
Coates' Canons Blog: What If a Proposed Rezoning Is Inconsistent With Our Plan?

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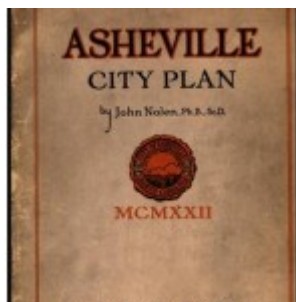
A proposal to rezone a 15-acre tract is pending before the town council. The tract is near the edge of town. It fronts one of the town's major roads and is occupied by three vacant residences. It is zoned for medium density residential use. The owner seeks to have it rezoned to a more intensive mixed used district. The owner has submitted a site plan showing a hotel, office building, and retail building to be located along the main road, three condominium buildings in the center of the property, and a row of townhouses along the rear of the property, which adjoins an existing single-family neighborhood.

Several of the immediate neighbors appear at the public hearing and object to the rezoning. They express concerns about noise, traffic, and changing the quiet, residential character of their neighborhood. The council also has before it a written recommendation from the town planning board. The planning board recommended approval, noting the project would create a vibrant development with a needed commercial presence along the main road. The planning board noted the townhouses would buffer the more intensive development from the adjacent neighborhood. They also noted the project would bring jobs and tax revenues to the town.

At the conclusion of the public hearing on the rezoning, town council member Ed Haskell raises a question. "I need some clarification on something in our information packet. The staff has prepared a draft statement for us to adopt that says this is a great thing for the town. But the small print says this rezoning would be inconsistent with our adopted land use plan. I was on the planning board five years ago when that plan was adopted. We spent a lot of time and effort on it. The plan said this land was to be a residential neighborhood, just like most of the land out there. Should we be going against our own plan? Is that even legal?"

Can the council enact a rezoning that is inconsistent with the plan?

When zoning was first authorized for North Carolina cities in 1923, the statute provided that "zoning regulations shall be made in accordance with a comprehensive plan." That language is still in the statutes. G.S. **160A-383; 153A-341**. However, the North Carolina courts (like many state courts) over the years did not interpret this requirement to mean that zoning must be compatible with a separate formally adopted comprehensive plan. Rather, the courts required that zoning be based on a reasoned consideration of the entire jurisdiction and the full range of land use issues facing that jurisdiction. See, for example, *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 229, 258 S.E.2d 444, 458 (1979).



The role of plans as a guide for zoning decisions long been discussed in North Carolina. In

1958 North Carolina's Municipal Government Study Commission concluded, "We have found that a number of North Carolina cities and towns have zoning ordinances and subdivision ordinances without any planning program. We believe that this procedure puts the cart before the horse." But even if the city or county has a plan, how should it be used in framing land use regulations? To what degree should it guide individual decisions?

Several states have addressed this issue by adopting legislation to mandate comprehensive planning, specify plan contents and procedures for adoption, and mandate that zoning be consistent with those plans. That approach has been discussed by the General Assembly several times, but not adopted.

While our legislature had not mandated formal plan consistency, the zoning statutes were amended in 2005 to strengthen the role of adopted plans. G.S. **160A-387** and **153A-344** mandate referral of proposed zoning amendments to the planning board for review and comment. G.S. **160A-383** and **153A-341** require that planning board review of each proposed zoning amendment include written comments on the consistency of the proposed amendment with the comprehensive plan and any other relevant plans (such as a small area plan, a corridor plan, or a transportation plan) that have been adopted by the governing board. City councils and county boards of commissioners are also now required to approve a statement on plan consistency before adopting or rejecting any zoning amendment.

A statement that the proposed amendment is inconsistent with a plan does not preclude the governing board from adopting a rezoning. In fact, the statement approved by the governing board on plan consistency is not subject to judicial review. Plan consistency is a factor that must be explicitly considered, but it does not control the outcome of the decision. *Coucoulas/Knight Properties v. Town of Hillsborough*, ___ N.C. App. ___, 683 S.E.2d 228 (2009), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 441 (2010).

So, in North Carolina it is substantive, rational planning and thought, rather than a formal plan document, that is required to support rezoning decisions. Planning provides technically competent analyses of the issues being considered and examines the long-term implications and the impacts of individual land use decisions. In addition, planning provides an opportunity to secure public participation, coordinate programs and decisions, and to set forth the basic policy choices that underlie a rational program of land use regulation. *Purser v. Mecklenburg County*, 127 N.C. App. 63, 488 S.E.2d 277 (1997). Consideration of small area plans, traffic plans, open space plans, redevelopment plans, and the like, as well as consideration of the comprehensive plan, provides important support to rezoning decisions both in terms of meeting the statutory requirements and the constitutional admonition to avoid arbitrary and capricious decision making. *Summers v. City of Charlotte*, 149 N.C. App. 509, 519–20, 562 S.E. 2d 18, 25–26, *review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002).

In several contexts there is a particular need to be even more careful in reviewing the plan. When the courts review a challenged small-scale rezoning, plan consistency is a significant factor in establishing the required reasonableness of spot zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 628, 370 S.E.2d 579, 589 (1988). Most zoning ordinances make consistency with adopted plans a mandatory review standard for special and conditional use permits. And a few zoning ordinances add a requirement of plan consistency for rezonings, a self-imposed limit that is binding if it is included in the ordinance. In these contexts careful consideration of plan consistency is vital.

So can a town council adopt a rezoning that is inconsistent with their plan? Yes, so long as they acknowledge in writing that they know they are doing so and take the time to set out the rationale for their decision. The statutes do not require detailed findings on this point, but do require that the statement approved by the board describe how the action is or is not consistent with the plan and “briefly” explains why the board considers the action to be reasonable and in the public interest.

While a local government has the legal authority to act inconsistently with their plan, the question of whether and when they should do so is a more complicated question. This is a policy choice for the board. A prudent governing board carefully considers the comprehensive plan before deciding on a rezoning. If the board is going to act contrary to the policies set forth in the plan, it must to explain why. After all, the plan was presumptively based on solid technical analysis, broad public participation, and has been used by land owners, investors, and residents as a guide for future land uses. The policies in the plan often create a set of expectations that many citizens may be relying upon. But the plan does not set policies in stone. Situations evolve and facts change, as do the policy choices of elected officials. Elected officials are free to make decisions on proposed rezonings that a majority of the board believes will best serve their citizens (and the citizens can address the wisdom of those choices at the next election). The plan creates the opportunity to make a more deliberate, thoughtful decision. The statutes mandate that it be considered. But the ultimate choice is left to the good judgment of our elected local government officials.



Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-383
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-341
- canons.sog.unc.edu/what-if-a-proposed-rezoning-is-inconsistent-with-our-plan/plan-asheville-2/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-387
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-344