

The 2009 City of Annapolis Comprehensive Plan (“ACP”) has the full force and effect of law

What is the basic law in Maryland?

“Planning” and “zoning” are different both conceptually and how they are handled in the Maryland statutory scheme. Planning is generally more long term and conceptual, whereas zoning is more finite and imposes an immediate regulation of property use. However, in Maryland, as in most states, planning and zoning can merge whereby planning documents do have the force of law. The general rule on this issue has been clear in Maryland for some time. The Court of Appeals of Maryland in *Mayor and Council of Rockville et. al. v. Rylans Enterprises, Inc.* 372 Md. 514 (2002) summarized the law as follows:

There exists a distinction between zoning and what commonly is called land use planning, both as a practical matter and as a function of different statutory grants of power and delegations of duties....

Plans are long term and theoretical, and usually contain elements concerning transportation and public facilities, recommended zoning, and other land use recommendations and proposals. Zoning, however, is a more finite term, and its primary objective is the immediate regulation of property use through the use of use classifications, some relatively rigid and some more flexible [citations omitted]. We repeatedly have noted that plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning [emphasis added]. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device [citations omitted]. In those instances where such a statute or ordinance exists, its effect is usually that of requiring that zoning or other land use decisions be consistent with a plan’s recommendations regarding land use and density or intensity. 372 Md. 514, 527-531 [footnotes omitted].

This general rule as to when a plan may be elevated to a “true regulatory device” is still the law in Maryland. See, *David Trail et. al. v. Terrapin Run, LLC et. al.* 403 Md. 523 (2008) at 527, footnote 5 (court acknowledges its statement of the law from *Mayor and Council of Rockville et. al. v. Rylans Enterprises, Inc.* quoted above); *Pringle v. Montgomery County Planning Board M-NCPPC*, 212 Md. App 478 (2013) at 489 (“Where, as here, the local government has enacted a statute, ordinance or regulation that links planning and zoning, the status of the comprehensive plan is elevated to the level of a true regulatory device”.)

In addition to legislative bodies such as the City Council passing an ordinance or the General Assembly passing a statute with the effect or elevating the status of all or some portions of a comprehensive plan, courts have noted that language in the actual comprehensive plan itself can act to elevate the plan’s status. This is only logical since in Maryland the legislative body is required to review and approve the comprehensive plan prepared by the Planning Commission. In *David Trail et. al. v. Terrapin Run, LLC et. al.* 403 Md. 523 (2008) the Court of Appeals upheld the lower court finding that with respect to the Allegany County ordinances and regulatory

decisions being reviewed, “nothing within the zoning code or the comprehensive plan itself acts to elevate the plan beyond a mere guide.” *403 Md. 523 at 534 [emphasis added]*.

Thus, under Maryland judicial precedent regarding what is sufficient to “elevate the status of a comprehensive plan to the level of true regulatory device,” the inquiry is whether there any provisions in (i) the Annapolis City Code, (ii) the ACP itself, or (iii) a state statute which create this outcome. The answer with respect to all three appears to be that such provisions do exist.

Are there any Annapolis City Code provisions which might link planning and zoning and thus elevate the ACP to a true regulatory device?

The Planning Commission prepares the ACP and the City Council must review and adopt it. But there is no requirement that when adopting City ordinances related to zoning or development, the City Council must expressly incorporate compliance with the ACP as a related purpose or mandate associated with aspects of zoning and development. Annapolis, however, has chosen to elevate the ACP. In Title 21 – Planning and Zoning of the Annapolis City Code, Section 21.02.030 lists the “specific purposes” for adopting the Zoning Code. Listed among these “specific purposes” is “To ensure the integrity of, and help implement, the Comprehensive Plan.” See, *Section 21.02.030(B)*. Based on the case law cited above, and on this provision alone of the Annapolis City Code, the City of Annapolis Office of Law has already concluded that the ACP does have the full force and effect of law. See, *July 2014 opinion memo (email) to Alderman Littmann attached hereto as Exhibit A*.

