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WHEN WILL THEY EVERY LEARN?—A LAMENT OVER THE OHIO SUPREME COURT DECISION IN APPLE GROUP, LTD V. GRANGER TOWNSHIP BOARD OF ZONING APPEALS

By Edward J. Sullivan* ©

I. Introduction

The recent decision of the Ohio Supreme Court in *Apple Group, Ltd. v. Granger Township Board of Zoning Appeals*,¹ revives a longstanding disagreement over the relationship of planning and land use regulation. Briefly stated, the Ohio Supreme Court sided with a traditional view that the language of the State Standard Zoning Enabling Act (SZEAA)² which Ohio has substantially adopted with respect to township enabling legislation,³ that requires zoning regulations to be “in accordance with a comprehensive plan”⁴ does not require a document separate from the zoning regulations themselves. One member of the court dissented.⁵

This article contends that the *Granger Township* decision is improvident, both as a matter of statutory interpretation and planning policy. Moreover, the decision postpones the day in which Ohio joins the majority of states in which rational land use regulation is supported by a discrete policy basis found in a comprehensive plan. The result is thus lamentable, as well as wrong.

However as shown below, the *Granger Township* decision was neither unprecedented, nor unexpected. Decisions denigrating or rejecting the role of the comprehensive plan have a long history in American planning law; indeed, at one time such decisions were clearly the majority rule. Although not found in the text of the various opinions that take this view, there is little doubt that consequentialism is a principal motivating factor for the twisted mental gymnastics involved in concluding that the zoning regulations *are* the plan and, both before and after their amendment they are always in accordance with themselves.



Following a summary of the *Granger Township* decision, that case will be analyzed in terms of its internal coherence and role in the national debate over the relationship between planning and zoning. This article will also look at alternative ways of viewing this relationship and will make some recommendations on how that the courts should view relationship in the absence of more precise legislation.

II. The *Granger Township* Decision

Apple Group, Ltd. ("Apple Group") purchased 88 acres of land in Granger Township ("Township") for residential development in the Township's R-1 Zone, which allowed single family and two-family homes on two-acre lots.⁶ Apple Group sought to place 44 homes on one-acre lots, applying for 176 variances to accomplish this end; however, the Township's Board of Zoning Appeals denied the variances.⁷ Apple Group filed an administrative appeal and lost,⁸ but it also filed a second set of challenges through a declaratory judgment action. In this second challenge, Apple Group alleged that the denials were both unconstitutional

and exceeded the township's statutory authority to zone because its zoning regulations were not "in accordance with a comprehensive plan" as required by Ohio statutory law.⁹ From this point, the challenges came down to the statutory issue. A trial court magistrate determined that the zoning resolution met the statutory requirements of a comprehensive plan because the zoning ordinance itself "has the essential characteristics of a comprehensive plan; it encompasses all geographic parts of the community and integrates all functional elements."¹⁰ The trial court agreed.¹¹

Apple Group took the matter to the Ohio Court of Appeals, which agreed with the trial court's determination that the zoning resolution constituted a comprehensive plan, adding that such a determination was not against the manifest weight of the evidence.¹² As noted by the Supreme Court:

The court reasoned that the purpose of the requirement in R.C. 519.02 for a comprehensive plan is to prevent piecemeal zoning and ensure that someone purchasing property will be able to determine in advance how the property may be used.¹³

The Ohio Supreme Court stated the issues before it correctly and succinctly from Apple Group's proposed legal propositions, *viz.* whether the zoning regulations and zoning map met the statutory requirement of a comprehensive plan or whether a separate document was required.¹⁴

Commencing its analysis, the Court determined that township land use regulations were neither inherent, nor specifically granted by the state constitution, but were a creature of statute.¹⁵ Thus the statutory language of RC 519.02(A) was central to the outcome. That language, as noted, was derived from the SZEA, which did not define the term "comprehensive plan."¹⁶ The court noted that:

The view of the majority of states adopting the SZEA language is that "comprehensive plan-

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ning requires some form of forethought and reasoned consideration, as opposed to a separate plan document that becomes an overarching constitution guiding development. A minority of states view the comprehensive plan as “an independent document separate from the comprehensive zoning ordinance.”¹⁷

The Court engaged in a peroration on two Ohio cases dealing with the relationship of planning and zoning that it did not find helpful. In *Cassell v. Lexington Twp. Bd. of Zoning Appeals*,¹⁸ zoning of a one square mile area for farming, residential, commercial and recreational uses, but without specifying which uses could occur on the various properties, nor including a zoning map was not “in accordance with a comprehensive plan” as it provided for arbitrary application of the regulations.¹⁹ More recently in 2009 in *B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals*,²⁰ the Supreme Court determined that a township could rely on a county comprehensive plan to meet its statutory duties.²¹

