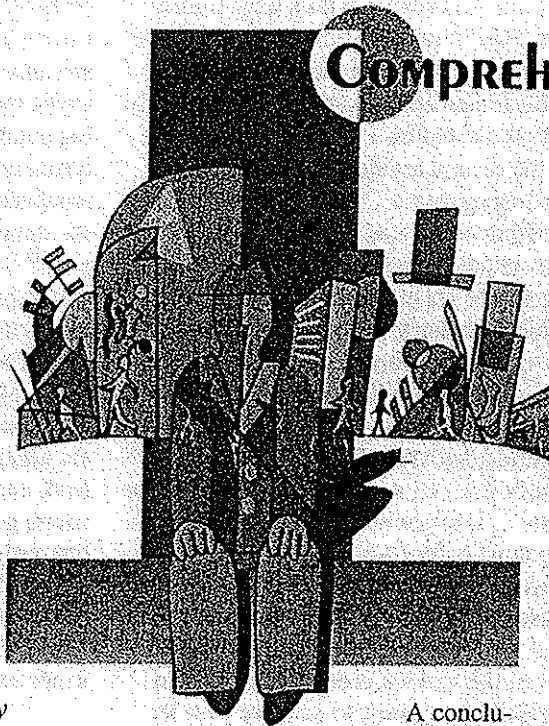


CONSISTENCY AND THE COMPREHENSIVE PLAN

By Brian W. Ohm, J.D.



The article by attorney John Bruce in the April 2003 issue of *the Municipality* raised several important issues about the consistency requirement for local governments found in Wisconsin's comprehensive planning law, also referred to as the "smart growth" law.¹

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A conclusion of that article was that municipalities need to consider the implications of the consistency requirement when they prepare their comprehensive plans. Because the consistency issue is central to comprehensive planning, this article provides further background to help local governments understand the consistency issue in greater detail.

The comprehensive planning law requires that beginning on January 1, 2010, any program or action of a local governmental unit that affects land use, including zoning or subdivision ordinances or official maps, shall be consistent with that local governmental unit's comprehensive plan.² The intent of this section is to achieve two objectives. One is to encourage local governments to follow

their plans when they take actions affecting land use. The second is to establish the comprehensive plan as a prerequisite for actions affecting land use. By making a comprehensive plan a prerequisite for these actions, the law attempts to elevate the status of comprehensive planning from a largely advisory status to the legal basis for local programs or actions affecting land use. The requirement also attempts to make it clear that the comprehensive plan is a document separate from implementing programs and actions (like zoning regulations). The statutory language, however, does not provide much guidance for what "consistent with" means. Some further insights into the consistency issue might be helpful.

A BRIEF HISTORY OF THE CONSISTENCY REQUIREMENT

The consistency issue is not new. It has its origins in the requirements of the model 1926 Standard State Zoning En-

1. John M. Bruce, "The Smart Growth Law: Some Implications of the Consistency Requirement," 98 *The Municipality* 121 (2003).

2. Sec. 66.1001(3), Stats.

abling Act that zoning regulations "shall be made in accordance with a comprehensive plan." Most states eventually adopted zoning enabling legislation for local governments based on the 1926 Standard State Zoning Enabling Act including this requirement. The model Zoning Enabling Act did not provide any guidance on the meaning of the requirement. Two years later the Standard City Planning Enabling Act was published and introduced the concept of a "master plan." It was unclear from the Standard City Planning Enabling Act whether the master plan was intended to be the same as the "comprehensive plan" mentioned in the Standard State Zoning Enabling Act. As a result, the relation of regulations to plans has resulted in a distinct body of litigation and commentary by scholars and practitioners on the following questions: Was a separate plan required as a prerequisite to the enactment of a zoning ordinance? If a plan is required, what is the nature of the plan and the analysis to be conducted to determine the connection between the plan and the zoning regulations?³ These questions are explored below.

1) THE PLAN AS A PREREQUISITE TO THE ENACTMENT OF LAND USE ORDINANCES

A leading early scholar on the consistency issue was Prof. Charles Haar at Harvard Law School. During the 1950s, Pro-

fessor Haar wrote two influential law review articles on the issue. The first article, "In Accordance with a Comprehensive Plan,"⁴ reviewed the legal history of that phrase and the reluctance of courts to invalidate zoning ordinances that were not predicated on a comprehensive plan. In the second article, "The Master Plan: An Impermanent Constitution,"⁵ Professor Haar advocated that a plan should be a prerequisite to a zoning ordinance. According to Haar, planning should relate to zoning similar to the way a constitution provides legal parameters for legislation.