In testimony before the Environmental Matters Committee on June 19, 2014 the Office of Law also stated this opinion. Counsel testified as follows:

“And as [Planning and Zoning staff] said, things like... planned development approvals have to be consistent with the plan... So if it’s determined by, for instance, the Planning Commission in the case of a planned development...that there is a failure of consistency with the plan, they will not approve – they cannot approve the particular application.”

“So while the plan is not a law in essence, there is a force of law behind it.” Transcript, page 5.

In addition to *Section 21.02.030(B)* cited and relied upon by the Office of Law to reach its opinion, many other provisions throughout the Annapolis City Code require incorporation of the ACP into decision making and fact finding by staff and various boards and commissions, thus making it more than a mere guide. Some of the many examples of reliance on the provisions of the ACP throughout the Annapolis City Code are listed in **Exhibit B** attached hereto. *NOTE: Exhibit B may not contain all past amendments to the Annapolis City Code, but the cited provisions have been the law at some time in the recent past.*

Are there any provisions in the ACP which indicate an intent to elevate its status?

State law does require that zoning laws, planned development ordinances, and other land use ordinances be “consistent with” the comprehensive plan. See, *Maryland Code Annotated Article – Land Use, Section 3-303*. However, there is no specific state requirement that the ACP itself contain language making its approval effectively integrated into the local law. Indeed, when approving the ACP the City Council could specifically insist that any express or implied language creating such an integration be removed from the ACP. Further the City Council could even have

required express language that the ACP is merely intended to be a guide, and not a tool which must be used otherwise. None of this was done at the time of adoption of the ACP presented by the Planning Commission, and as noted above and in attached **Exhibit B**, the visions, goals and policies of the ACP are woven into the Annapolis City Code itself. Some examples of text contained in the ACP indicating it is intended to be more than a mere guide include the following:

The ACP notes that is intended to be a City policy document with a “primary means of implementation” to include “incorporation...into daily decisions guiding development,...preservation, infrastructure, transportation, economic development, growth and a myriad of other issues.” *ACP Chapter 10-Implementation, page 134 [emphasis added]*

The ACP provides that when preparing review materials for decision making “consideration should be given to incorporating policies [listed in the ACP] into checklists or other review materials to ensure that they are utilized when and where appropriate.” *ACP Chapter 10-Implementation, page 134 [emphasis added]*

“The City will maintain a commitment to the ongoing, successful implementation of the Comprehensive Plan. The City’s management and staff, together with its boards and commissions, have essential roles in implementing the plan...” *ACP Chapter 10-Implementation, page 136 [emphasis added]*

The ACP expressly recognizes that among the Planning Commission’s responsibilities are that it “ensures decisions and recommendations presented to the City Council are consistent with the [ACP’s] policies, objectives, and recommendations. This relates particularly to decisions for subdivision approval, site plan review,...and growth” *ACP Chapter 10-Implementation, page 137 [emphasis added]*

In specific development situations, are there any Maryland statutes that link planning and zoning, and thus elevating at least some provisions in the ACP to a true regulatory device?

It is clear the General Assembly views Comprehensive Plans as important. In 2009, the State enhanced the importance when it passed the Smart and Sustainable Growth Act. Among other things, it amended the Land Use section to make clear that Comprehensive Plans are not merely guides to follow when desired, and to ignore if so inclined. The preamble to this 2009 state statute expressed the intent of the General Assembly by noting:

WHEREAS, ...Maryland requires a local jurisdiction to implement the provisions of its local comprehensive plan through...the adoption of applicable zoning ordinances and regulations, planned development ordinances and regulations, ... and other land use ordinances and regulations that are consistent with the plan; and *[emphasis added]*

WHEREAS, Citizens invest countless hours in determining the future direction of their jurisdiction through local comprehensive plans; and