In short order, the court rejected Apple Group’s contention that “comprehensive plan” was a “term of art” and should be construed in a manner consistent with current planning practice,²² opting instead for what it called the “plain meaning” of the statute, adding that: “[i]f a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further.”²³

The court inferred, without directly holding, that the statute was clear, found: “Our consideration of the statutory language leads us to conclude that no formally enacted comprehensive plan is required by R.C. 519.02.”²⁴

The court stated that the functions of a comprehensive plan—whatever it was—included a need to reflect community-wide goals and guard against arbitrariness.²⁵ But the court turned to an unreported Court of Appeals decision that it found “even more helpful” to its analysis of the “comprehensive plan”

language.²⁶ That case was *White Oak Property Dev., L.L.C. v. Washington Twp.*,²⁷ a case rejecting a challenge to a township zoning ordinance based on the “in accordance” language. In that case, the challenged ordinance comprehended four zoning districts, addressed a number of topics, including land use, housing and environmental precautions, and had a zoning map that enabled landowners and others to know the permissible uses of properties.²⁸ Taken in combination, these characteristics were sufficient for the zoning ordinance to constitute a comprehensive plan.²⁹ The Supreme Court gleaned from *White Oak* certain factors that would validate a finding that the Granger Township Zoning Ordinance constituted a “comprehensive plan”:

We adopt the factors that the White Oak court considered to be Indicative of a comprehensive plan, i.e., that it “(1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put.”³⁰

After noting that the township plan was over 100 pages long and included a zoning map, the court quoted from the statement of purposes of the ordinance, i.e.:

[t]o promote and protect the health, safety, morals, and welfare of the residents of the unincorporated area of Granter Township [sic], Medina County, Ohio, and to conserve and protect property and property values, and to provide for the maintenance of the rural character of Granger Township, and to manage orderly growth and development in said Township.³¹

The court then reviewed the Granger Township zoning ordinance and found that its newly adopted factors were met and affirmed.³² The court concluded:

A comprehensive plan is defined as one that reflects current land uses within the township, allows for change, promotes public health and safety, uniformly classifies similar areas,

clearly defines district locations and boundaries, and identifies the use or uses to which each property may be put. Granger's zoning resolution was enacted in accordance with such a comprehensive plan pursuant to R.C. 519.02.³³

Justice Kennedy dissented and, while agreeing that the power to regulate land uses by zoning was derived solely from statute,³⁴ the "in accordance" language (which appeared three times in the township zoning enabling legislation)³⁵ conditioned the exercise of that power on the existence of a separate comprehensive plan.³⁶ She added that the Supreme Court had on several occasions recognized terms that acquired meaning through understandings and practices over time and chided the majority for failing to accept expert testimony on the meaning of "comprehensive plan."³⁷ The dissent suggested that, because zoning and planning are referred to in different ways, they cannot be the same thing.³⁸ Moreover, "in accordance" connotes rigid compliance that is inconsistent with an approach that requires zoning regulations comply with themselves.³⁹ Justice Kennedy also noted that Ohio cities do not operate under the "in accordance" language and inferred the legislature must have meant something by this distinction.⁴⁰

More importantly, Justice Kennedy noted that the Court did not accept the issue of what constituted a comprehensive plan when it took review of this case, so the use of the *White Oak* factors was not before the Court.⁴¹ Those factors were found in the zoning enabling legislation purposes and parroting them in *White Oak* and in the current decision added nothing to the comprehensive plan requirement.⁴² While rejecting the notion that a professional planner must draft such a plan, Justice Kennedy said she would still require a separate plan document.⁴³ Justice Kennedy's rule of law would provide that the absence of a separate comprehensive plan shifts the burden to the

local government to demonstrate that its zoning regulations are a valid exercise of the legislative delegation of the power to zone.

III. A CRITIQUE OF GRANGER TOWNSHIP

There are several reasons why the *Granger Township* decision is both incorrect as a matter of law and inconsistent with rational planning policy. In this section, the decision will be analyzed and evaluated.

A. Statutory Interpretation—As noted in the previous section, the Ohio Supreme Court infers, but does not clearly state, its view that RC 519.02(A) is clear, so that there is no need to refer to other interpretive aids.⁴⁴ However, the "in accordance" language is anything but clear, unequivocal and definite, as demonstrated by the three cases upon which the court rests its conclusions.

Cassell determined that a zoning ordinance that lacks textual specificity and a map is invalid because it lacks a "comprehensive plan."⁴⁵ It appears, based on the *Granger Township* court's view that the essence of this 1955 case was the avoidance of arbitrariness, that *Cassell* was largely concerned with the lack of regulatory specificity and incomplete spatial regulatory coverage of the zoning regulations.