According to Professor Haar, "It is difficult to see why zoning should not be required, legislatively and judicially, to justify itself by consonance with a master plan... It might even be argued that zoning done before a master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare."⁶ Planning involves an analysis of the issues confronting a community and helps identify the reasons for pursuing a particular course of action. Making zoning consistent with a comprehensive plan was therefore seen as a way to provide a rational basis for local land use actions as a protection against arbitrary and capricious decisions.

Twenty years after Professor Haar's articles, a trend was slowly beginning to

emerge that continues today. Courts and legislatures were beginning to give increasing weight to comprehensive plans. Courts began to look at the comprehensive plan "as a hedge against special interest, irrational ad hocery."⁷ In a growing number of states, legislatures and courts require consistency between local regulatory action and a separately adopted, statutorily defined comprehensive plan.⁸ Some of the states with statutes that require consistency between regulatory actions and planning include Arizona, California, Delaware, Florida, Kentucky, Maine, Minnesota (only applies to the seven county Twin Cities metropolitan area), Nebraska, Oregon, Rhode Island, and Washington. In other states, courts grant legal status, if not controlling weight, to comprehensive plans as distinct from zoning ordinances.⁹ Nevertheless, in what is perhaps still a majority of states, courts equate a zoning ordinance as the comprehensive plan.¹⁰

THE CONSISTENCY REQUIREMENT IN WISCONSIN

Historically, Wisconsin courts have followed the unitary view that the zoning ordinance is the same as a comprehensive plan. Like most states, Wisconsin's zoning enabling statutes in section 62.23 of the Wisconsin Statutes follow parts of

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3. Stuart Meck, ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (2002) at 8-33.
4. Charles Haar, "In Accordance with a Comprehensive Plan," 68 *Harv. L. Rev.* 1154 (1955).
5. Charles Haar, "The Master Plan: An Impermanent Constitution," 20 *Law Contemp. Prob.* 353 (1955).
6. Haar, 68 *Harv. L. Rev.* at 1174.
7. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 75 (Minn. 1984) quoting *Town of New Bedford v. Village of Mt. Kisco*, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155, 159 (1973).
8. Edward J. Sullivan & Laurence J. Kressel, "Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement," 9 *Urb. L. Ann.* 33, 41 (1975).
9. *Id.*
10. *Id.*

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the 1926 Standard Zoning Enabling Act verbatim. Wisconsin's planning enabling statutes, also in section 62.23 of the Statutes, follow the 1928 Standard City Planning Enabling Act. Since the 1940s, the Wisconsin statutes have included the requirement that zoning be "in accordance with a comprehensive plan."¹¹ While lawsuits over the meaning of this phrase were brought in many states in the 1950s and 1960s, the meaning of the phrase was not addressed by the Wisconsin Supreme Court until 1985 in the case *Bell v. City of Elkhorn*.¹² In *Bell*, the

State Zoning Enabling Act. There is a clear trend in case law and statutory law to provide for a separate comprehensive plan."¹⁴

While the Court in *Bell* took the view that a separate comprehensive plan is not a prerequisite to having a zoning ordinance, other decisions by Wisconsin courts have recognized that a separate comprehensive or master plan does have legal status in the court's review of local decisions. For example, in *Lake City v. City of Mequon*,¹⁵ the Supreme Court recognized that Wisconsin subdivision law gave "legal teeth" to the master plan as a basis for denying a plat even though

Wisconsin's farmland preservation law requires that "exclusive agricultural zoning ordinances shall be consistent with county agricultural plans."¹⁷ This requirement has not generated any reported court cases. Recognizing the importance of having a separate plan as the basis for local decision making and promoting consistency between local plans and implementing ordinances are therefore not entirely new concepts for Wisconsin.

A recent Wisconsin Court of Appeals decision recognizes that the largely advisory status of plans will change on January 1, 2010 because of the consistency requirement. The case, *Step Now Citi-*

“A RECENT WISCONSIN COURT OF APPEALS DECISION RECOGNIZES THAT THE LARGELY ADVISORY STATUS OF PLANS WILL CHANGE ON JANUARY 1, 2010 BECAUSE OF THE CONSISTENCY REQUIREMENT.”

