1-1-1981

The Consistency Doctrine and the Limits of Planning by Joseph F. DiMento

Charles C. Humpstone

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Land Use Law Commons

Recommended Citation

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
BOOK REVIEW

LAND DEVELOPMENT PLANNING


Reviewed by Charles C. Humpstone*

This book is a rewarding exploration of a longstanding controversy over how best to govern the competing preferences of land-use planners on one hand and private real estate developers on the other. Even if one is biased against planners and planning, one comes away enlightened if not dissuaded.

Professor DiMento likes quotations. He introduces his book, and point of view, with:

A plan without an ordinance to follow is like a bow without an arrow. Longswamp, T.P. v. Planning Commission of Berks County, 65 Berks 69, 72.¹

and one of the themes he will explore with:

It is a matter of common sense and reality that a comprehensive plan is not like the law of the Medes and the Persians; it must be subject to reasonable change from time to time as conditions . . . change. Furniss v. Township of Lower Merion, 412 Pa. 404, 194 A.2d 927, 928.²

To the author’s quotes, this reviewer would add another, summarizing the consistency controversy:

One man’s Mede is another man’s Persian. George S. Kaufman

---

² Id. at 1.
The Consistency Doctrine is an extraordinary achievement. Read narrowly, it is a presentation of the arguments in favor of, and against, requiring that the administration of local zoning ordinances conform to ("be consistent with" hence "consistency") the requirements imposed by long-range comprehensive land-use plans. This controversy has intensified with the passage of time as many states, including California, Kentucky, Nebraska, Florida, New Jersey, and Minnesota, have enacted statutory requirements for consistency, while other states, including Washington, Vermont, Arizona, Maine, and Indiana, have encouraged movement toward consistency.

Read more broadly, The Consistency Doctrine presents larger issues: contests between collective order and individual freedom; between common benefit and private gain; between administrative predestination and legislative free will. Almost in passing it also provides, for those of us not drawn into direct contact with land-use planners, an introduction to planners as a group. A quoted passage from Article IX, Code of Professional Responsibility of the Canons of the American Institute of Planners, gives a first glimpse of the dizzying heights from which planners look down upon the members of the Boards of Supervisors or Zoning Boards whom they serve:

1.1(a) A planner serves the public interest primarily. He shall accept or continue employment only when he can insure accommodations of the client's or employer's interest with the public interest.

(b) A planner shall seek to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons and shall urge the alteration of policies, institutions and decisions which militate against such objectives.3

This glimpse is our first view of a group of the major themes of The Consistency Doctrine.

Who is "the public?" What are its interests, needs, and desires? Who can best identify these, present them, or balance them against one another when they are multiple and conflicting? In the end, are controlling land-use decisions best made by civil servants or by local elected officials? The Consistency Doctrine raises these issues and a score of related ones, some of constitutional dimensions, e.g., the relationship of government regulation to private ownership of land. Some of its questioning of the process of planning touches on broader questions affecting any planning—What can be known about

3. Id. at 47.
the future? Is it more prudent to follow a plan based on preconceived notions of the unknown or to be guided by the available knowledge of the present? The book does not seek to answer directly. Instead, it presents the arguments on each issue dispassionately, sympathetically, in a text which is simply written but accompanied by profuse citations.

Professor DiMento is at his very best in the presentation of pros and cons. Chapter Three, which will be discussed below in some detail, is a model for summation of the merits of opposing views. Perhaps its balance betrays more than the author’s instinct for fairness. In his Epilogue, he suggests that the act of formulating his expression of the arguments in the consistency debate may have caused him to change his mind about their relative merits not once but several times.

Is a consistency doctrine advisable? In this Epilogue I present my evolving views on whether a state or local government should adopt the consistency doctrine and on the nature of the requirement. The views remain tentative. Conceptualizing, researching, and writing The Consistency Doctrine involved frequent vacillation in the status I would attribute to planning.4

Professor DiMento goes on to admit, for the first time explicitly, that in the end, he sides with the planners. Whether or not one agrees with his conclusion, one cannot help but admire the way he reaches it.

His steps are worth retracing. The opening chapter announces the increasing tendency among legislatures and courts to require consistency. It retraces the evolution of the consistency requirement since 1922, noting ambiguity in both statutory and judicial statements of the requirement and in policy debates over “both the feasibility and advisability of a strong planning function.”5

The author then examines the variations among state and federal statutes that impose consistency requirements and describes the extent to which judicial decisions contradict one another. He considers the legal implications of a series of variables. For example, the time allowed for achieving consistency changes the nature of the requirement itself. Remedies are a special concern. A court may invalidate a non-conforming zoning decision, but most are reluctant to do so. In California alone: “Remedies range from giving local governments extensions of time to meet the state’s plan adoption deadlines to enjoining the issuance of building permits or setting aside of a subdivi-

4. Id. at 140.
5. Id. at 3.
sion approval until an adequate general plan has been adopted."6 Administrative remedies may range from carrots, in the form of supplemental planning grant awards, to such sticks as state preemption of development regulations. In general, Professor DiMento concludes that administrative enforcement will fail unless reinforced by the availability of injunctive relief to both private litigants and to the state planning agency.