But the *B.J. Alan Co.* case merely stated that a Wayne County township could rely on the comprehensive plan of Wayne County and need not have its own comprehensive plan.⁴⁶ However in that case, the county had a *real* comprehensive plan, that met the statutory "in accordance" standard.⁴⁷

Finally, in the unreported *White Oak* case, in which the *Granger Township* court found "useful" factors for determining whether a zoning ordinance constitutes a comprehensive plan, the court rejected a challenge based on the "in accordance" language because the township had a zoning map encompassing its

entire territory (thus avoiding the *Cassell* problem), and an ordinance text that “covered many topics,” and allowed for future zone changes.⁴⁸ The *Granger Township* court read the *White Oak* decision to find these characteristics sufficient:

The Twelfth District agreed that the township’s zoning resolution and accompanying zoning map constituted a comprehensive plan and that it therefore complied with R.C. 519.02.⁴⁹

The *White Oak* “factors” were added as an additional ground and will be assessed below, but suffice it to say that *White Oak* is the sole case relied upon in *Granger Township* for the proposition that complete territorial regulation plus a zoning ordinance text that “covers many topics” and allows for rezoning is all that is necessary for Ohio townships to regulate the use of land.

The *Granger Township* court correctly states that its decisions in *Cassell* and *B.J. Alan Co.* are not helpful in interpreting the “in accordance” language in the case before it. Indeed neither case addresses the issue. That means that the entire logic of *Granger Township* falls on *White Oak* and that, despite the inference that RC 519.02(A) is clear on its face, the court still resorts to *two* conclusions drawn from *White Oak*, i.e., that the adoption of just about any zoning ordinance will satisfy the “in accordance” language and that the factors used in that case are proof of statutory conformity. It is curious that both propositions are advanced simultaneously. It is even more curious that the *Granger Township* court advanced both propositions, notwithstanding its inference that the “in accordance” statute was clear on its face.

B. Judicial Paternalism (or Control)—One of the stated mainstays for interpreting the “in accordance” language was avoidance of arbitrary local decision making.⁵⁰ This end is difficult to square with the result in *Granger Township*, because if the zoning ordinance is

the only reference point there is effectively no real basis for judicial review of land use regulations and actions.

The frequent use of the “arbitrary and capricious” substantive due process standard masks the application of the judges’ personal public policy preferences (or at best, a goodwill guess as to how the local government may best achieve its objectives) in a free form “interpretation” of local government actions. While substantive due process (once the principal standard for judicial review of land use regulation⁵¹ before the takings clause was utilized) is now rarely used in federal courts,⁵² many state courts continue to use this highly malleable concept enabling some judges to play Robin Hood under the guise of constitutional interpretation.

This guise is also evident in the judicial invention of “spot zoning”⁵³ (among other terms) to provide a check on “bad” rezonings as may be perceived by a judge. You will find no statutory basis for this term, which has devolved into a totemic incantation against local actions that, like Potter Stewart’s observation on pornography, are difficult to define for purposes of validity or constitutionality, but one knows it when she sees it.⁵⁴ Continuing this fiction of detached constitutional interpretation through a vague constitutional sleight of hand arrogates power to the judiciary and relieves local governments of the responsibility to make reasoned decisions instead of depending for survival on judicial review based on who had the better lawyer or the personal social or political preferences of the judge.

Thus, the contention that the zoning regulations constitute the comprehensive plan because they check arbitrariness is tautological and wrong.

C. The White Oak “Factors”—The *coup de grace* of the *Granger Township* conclusion that the zoning regulations constitute the compre-

hensive plan for statutory compliance purposes is found in its adoption of the *White Oak* factors, i.e., that the zoning ordinance “(1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put.”⁵⁵ The court engages in an “analysis” of each of these newfound factors (which were not provided to the parties beforehand) and pronounces the zoning to be in compliance with the statute.⁵⁶

The dissent, probably correctly, sees these factors as listing those items that must be contained in any zoning ordinance.⁵⁷ If so, the factors may be harmless and superfluous, if they did not promise to be a check upon zoning powers. If these factors are present in all zoning regulations that meet the statute, they have no purpose and provide only the illusion of standards. More importantly however, the substitution of these factors for zoning ordinance standards is meaningless and self-serving. Finally, the provenance of the factors is unclear, as is the authority of the court to substitute them for a statute requiring a comprehensive plan separate from the township zoning regulations.