WHEREAS, The people of Maryland are best served if land use decisions are consistent with locally adopted comprehensive plans; and . . . *[emphasis added]*

WHEREAS, It is the intent of the General Assembly . . . that comprehensive plans should be followed as closely as possible while not being elevated to the status of an ordinance and that deviations from the plan should be rare...*[emphasis added]*

Even when a Comprehensive Plan has not been elevated by the local jurisdiction to having the force of law, the General Assembly's view is that "deviations from the plan should be rare." Preambles to legislation are typically not part of the statute, but they do provide guidance. With this backdrop, in recent years the General Assembly has made changes to Article 66B (now the Land Use article of Maryland Code Annotated) regarding Comprehensive Plans and the roles of Planning Commissions. One section relevant here is Section 3-205, Planning Commission Review, which is applicable to a jurisdiction such as Annapolis with a Comprehensive Plan. This section mandates that with respect to certain types of developments, The Planning Commission must make a determination that it is "consistent with" the ACP. Section 3-205(b) provides that:

(b) A publicly or privately owned street, square, park, or other public way, ground, or open space, a public building or structure, or a public utility may not be authorized or constructed in the local jurisdiction or in a geographic section of the local jurisdiction until the planning commission has approved the location, character, and extent of the development as consistent with the plan. *[emphasis added]*

Section 3-205 stands on its own if approval is sought for development containing any of these enumerated facilities, regardless of whether Annapolis has taken actions to give the ACP the force of law. It is a General Assembly mandate, regardless of whether the jurisdiction adopting a Comprehensive Plan has elevated the status of the plan. New development containing any of these enumerated facilities has to be "consistent with" the ACP. This section does not appear to limit its applicability to development projects limited to using public funds build the item. For example, private funds being used to build a road or utility that will be taken over by the City after construction are covered. Developments with either a "publicly or privately owned street, square, park, or other public way" are covered, so expenditure of public funds is not a pre-requisite to the application of this statutory mandate in every instance.

Though not integral to determining if the ACP has the force of law, it merits mention that in this section 3-205 of the Land Use law, unlike other sections, the General Assembly does not provide a unique definition of what findings by the Planning Commission are necessary to determine if the project is "consistent with" the ACP. In such a setting with no statutory definition, the basic rules of statutory construction in Maryland would guide the Planning Commission to determine the meaning of the phrase "consistent with". These rules have been summarized as follows:

- [1] The cardinal rule of construction of a statute is to ascertain and carry out the real intention of the Legislature.
- [2] The primary source from which we glean this intention is the language of the statute itself.
- [3] In construing a statute, we accord the words their ordinary and natural signification.
- [4] If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless.
- [5] Similarly, wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences.
- [6] Moreover, if the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature.

The Mayor and Council of Rockville et. al. v. Rylans Enterprises, Inc. 372 Md. 514 (2002), 549-550.

In the Land Use Code the General Assembly does require that jurisdictions with Comprehensive Plans shall implement their plans through the adoption of zoning laws, planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations “that are consistent with the comprehensive plan.” See Maryland Code Annotated – Land Use, Section 3-303. The legislature did see fit to help legislative bodies to determine if these required zoning laws, planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations are “consistent with” their mandated Comprehensive Plans. For Annapolis, which is in a priority funding area, “consistent with” for the purpose of complying with Section 3-303 is defined in Maryland Code Annotated – Land Use, Section 1-304. For the City of Annapolis, in order to be “consistent with” the ACP, these ordinances and regulations must “further, and not be contrary to, the following items in the [ACP]:

- (1) policies;
- (2) timing of the implementation of the plan;
- (3) timing of development;
- (4) timing of rezoning; and
- (5) development patterns.”

While the clarification of “consistent with” in Section 1-304 may provide some guidance to the Planning Commission in applying Section 3-205(b) as it is part of the same statutory scheme (see rule of construction 6 above), it is by no means dispositive.

