable and in the public interest. The case is discussed in more detail by my colleague Adam Lovelady in this **blog post**.

These two cases confirm that the governing board must actually approve a statement when it amends a zoning ordinance and that statement must be more than a checklist conclusion – it must include some modest discussion and explanation.

New Statutory Requirements

In 2017 the General Assembly amended G.S. 153A-341 and 160A-383 to add more specificity to the law regarding the mandated plan consistency statements.

Section 2.4 of **S.L. 2017-10** amends the statutes and makes these new requirements applicable to all zoning amendment applications filed on or after October 1, 2017. This bill also made amendments to the subdivision statute, discussed by my colleague Adam Lovelady in this **blog post**.

The amended statute still requires approval of a statement and the statement still must describe plan consistency and explain why the proposed action is reasonable and in the public interest. So the Wally and Atkinson cases noted above are still good law.

However, the form of the required statement is changing. As of October, the statement must take one of three forms:

1. A statement approving the proposed zoning amendment and describing its consistency with the plan;
2. A statement rejecting the proposed zoning amendment and describing its inconsistency with the plan; or
3. A statement approving the proposed amendment and declaring that this also amends the plan, along with an explanation of the change in conditions to meet the development needs of the community that were taken into account in the zoning amendment.

With each of these alternatives, the statement is also to include an explanation of why the governing board deems the

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action reasonable and in the public interest.

The statutory amendment also includes a rather curious provision that for the purposes of plan consistency, the “plan” includes a unified development ordinance as well as any other officially adopted plan that is applicable. A comprehensive or land use plan is rarely a part of a unified development ordinance. If a unified development ordinance exists, the zoning ordinance is a part of that ordinance. In that situation amending the zoning ordinance is an amendment in and of itself of the “unified development ordinance.” Given this near universal practice, this provision seems superfluous.

Implications

In some respects this amendment heightens the tie between the plan and zoning ordinances. If a proposed zoning amendment is consistent with the plan it may be approved and if it is inconsistent with the plan it may be rejected. But if the zoning amendment is inconsistent with the plan and the governing board wants to approve the amendment anyway, the plan is deemed amended and the governing board must set forth the “change in conditions” that led it to take that action.

The statute does not address a fourth possibility – that the board finds the amendment consistent with the plan but decides to reject the amendment anyway. Prior case law allows this to happen and given the advisory nature of the plan, that is likely still permissible. But the fact that it is not listed as an option in the new statute does give some pause to consider whether it is implied that this is no longer permissible. After all, the amended statutes uses mandatory language, saying the governing board “shall adopt one of the following statements.” To avoid a potential problem in this situation, it would be prudent for a governing board rejecting a zoning amendment that is consistent with its plan to concurrently amend the plan.

Presumably the discretion of the governing board is not substantially limited when it decides to approve a zoning amendment that is inconsistent with the plan. The board can decide which “changing conditions” to consider and whether they are sufficient. For example, there may have been changes in physical conditions on the site, on the infrastructure available, on the demand for new development, on the policies or priorities of the board, on the board’s assessment of neighborhood needs, or on a host of other potential “conditions.”

In any event, the lessons of the Wally and Atkinson cases noted above should continue to be carefully observed. The statutory requirement for consideration of plan consistency is not a legislative suggestion. A statement on plan consistency must be explicitly approved by the governing board at the time a zoning amendment decision is made. The statement must be more than a one-sentence conclusion. It must both describe plan consistency or inconsistency and it must explain the rationale of the decision. The statement is to take the form of one of the three options noted above.

That said, the statement does not need to be a long, complicated, legalistic document. The statement does not have to be supported by evidence in the record, as would be the case for a quasi-judicial decision. But it must be real, it must be approved by the board, and it must have a brief description of why the action is or is not consistent with the plan. Anything less risks judicial invalidation of the zoning amendment.

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