D. Statutory Interpretive Methods—In addition to the *ipse dixit* inferential determination that the “in accordance” language was “clear, unequivocal, and definite,”⁵⁸ contradicted by its analysis, the rationale of *Granger Township* is flawed, incoherent, and unsupported. As the dissent points out, the fact that township zoning regulations must be enacted “in accordance with a comprehensive plan” (a term used three times in the same statute) *must* mean that the statutory object and its standard cannot be the same thing.⁵⁹ Moreover, the dissent points out that “in accordance with” means rigid compliance and that failure to give meaning to all words in an interpreted

statute constitutes error.⁶⁰ Aside from declaring the statute to be clear on its face and contradicting itself by use without notice of factors from an unreported case to declare the law, the majority decision dissembles.

It may well be that the majority sought to “save” zoning from the negligent actions of planners and public officials who reflect the American preference for geographically and regulatory precision in zoning over more ambiguous and policy-laden planning.⁶¹ If so, it is a Pyrrhic victory, for it condemns citizens of Ohio townships to the continuation of standardless local decisions, punctuated by an occasional reversal or remand, depending on standardless judicial review.

E. Public Policy—*Granger Township* is the first Ohio Supreme Court case to deal with the relationship between planning and zoning under the “in accordance” language. That court had the opportunity to conclude that planning and zoning were two different exercises, reflected in two or more different documents, with planning being a necessary precedent for zoning. The court had the opportunity to dispel the view that planning and zoning were either identical or that planning was unnecessary—that the commands of self-contained land use regulations with no outside reference point on which those regulations could be reviewed was both inherently arbitrary and capricious *and* a violation of the enabling statute. The court had the opportunity to consider and apply the lessons learned from planning practice over nearly 100 years that planning and zoning are not static, and there must be a standard for judicial review of land use regulations and actions other than the personal feelings of the individual judge. The court did not side with rationality, with the words of the statute, with the practice of planning. Instead, it chose to side with the received wisdom of things as they are, with local arbitrary power, and with a system of judicial review that resembles the “thumbs up” or “thumbs down” decisions more

associated with Roman circuses than the courtroom. Indeed, *Granger Township* is more than a lamentable missed opportunity; it signals business as usual for a state that could use planning.

IV. SOME MODEST PROPOSALS

The difficulties that result from the decision in *Granger Township* are judicially caused and the first prospect for resolution of them lays with the Ohio courts, although the more practical response would be legislative in nature. Let us consider what the court might do in these circumstances:

1. The Remedy of the Dissent—Justice Kennedy's dissent is longer than the court's decision and many of its points are included in the critique of that decision. It is the proposed remedy of Justice Kennedy that should be considered:

In the event, however, that Apple Group is able to prove that Granger Township does not have a comprehensive plan separate from its zoning resolution, even one compiled from several sources, the resolution should not be presumptively deemed invalid. Instead, the burden of proof shifts to Granger Township to establish that the resolution is a valid exercise of the power to zone granted by the General Assembly.⁶²

This is strong stuff and it is no wonder that the court declined to consider this option. Granger Township is not alone among Ohio townships in how it plans (or does not plan) and regulates and in its implicit understanding that a separate comprehensive plan is necessary to undertake zoning—an assumption noted as prevalent by the majority.⁶³ While Justice Kennedy's presumption of invalidity is legally correct, it would likely cause chaos among Ohio townships.

2. Leaving Existing Ordinances in Place by Judicial Fiat—Another judicial invention to prevent “bad” rezonings has been the “change or mistake” rule, under which the existing zon-

ing scheme is presumed valid and constitutional, but a change to that scheme in the form of a single tract rezoning must show a change in physical circumstances or a mistake in the original zoning scheme.⁶⁴ While this would substitute one fiction (i.e., the change or mistake test has no basis in zoning enabling legislation)⁶⁵ for another (the zoning regulations are the comprehensive plan), the result would be to keep existing zoning regulations in place until a true comprehensive plan were enacted.

Courts could also determine that existing regulations unchallenged for statute of limitation purposes would be deemed valid and constitutional. Like the analogy to the “change or mistake” rule, such a result would keep current zoning regulations in place (though effectively subjecting any proposed change to those regulations to challenge) until a comprehensive plan is adopted.

A variant on this theme would be the use of “planning factor” cases,⁶⁶ under which a court would judge the validity a land use regulation or action so that the absence of a plan or inconsistency with the same would be a factor of greater or lesser significance in its review. This approach may encourage local governments to adopt plans or risk invalidity of their land use regulations.

Any of these alternatives invites courts to undertake choices ordinarily made by the legislature and is as illegitimate as the kind of interpretation made by the *Granger Township* majority. Its only justification is temporary expediency.

3. Reallocation of the Burden of Proof—In establishing conformity with state law, which requires, albeit more directly, consistency with a comprehensive plan, the Florida Supreme Court established a shifting burden of proof:

Upon consideration, we hold that a landowner seeking to rezone property has the burden of