

Coates' Canons Blog: Zoning Ordinance Amendments and Plan Consistency Statements

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The city council is about to take action on a proposed rezoning of property. The rezoning will enable undeveloped land to be used for an office and retail business park. Suppose that the council has before it a planning staff analysis of the proposed rezoning that has been adopted by the planning board, recommending adoption. The analysis concludes that the expected impacts of permissible development under the proposed rezoning on safety, traffic, parking, the environment, and public facilities appear to be compatible with the development and zoning of the surrounding area. Furthermore, the analysis concludes that the rezoning is consistent with the long-range goals of the local unit as set forth in its 2015 community comprehensive plan and is reasonable in light of the community's ability to serve expected development with public facilities and services. After reviewing this analysis and the usual public hearing comments, the council adopts the rezoning. Is there anything wrong with this scenario?

Well, the North Carolina Supreme Court seemed to think so in a recent decision, *Wally v. Town of Kannapolis*. In that case the high court reversed a decision of the North Carolina Court of Appeals and held that a Kannapolis zoning amendment was invalid. Why? Because when the governing board adopted the amendment, it failed to approve a separate statement describing why the action was or was not consistent with any controlling comprehensive plan and explaining why the action was reasonable and in the public interest. Where does this requirement come from? The first paragraph of G.S. 160A-383 (cities) provides as follows:

Zoning regulations shall be made in accordance with a comprehensive plan. When 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. That statement is not subject to judicial review.

The town governing board had reviewed the statement originally authored by staff and had the statement before it when it adopted the rezoning. According to the town, the council thus approved the statement regarding consistency and reasonableness by implication. The court found this argument unpersuasive, insisting on strict compliance with the statute.

Legislative History

In this regard it is worth noting that the consistency-statement language of G.S. 160A-383 was first adopted in 2005 and became effective January 1, 2006. It originally provided that the statement was to be "adopted" by the governing board, and the adoption was to occur "(p)rior to" the adoption of the zoning amendment. The language was changed in 2006 (effective August 23, 2006) to require only that the board "approve" such a statement and that such approval occur "when" the action on the zoning amendment occurred. (The corresponding county statute (G.S. 153A-341) was not amended in 2006 and retains the original "(p)rior to" and "adopt" language.) The municipal changes were designed to provide governing boards with more flexibility and to make compliance with the statute easier. But these good intentions were inadequate the save the Town of Kannapolis.

In *Wally v. Town of Kannapolis*, the town pointed out that the statute provides that the consistency/reasonableness statement "is not subject to judicial review." How, then, could the court hear the case? The court's response was that while the adequacy of such a statement was not subject to such review, whether or not such a statement was actually approved (the issue in this case) was subject to review.

Strict Compliance

Inn most respects the decision should come as no surprise. Our courts have long insisted on strict compliance with the

procedural requirements that apply to the adoption of zoning amendments. For example, failure to advertise the governing board's public hearing the requisite number of days before the hearing is sufficient to invalidate an adopted amendment. We should expect the same result if a governing board fails to comply with a statutory requirement requiring approval of a plan consistency statement contemporaneously with a zoning amendment action.

Do Over?

When a zoning amendment is invalidated or is challenged by opponents, one reaction of a governing board may simply be to repeat the process (a "do-over"), but the next time to do it right. Zoning amendment opponents may succeed in delaying a rezoning such as this one, but in the longer run they may not be able to prevent it. Chances are that there are North Carolina cities and counties that have adopted zoning amendments without complying with the consistency-statement requirements of the statutes. Should such a local government initiate a do-over? The statutes of limitations (SOL) (G.S. 160A-364.1; G.S. 153A-348) for challenging zoning amendment decisions were changed last summer. Challenges to zoning map amendments must still be brought within two months of adoption, but challenges to zoning text amendments may be brought up to three years after adoption. Local governments that are only now reminded of the plan-consistency statement requirement by this blog may need to ponder whether it is better to conduct a do-over or to hunker down and wait out the SOL period as it applies to a particular zoning amendment action.

What is Plan Consistency?

Determining whether a particular zoning amendment proposal is or is not consistent with the fetures of an "officially – adopted plan" can be an uncertain undertaking. One view of plan consistency emphasizes the process used by local governments in making zoning decisions. The procedures used for reviewing zoning amendment proposals emphasize gathering and analyzing relevant economic, social, and environmental information, assessing the political implications of the decision, determining what the long-run future impacts of the decision will be, and making the decision in a careful deliberate fashion. These considerations help to form the policy choices that allow rational land-use regulation. These steps are also related to determining the reasonableness of the proposal. (See the Dave Owens blog "What if a Proposed Rezoning is Inconsistent with Our Comprehensive Plan?")

Plan consistency statements can also emphasis the substance of what relevant planning documents say and display. This emphasis was bolstered by the 2006 amendment to G.S. 160-383 that refers not only to consistency with an "adopted comprehensive plan" but also consistency "with any other officially adopted plan that is applicable." These references encourage elected officials to consider whether specific legislative zoning decisions are compatible with written community planning policies that may come from a variety of sources. Planning documents are clearly important. The composition, format, use, method for adoption and amendment, and legal significance of comprehensive plans (and land-use plans) is not defined in North Carolina law, except in connection with the Coastal Area Management Act. As a result, plans vary considerably. Some plans are largely reports. Others include a series of policy statements. Others emphasize goal-setting. Few try to reconcile internal inconsistencies between competing policy statements or goals. Also, it is not common for plans to spell out carefully the timing of plan implementation or the progression of conditions from the time the plan is adopted until the plan target year. For example, the plan may offer little guidance about just when it is appropriate for a particular area to be rezoned to enable the type and intensity of development indicated in a land-use plan. Finally, there is the matter of scale. Policy statements and plan-related maps are broad, general, and often lacking in precision; zoning amendment proposals are relatively specific and "fine-grained," applying to specific parcels of land. Fortunately our courts have not insisted on close matches between plan documents and rezoning proposals. For example, in *Coucoulas/Knight Properties v. the Town of Hillsborough*, the North Carolina Court of Appeals upheld the denial of a rezoning even though the consistency statement indicated that that the rezoning proposal was consistent with the town's plan. (See my blog "Just Say No: The Denial of a Rezoning Petition").

The *Town of Kannapolis* case has little to say about just how consistency statements may be used to ensure sound zoning amendment decisions. It leaves for the future resolution significant questions about how they may be used effectively. But the case does make it clear that local governments may not be too cavalier about taking a simple procedural step to acknowledge that plan consistency counts.

Links



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- appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xMTFQQTEuLTEucGRm
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-383
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