
Coates' Canons Blog: Consistently Inconsistent? Considering Consistency Statements for Zoning Amendments

By Adam Lovelady

Article: <https://canons.sog.unc.edu/consistently-inconsistent-considering-consistency-statements-for-zoning-amendments/>

This entry was posted on September 15, 2014 and is filed under Land Use & Code Enforcement, Legislative Decisions, Planning, Zoning

When the city council or county commission considers a rezoning or zoning ordinance amendment the board must approve a statement about the amendment's consistency with adopted plans and public interest. According to the statute "[t]hat statement is not subject to judicial review." And yet we have two recent examples of North Carolina courts reviewing consistency statements. What gives? This blog reviews the statutory requirements, the recent cases, and some guidance for moving forward.

In North Carolina "[z]oning regulations shall be made in accordance with a comprehensive plan" (160A-383; 153A-341). Our courts have interpreted that mandate to require a comprehensive approach, but not necessarily a formal document called a "Comprehensive Plan." As part of the statutory procedures for zoning, though, the planning board and governing board must consider consistency with applicable plans and adopt a statement concerning that consistency. As my colleague David Owens wrote here, plans are not binding, but governing boards must procedurally consider and acknowledge them.

Under 160A-387 and 153A-344, when a local government first seeks to adopt a zoning ordinance or adopt comprehensive revision, the planning board must prepare or review and comment on the proposed ordinance or revision, including a written recommendation on adoption.

Amendments to the ordinance must be referred to the planning board for review and comment as to "whether the proposed amendment is consistent with any comprehensive plan that has been adopted and any other officially adopted plan that is applicable." The planning board is tasked with providing a "written recommendation to the governing board that addresses plan consistency and other matters as deemed appropriate by the planning board." The planning board must provide that recommendation within 30 days of referral. After that the governing board may take action on the ordinance amendment without planning board recommendation. To be sure, this is a procedural step; it is not determinative. Even if the planning board finds that the zoning amendment is inconsistent with the comprehensive plan, the governing board may still consider and approve the amendment (160A-383 & 387; 153A-341 & 344).

The governing board, too, has a procedural requirement to consider consistency and public interest. For municipalities, General Statute 160A-383 requires that "[w]hen adopting or rejecting any zoning amendment, the governing board shall also approve a statement *describing* whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and *briefly explaining* why the board considers the action taken to be reasonable and in the public interest." The county version of the statute, at GS 153A-341, is substantially the same, but with one procedural difference: the commission must adopt the consistency statement prior to adopting or rejecting the amendment.

The statute specifies that the consistency statement "is not subject to judicial review." As our courts have considered the requirement and the scope of review, they have interpreted this to mean that the decision content of the statement ("Yes, this amendment is consistent with the comprehensive plan." Or, "No, this rezoning is not in the public interest.") is not reviewable. Courts can, however, review whether a local government acted properly when adopting (or failing to adopt) the required statement, including the presence of necessary elements of the statement.

The Board Must Take Action

In *Wally v. City of Kannapolis*, 365 N.C. 449, 722 S.E.2d 481 (2012), the North Carolina Supreme provided some guidance into what is—and what is not—sufficient for a consistency statement.

In *Wally*, a property owner applied for rezoning. The city council, as part of the public hearing for the rezoning, received a staff report that included analysis of the proposed rezoning, including compatibility with the surrounding area and safety issues. Staff concluded that the rezoning was “consistent with the long range goals of the City, and reasonable in light of existing and approved infrastructure.” The council approved the rezoning. Neighbors challenged the rezoning, claiming among other things that city council failed to adopt a consistency statement as required by the statutes.

The case was appealed up to the North Carolina Supreme Court. The city argued that it met the statutory requirements for a consistency statement. When city council approved the rezoning, the city claimed, it impliedly approved the staff statement of consistency and reasonableness. And the council adopted a statement that “Council’s final vote conforms to the guidelines under which they are granted final authority to act upon a rezoning petition.” And in any event, the city argued, the consistency statement is not subject to judicial review. The court was not persuaded.

The court emphasized that although an approved consistency statement is not subject to judicial review, “the statute does not prohibit review of *whether* the City Council approved a statement, which is the issue here.”

The court noted that “the statute requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and second, approve a proper statement.” In this case, council failed to take the second step. It is not enough to have a staff report with some consistency analysis. The council must take action to approve the statement. Moreover, council’s adoption of a generic statement about conforming to guidelines for zoning authority is insufficient. There must be some explanation and description regarding the specific zoning matter at issue, as required by the statute for consistency statements.

For more on the *Wally* decision and elements of plan consistency, check out my colleague Rich Ducker’s blog [here](#).