Court held that the "[zoning] ordinance itself is a comprehensive plan ... [n]o separate comprehensive plan document need be adopted by a city as a condition precedent to enacting a zoning ordinance."¹³ Following the Wisconsin Supreme Court's decision in *Bell*, legal commentators noted that: "*Bell* is a holdover case from an earlier day when courts were reluctant to invalidate zoning when it was not clear what a 'comprehensive plan' was under the Standard

the proposed subdivision was permitted under the existing zoning for the area. In *Peterson v. Dane County*, the Wisconsin Court of Appeals noted in passing that "the failure of the city to advance any rationale for not following its comprehensive plan is strong evidence of arbitrary action."¹⁶

In addition, the requirement for consistency between a separate plan and zoning ordinances appears elsewhere in the Wisconsin statutes. For example,

zens Group v. Town of Utica Planning and Zoning Committee,¹⁸ raised an issue about whether a town with a land use plan was required to act consistent with the land use plan. The case involved a challenge to a rezoning where one of the issues was whether a rezoning that was inconsistent with a land use plan constituted illegal spot zoning. The Court of

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11. Sec. 62.23(7)(c), Stat.

12. 122 Wis. 2d 558, 364 N.W.2d 144 (1985).

13. 122 Wis. 2d at 567, 364 N.W.2d at 148.

14. Linda J. Bozung & M. Randall McRoberts, "Land Use Planning and Zoning in 1987: A National Survey," 19 *Urb. Law.* 899, 976 (1987).

15. 207 Wis.2d 155, 167, 558 N.W.2d 100, 105 (1997).

16. 136 Wis. 2d 501, 510, 402 N.W.2d 376, 381 (1987) citing *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 75 (Minn. 1984).

17. Sec. 91.73(2), Stats.

18. 2003 WI App 109.

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Appeals cited the *Bell* case for the proposition that a comprehensive plan is merely advisory. As a result, the Court of Appeals held that the town did not need to follow its land use plan. As further support for its decision, the Court of Appeals quoted the recent comprehensive planning legislation and stated, “A logical interpretation of this statute is that until January 1, 2010, a local governmental unit’s program or action affecting land use does not need to be consistent with that local governmental unit’s comprehensive plan and thus currently a land use plan is merely advisory.” This decision is an indication that the courts recognize the zoning/planning relationship will be different after January 1, 2010.

2) THE NATURE OF THE PLAN AND THE ANALYSIS TO DETERMINE CONSISTENCY

The January 1, 2010 consistency requirement attempts to establish that local governments in Wisconsin must have a separate comprehensive plan as a prerequisite to the enactment of a zoning ordinance and other plans and land use controls. With a separate local comprehensive plan in place, local governments are then expected to act consistent with it. What does this mean? Does it mean that in order for a local program or action to be consistent with a comprehensive plan the comprehensive plan must include a reference to that local program or action?

How detailed must the plan be? These questions are explored below.

If consistency is defined as a literal, exact translation from plan to zoning ordinance, undesirable results might occur. The plan will become the zoning ordinance.¹⁹ The genesis of the consistency issue is to clarify that a zoning ordinance is not the same as a comprehensive plan. It would be ironic to take the interpretation that the consistency requirement means that the zoning ordinance and the plan must be exactly the same.

The nature of comprehensive planning is constantly evolving.²⁰ The original object of planning was a fixed end-state master plan, with a detailed multi-colored map indicating detailed future land uses. This approach was criticized as too rigid. Plans evolved to include more general policy statements with less specific maps.²¹

According to Professor Haar, the influential early proponent of planning/zoning consistency, the comprehensive plan should be a substantive document that states the goals of a locality and should serve as a guide for implementing legislation. It should not be excessively detailed; rather, it is a “philosophic guide to a way of life.”²²

Another major influence on thinking about the nature of comprehensive planning was T.J. Kent’s book *The Urban General Plan*. According to Kent, a comprehensive plan is:

The official statement of a municipal legislative body which sets forth its major policies concerning desirable

19. Maryland Office of Planning, *Achieving “Consistency” under The Planning Act of 1992* (1994) at 6-7.

20. Edward J. Kaiser and David R. Godschalk, “Twentieth Century Land Use Planning: A Stalwart Family Tree,” 61 *J. Am. Plan Assoc.* 365 (1995).

21. A. Dan Tarlock, “Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against,” 9 *Urb. L. Ann.* 69, 72-73, n. 13 (1975) citing Daniel Mandelker, *The Zoning Dilemma* (1971) at 60-63.