Does the Court of Appeals of Maryland decision in *David Trail et. al. v. Terrapin Run, LLC et. al.* 403 Md. 523 (2008) change any of this analysis?

Much has been done in recent years by the General Assembly with respect to Comprehensive Plans and their role. Some of this legislative activity was caused by the decision of the court in *David Trail et. al. v. Terrapin Run, LLC et. al.* 403 Md. 523 (2008) cited above. As is noted above, the decision in *David Trail et. al. v. Terrapin Run, LLC et. al.* 403 Md. 523 (2008) did not change the basic rules as to when a Comprehensive Plan may be elevated to the status of law; rather, it reaffirmed the law. That court decision upheld the lower court finding that with respect to the Allegany County ordinances and regulatory decisions being reviewed, it found “nothing within the zoning code or the comprehensive plan itself acts to elevate the plan beyond a mere guide.” 403 Md. 523 at 534. Under that fact setting, wherein the comprehensive plan remained a mere guide, the court then went on to address a very narrow, single question it summarized as “May a board of appeals deriving zoning authority under Article 66B grant a special exception, in the absence of an affirmative finding that the proposed use conforms to the jurisdiction’s comprehensive plan?” 403 Md. 523 at 526. The court ruled that a special exception “in harmony” with a county plan thus “conformed” to the plan as required by statute. The General Assembly subsequently changed various provisions of Article 66B to clarify the rules in this type setting.

EXHIBIT A

----- Forwarded message -----

From: **Jacqueline Lee** <jglee@annapolis.gov>
Date: Fri, Jul 25, 2014 at 12:54 PM
Subject: Comprehensive Plan - Full Force and Effect of Law
To: "Ald. Jared Littmann" <aldlittmann@annapolis.gov>
Cc: Gary Elson <gmelson@annapolis.gov>

Dear Alderman Littmann:

Gary Elson has asked that I forward this email to you on his behalf.

You have asked whether the City of Annapolis Comprehensive Plan has the full force and effect of law?

The answer to that question is, yes. In a 2002 decision of the Court of Appeals of Maryland the Court stated that “[w]e repeatedly have noted that [comprehensive] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device In those instances where such a statute or ordinance exists, its effect is usually that of requiring that zoning or other land use decisions be consistent with a plan’s recommendations regarding land use and density or intensity.” Mayor & Council of Rockville v. Rylins Enterprises, Inc., 372 Md. 514, 530-31, 814 A.2d 469, 478-79 (2002). [Internal Citations omitted].

Section 21.02.030 of the City Code states that “[t]he Zoning Code is adopted for the purpose of promoting the public health, safety and general welfare of the citizens of the City of Annapolis . . . and [B.] to ensure the integrity of, and help implement, the Comprehensive Plan.” Thus, because the City of Annapolis has linked its Comprehensive Plan, by Ordinance, with the Zoning Code, the Plan is implemented with the full force and effect of law.

Kindest regards,

Jacqueline

EXHIBIT B

Examples of Annapolis City Code Reliance on the Comprehensive Plan

NOTE: Exhibit B may not contain all past amendments to the Annapolis City Code, but the cited provisions have been the law at some time in the recent past.

City Code 20.08.010 " No subdivision plat shall be approved under this title unless, at the time of approval, the subdivider has demonstrated to the reviewing agency that all improvements present on, or intended to be constructed upon, the property to be subdivided are, or will be, in full compliance with the then applicable provisions of the City's building, housing and property maintenance standards (Title 17 of this Code), Zoning Code (Title 21 of this Code), and are consistent with the Comprehensive Plan."

Chapter 21.24 of the Annapolis City Code relates to Planned Developments. This ordinance lists purposes for planned developments as including "To promote development that is compatible with the goals of the Comprehensive Plan."
Annapolis City Code Section 21.24.010 A(6).