More Than Cut and Paste

The North Carolina Court of Appeals has offered additional guidance into what is—and what is not—sufficient for a consistency statement in *Atkinson v. City of Charlotte*, 760 S.E.2d 395, 396 (N.C. Ct. App. 2014).

In *Atkinson*, a property owner initiated a zoning text amendment to exempt certain parking decks from floor area ratio requirements. The zoning committee of the planning commission reviewed the proposed amendment and voted unanimously to recommend approval. As part of the recommendation, the zoning committee included a statement finding that the amendment was consistent with adopted plans and reasonable and in the public interest. At the city council hearing the mayor informed council members that the zoning committee “found this petition to be consistent with the adopted policies and reasonable and in the public interest.” City council approved this “statement of consistency” and the zoning amendment. Neighbors challenged the amendment as failing to comply with the statutory requirement for consistency statements.

This case had notably different facts from *Wally*. In *Wally*, no consistency statement was adopted. In *Atkinson*, the council formally adopted and approved a statement from the zoning committee titled “Statement of Consistency.” The city, understandably, pointed to that adopted statement, arguing that they met the statutory requirement and that the content of the statement is not subject to review. Once again, the court was not persuaded.

For the *Atkinson* decision, the NC Court of Appeals drew guidance from the NC Supreme Court’s language in *Wally*. In *Wally* the court said that the statute “requires more than a general declaration that the action comports with relevant law.” The consistency statement must “*must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest.*” Thus, court review of adequacy of a consistency statement will consider:

1. *Did the council take action to adopt a consistency statement?*
2. *Did the statement include a description of whether the amendment is consistent with any controlling land use plan?*
3. *Did the statement include an explanation as to why the amendment is reasonable and in the public interest?*

“Once it is determined that a proper statement, which includes a description and explanation, has been adopted, the content of the statement ‘is not subject to judicial review.’” In *Atkinson*, the city adopted a statement, but that statement

lacked the necessary description and explanation. A mere conclusory statement (e.g., “This amendment is consistent. Period.”) is insufficient.

As an aside, the neighbors also challenged the role of a zoning committee of the planning commission—they argued that the full planning board must review and make recommendation on zoning amendments. Because the court found the consistency statement lacking, it did not address the question about the planning commission structure and requirements.

Now what?

So where does that leave us? Here are some practical considerations for compliant zoning amendments.

Each case needs a unique consistency statement. The governing board can't just cut and paste the generic statement from the last rezoning case. Nor can the board merely check a box on a checklist. The statement must reflect the unique character of the particular amendment through description and explanation. The basic format may be the same for all consistency statements, but each one should reflect the particular amendment. As a guide, you might start with this:

- The amendment is/is not consistent with applicable plans because _____ [*Describe elements of controlling land use plans and how the amendment is or is not consistent*].
- And the amendment is/is not reasonable and in the public interest because _____ [*Briefly explain why. Factors may include public health and safety, character of the area and relationship of uses, applicable plans, or balancing benefits and detriments.*].

Can staff or the planning board draft the statement for governing board approval? Yes. The statutory requirement is that the governing board shall *approve* or *adopt* the statement. A draft statement provided by the planning board or staff should be sufficient, so long as the governing board has the statement and takes formal action to approve it. The planning board already has to comment on consistency of amendments for rezonings and zoning text amendments. For continuity of review, the planning board could apply the same standards as the governing board, including a description of how the amendment is consistent and an explanation as to why it is reasonable and in the public interest. Recall that the governing board is not bound by the planning board's findings.

How much detail do you need in a statement? A brief statement such as above with some description and explanation is legally sufficient. Courts will not review the substance of the content (even if they disagree with the finding), but courts will review whether the description and explanation is there in the statement. Just how much detail to include is a policy decision for the local government and the particular ordinance amendment. Some local governments will choose to craft a few simple sentences to meet the legal standard. Others may opt to provide an exhaustive 10 page consistency analysis, identifying all applicable comp plan elements. Either should be acceptable, so long as the governing board has the statement in front of them and formally adopts it. If your community does have a long consistency analysis, you may consider a shorter summary statement for explicit adoption by the governing board. The statement should serve as a useful tool for plan implementation and protection from court challenges (especially for claims of spot zoning), but the statement need not be overly-complicated or lengthy.

Regardless of who drafts the statement, the governing board must take formal action to adopt the statement. A passing reference to the staff report or the planning board statement is insufficient. For municipalities, it appears that the governing board action to adopt the statement may be part of the motion to approve or deny the amendment. The county statute, though, requires that the consistency statement be adopted “*prior to* adopting or rejecting any zoning amendment.”

If a statement is formally approved and it includes a description of consistency and an explanation of reasonableness and public interest, then the substantive content of the statement will not be subject to judicial review.

Links

- canons.sog.unc.edu/?p=5398&print=1
- canons.sog.unc.edu/?p=6559