22. Haar, 20 *Law Contemp. Prob.* at 370.

future physical development; the published general-plan document must include a single, unified general physical design for the community, and it must attempt to clarify the relationships between physical-development policies and social and economic goals.²³

A leading text on planning practice recognizes three characteristics of a comprehensive plan — comprehensive, general, and long range: “‘Comprehensive,’ means that the plan encompasses all geographical parts of the community and all functional elements which bear on physical development. ‘General’ means that the plan summarizes policies and proposal and does not indicate specific locations or detailed regulations. ‘Long range’ means that the plan looks beyond the foreground of pressing current issues to the perspective of problems and possibilities twenty to thirty years in the future.”²⁴ As recognized in a book devoted to the planning/zoning consistency issue, because of the general nature of the comprehensive plan, the plan often may not provide any guidance for the location of a fire station on a specific lot or rezoning a parcel on the boundary of a neighborhood shopping district.²⁵

Other planning scholars also note the tension inherent in the need to keep the plan more general and leave the detail to the regulatory tools: “To the extent that a plan takes on regulatory ef-

fects, it heralds the demise of planning ... for by definition planning is not regulation.”²⁶

The general nature of comprehensive planning, however, is not without problems. A local government might devise a plan of such general nature that it would give inadequate guidance to the drafting of zoning and other ordinances. It could simply end up “permitting most anything, anywhere, under any conditions.”²⁷ Recognizing the need for more refined guidance, since the 1950s, the plan “has shifted from simple policy statements and a single large-scale map of future land use, circulation, and community facilities, to a more complex combination of text, data, maps, and time tables.”²⁸ Modern plans have “policy sections covering environmental/social/economic/housing/infrastructure concerns, land classification maps defining spatial growth policy, land use design maps specifying locations of particular land uses, and development management programs laying out standards and procedures for guiding and paying for growth.”²⁹ As result, comprehensive plans often include a hybrid of specific and general guidance. The text of the plan is as important as any map for analyzing consistency. The text of the plan can explain how to address issues that are not easily depicted on a map, like timing and phasing provisions to avoid the premature zoning of land and non-conforming uses.

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23. T.J. Kent, Jr., *The Urban General Plan* (1964) at 18.
24. Alan Black, “The Comprehensive Plan,” Chapter 13 in *Principles and Practice of Urban Planning* (William I. Goodman and Eric C. Freund, eds., 1968) at 349.
25. Joseph Dimento, *The Consistency Doctrine and the Limits of Planning* (1980) at 5, quoting Kent, *supra* note 23 at 76.
26. Donald Hagman and Joseph Dimento, “The Consistency Requirement in California,” 30 *Land Use L. and Zoning Digest* 5, at 7 (1977).
27. Maryland Office of Planning, *supra* note 19, at 7.
28. Kaiser and Godschalk, *supra* note 20 at 378.
29. *Id.* at 381.

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Wisconsin's comprehensive planning statutes reflect the evolving nature of comprehensive planning. The statutes specify that the general content of a comprehensive plan must include, at a minimum, the following nine elements: Issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; inter-governmental cooperation; land use; and implementation. For each of the elements, the statutes provide some general guidance regarding the questions that must be addressed to arrive at the substantive content of the element, including the need for data, policies, programs, and maps. The implementation element also allows a community to develop an implementation schedule for actions that may need to occur sequentially after the comprehensive plan is adopted. The statutes, however, give local governments considerable discretion about the specific detail of each element. In light of the consistency requirement, local governments might want to be general in some areas and more specific in other areas. The level of detail needs to be a function of the planning process — a process driven by the issues in the community and the region.

DETERMINING CONSISTENCY

The generally accepted analysis for determining consistency recognizes the general nature of comprehensive planning. California, a pioneer in the zoning/planning consistency concept, provides the following guidance for analyzing consistency: "An action, program or project is consistent with the [comprehensive] plan if, considering all its aspects, it will

further the objectives and policies of the [comprehensive] plan and not obstruct their attainment."³⁰ The model state enabling legislation prepared by the American Planning Association uses a similar standard and includes some additional analytical steps:

The local planning agency shall find that proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land-use action is consistent with the local comprehensive plan when the regulations, amendment, or action:

- (a) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan;
- (b) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan; and
- (c) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other specific public actions, or actions proposed by non-profit and for-profit organizations that are contained in the local comprehensive plan.