Section 21.24.090 of the Annapolis City Code relates to planned development review criteria and findings. 21.24.090(A) provides that when deciding planned development applications the Planning Commission shall make written findings based on the following: "The planned development is compatible with the character of the surrounding neighborhood and the Comprehensive Plan and the purposes of planned developments."

Section 21.24.110 of the Annapolis City Code relates to the expiration of a planned development approval. 21.24.110(2)(D) mandates that if a planned development is abandoned or expires, "no building permits shall be issued for the planned development unless it is determined by the Planning and Zoning Director that the planned development complies with the current Comprehensive Plan..."

Section 21.22.050 of the Annapolis City Code relates to granting waivers as part of a site design plan review. 21.22.050(B) provides that "The Planning and Zoning Director may waive submission requirements if the Director finds that the waiver will not be detrimental to the public health, safety, or general welfare or have the effect of nullifying the intent and purpose of... the Comprehensive Plan..."

Section 21.22.080 of the Annapolis City Code lists review criteria and required findings related to site design plans. 21.22.080(B) mandates that "The decision of the Planning and Zoning Director shall be based on findings with respect to the following:

...

Design. The proposed design is in harmony with the character of the surrounding neighborhood and the Comprehensive Plan."

Chapter 21.64 of the Annapolis City Code relates to various standards for property uses when such uses are subject to standards. Section 21.64.240(A)(9)(c) provides that when reviewing a subdivision plat that “the Planning Commission shall determine that the design and development of the project is in compliance with all applicable goals and policies of the Comprehensive Plan...” 21.64.240(A)(9)(d)(iv) provides that when assessing a requested modification to a standard, “the Planning

EXHIBIT B continued

Commission shall find based on the evidence presented in each case that the proposed modification to the standard complies with all of the following criteria:

...

The modification is in compliance with all applicable goals and policies of the Comprehensive Plan...”

Section 21.64.300 of the Annapolis City Code relates to food and beverage-related uses for property. Section 21.64.300(F) provides that in every instance “The use shall comply with the City's Comprehensive Plan...”

Section 17.11.720 of the Annapolis City Code relates to considerations for variances. 17.11.720(B) mandates that “In considering variance applications, the Department of Neighborhood and Environmental Programs shall consider and make findings of fact on all evaluations, all relevant factors, requirements specified in other sections of this chapter, and the following factors:

...

(8) The relationship of the proposed use to the comprehensive plan for that area.

Chapter 22.02 of the Annapolis City Code relates to testing for adequate public facilities. Section 22.02.010(A)(1) includes among the purposes of testing for and certification of adequate public facilities is to “Assure that development and redevelopment occurs in concert with the Capital Improvement Program and will enable the City to provide adequate public facilities in a timely manner and achieve the growth objectives of the Comprehensive Plan”.

Chapter 21.05 of the Annapolis City Code contains a series of Bulk Regulations Tables applicable to implementing the Planning and Zoning ordinances of the City. Throughout these tables, the manner in which streets are designated in the ACP are binding guides to how a specific bulk regulation is applied to a site. See for example Sections 21.50.170, 180, and 210 relating to bufferyards being set based on how the adjacent streets are designated in the ACP.

Chapter 20.24 of the Annapolis City Code relates to Design Standards. Section 20.24.010 regarding street design considerations requires that “The arrangement, character, extent, width, grade and location of all streets shall

conform to the comprehensive master plan...” Section 20.24.040 regarding right-of-way widths requires that “Street right-of-way widths shall be as shown in the comprehensive master plan...” Section 20.24.150(A) regarding public sites and open spaces requires that “Where a proposed park, playground, school or other public use shown in the comprehensive master plan is located in whole or in part in a

EXHIBIT B continued

subdivision, the Planning Commission may require the reservation of an area for the use within the subdivision...”

Title 2.50.040 of the Annapolis City Code addresses the powers and duties of the Annapolis Conservancy Board. It provides in 2.50.040(A) that among the powers and duties are to “Promote the stated goals and purposes of the Comprehensive Plan...”