In determining whether the regulations, amendment, or action satisfies the requirements of subparagraph (a) above, the local planning agency may take into account any relevant guidelines contained in the local comprehensive plan.³¹

While not interpreting the meaning of "consistency" under 66.1001(3), the

Lake City Corp. v. City of Mequon case is very instructive for interpreting what "consistent" means. The *Lake City* case involved a challenge to the City of Mequon's denial of a subdivision plat based on its inconsistency with the City's master plan under oddly worded statutory language in sec. 236.13(1)(c), Stats., that referenced master plans being consistent with official maps. The court's interpretation in that case is similar to the above interpretations of the zoning/planning consistency. According to the Wisconsin Supreme Court, "[t]he word 'consistent,' according to common and approved usage, means 'in agreement; compatible.' *The American Heritage Dictionary* 402 (3d ed. 1992). In other words, 'consistent' means 'not contradictory.'"³²

Under this standard, not every detail of a zoning ordinance, nor every local program or action needs to be included in the comprehensive plan to be consistent with the comprehensive plan. Again, the *Lake City* case is instructive on this issue. *Lake City* took the interpretation that "consistency" meant that any portion of a master plan that dealt with issues not covered by an official map is inconsistent with the official map. Under this interpretation, the City could deny plat approval based upon an element contained in a master plan only if such element is similarly contained in an official map. The City argued that a master plan is consistent with an official map even if the master plan addresses issues not contained in the official map. The Court agreed with the City's interpretation.

Consistency also does not mean that the plan is static. Kent advocated an annual review and amendment of the comprehensive plan and a major reconsidera-

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30. Office of Planning and Research, Governor's Office, State of California, Sacramento, *General Plan Guidelines* (June 1998).

31. Meck, *supra* note 4 at 8-37.

32. 207 Wis.2d at 164, 558 N.W.2d at 104.

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tion of the entire plan document every ten years.³³ Wisconsin's comprehensive planning law follows Kent's views. Wisconsin law requires that the implementation element "include a mechanism to measure the local governmental unit's progress toward achieving all aspects of the comprehensive plan" (such as an annual review and amendment, suggested by Kent) and that the comprehensive plan must be updated no less than once every ten years.³⁴ The plan needs to be continually amended as conditions

tency requirement should work, given all of the above. A comprehensive plan may designate a certain area for single-family residential development with a density of six units per acre. Given the general nature of comprehensive planning, the plan does not include specific standards for setbacks. The area is zoned to allow for a density of six units per acre and is therefore consistent with the plan. (It would be inconsistent with the plan to zone the area "industrial.") The zoning ordinance includes specific standards for setbacks. A property owner requests a variance from the setback provisions of the zoning ordinance to build a garage. Even though

under Wisconsin law would also make granting the variance unlikely.)

CONCLUSION

Local plans in Wisconsin have been used in challenges to local land use decisions in the past with mixed results. With the advent of the consistency requirement after January 1, 2010, comprehensive plans will be a factor in the judicial review of land use disputes. Comprehensive plans should therefore play a more definitive role in the local decision making process. That is the intent of the comprehensive planning legislation.

“IN EVERY AREA OF LAW ... THERE IS A STRUGGLE BETWEEN THE NEED FOR RIGID RULES AND THE NEED FOR FLEXIBILITY. COMPREHENSIVE PLANNING IS NO DIFFERENT.”

change. Likewise, the procedures for adopting a comprehensive plan expressly apply to the adoption of the original comprehensive plan and amendments to the plan.³⁵ This approach emphasizes the "information assembly and display" and "pulse-taking" functions of planning to provide the foundation for policy formulation by the local legislative body.³⁶

AN EXAMPLE

Given the uniqueness of land, the meaning of consistency will often depend on unique facts and circumstances. The following is one example of how the consis-

the zoning ordinance is consistent with a comprehensive plan, a variance from the zoning ordinance does not automatically mean the variance is inconsistent with the comprehensive plan. The variance will be consistent with the plan as long as it follows the density called for in the plan and is not inconsistent with any other policy in the plan. It would be a different scenario if the property owner was seeking a use variance to construct a gas station in the area planned for single family residential. Here the person requesting the variance would have a difficult time showing consistency. (The stringent standards for use variances

Local governments will need to use their comprehensive plan as a guide to be sure that their decisions do not conflict with the provisions of their plan. If they do conflict, the local government has the option of amending its plan. Given the general nature of comprehensive planning, there will still be room for discretion. But discretion should not be confused with arbitrariness. In every area of law — contracts, wills, etc. — there is a struggle between the need for rigid rules and the need for flexibility. Comprehensive planning is no different.

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33. Kent, *supra* note 23 at 68.

34. Sec. 66.1001(2)(i), Stats.

35. Sec. 66.1001 (4), Stats.

36. Tarlock, *supra* note 21 at 99, n. 94.