May a change in planned land use affect the value of the property to the extent that it constitutes a "taking" for which the owner must be reimbursed? The answer on the whole has been that there is no "taking" unless the change "deprives a property owner of substantially all use of his property."7 The consistency doctrine does not yet seem to change this although courts in the past, in finding that changes in plans were not "takings," have sometimes based their conclusions on assertions that plans are only tentative and advisory. This book voices a hope that courts confronting the stronger relationships between plans and zoning will, nevertheless, continue to find no unconstitutional "taking" unless substantially all value is destroyed.

A special peril to the consistency requirement is posed by "spot planning," a tempting procedural gambit for the developer who has been denied a zoning change by operation of the requirement. Although a local government subject to consistency requirements may be bound both to create a general plan and then to follow it in making its zoning decisions, it also enjoys considerable flexibility in writing and amending the original plan. The developer who initially is prevented from pursuing a non-conforming activity on his site due to the decision of a zoning board which is obedient to a restrictive general plan, may use his influence on the local government to obtain an amendment to the general plan which reclassifies his property. He may then return to the zoning board, this time using the consistency doctrine to compel the sought-after zoning change. California, Oregon, Hawaii, Kentucky, and Pennsylvania have attempted legislatively to prevent such spot planning with varying success.

Professor DiMento's Chapter Three, "The Consistency Debate," is his best. He presents the arguments first for, and then against, land-use planning in general and the consistency requirement in particular. He appears not as advocate, but as intermediary, quoting, paraphrasing, or characterizing, the assertions made by others. It is not only by inference that these arguments may be read as touching

6. Id. at 24.
7. Id. at 27 (emphasis in original).
on a much wider range of controversies than those involving zoning variances. His preface invites such a reading:

*The Consistency Doctrine* may be read narrowly. As such, it is applicable to the question of whether local planning should be required and translated into local zoning and other development regulations. However, several sections generalize to a much broader concern, that of the function of planning in acceptable regulation by modern government. An aim of the present work is to use the consistency doctrine as a vehicle to advance discussion of the broader debate.  

The argument in favor of planning is summarized below with less felicity, and, a perceptive reader will suspect, less enthusiasm, than in the original.

First, planning is necessary for rational development and promotes “more desirable futures than nonplanning.” Planners are getting better at their work. They can analyze large bodies of data so as to present rational choices among alternatives. Planning without a consistency requirement is ineffective. Planning’s past failures have resulted from a lack of a consistency doctrine. Second, a series of fundamental questions must be addressed. “What means will most equitably and efficiently allocate societal goods?” Should development decisions be under the control “of those persons who have substantial economic interests in their outcomes?” How, and by whom, is the public interest best defined?

From the planners’ viewpoint, interests are best identified by interest groups. These should be represented and their requirements heard. However, allocation of resources among these groups should be based on forecasts and data analysis not available to, or understood by laymen. In each of these arguments the author assigns to the planning process the implied competence to carry heavy responsibility. Each time he does so, the author steps back to question the implication. Why are planners better suited than local legislatures to resolve the differences among the competing groups? Because, he reasons, the planners’ training emphasizes “optimization under constraints.” They are trained to seek out the interest of the whole public rather than the single issue group. “Planners tend to be more socialistic in their attitudes toward use of resources than

8. *Id.* at xvi.
9. *Id.* at 45.
10. *Id.* at 46.
11. *Id.*
are other groups strongly interested in the outcomes of planning and land use control processes.”12 This last statement will not win debating points in front of all audiences. It is, however, a fair characterization of the attitude expressed in the earlier quotation from the Canons of the American Institute of Planners.

Finally, the consistency requirement would remove the present opportunities for the most influential forces in the community to co-opt the planners in such a way that the planners’ supposed quantitative, “value-free,” work product conceals a bias in favor of the developers. By forcing more public participation at the planning stage, the consistency requirement would restore the balance among the planners’ sources of information.

Here and there in his presentation of the case for planning, signs of Professor DiMento’s underlying enthusiasm for the planning process appear, if only implicitly. Surprisingly, then, when he turns to the case against planning, his presentation becomes more persuasive. An adversary to planning might point out, with some relish, that the advocate’s job becomes easier here because the arguments against planning are inherently stronger than those in its favor. A more impartial critic must feel some admiration for the precision and eloquence with which the author reveals the shortcomings of the position for which he is later to admit his support.

Even his quotations get more lively:

Control of land use and development through public planning and regulation is akin to performing surgery by a team consisting of faith healers, exorcists and surgeons. While the patient may not die instantly, he may well wish he had.13

American political attitudes do not lend themselves to mixing up property values with moral tracts. As an exhortative force in community life, comprehensive planning as it has been practiced is a failure. And as an effective interventionist with the price mechanisms of the market place, it does not begin to have the leverage possible in the political systems of Europe and Russia.14

Consistency is a bad idea because planning is just not done well. It is “costly,” “conservative,” “noninventive,” “highly subjective,” “pedestrian.” Planners are incompetent.

12. Id. at 47.
Planners are naive and fail to understand that where conflict is real, consensus is impossible. They do not understand the highly political values that control local government actions. "The very notion that allocations of immensely valuable land uses can be made in long-range plans reflecting a modicum of technical expertise, 'utopian' values, and nonrepresentative citizen sentiment is naive."^{15}

More important, long-range planning can never be done well because the shape of the remote future is beyond our ability to forecast, always inchoate, because there can be no permanent resolution of the continuing conflicts within society, and because attempts to characterize a consistent set of community goals must either fail by reason of the internal conflicts or produce only a compendium of generalities too vague to serve as a basis for any action. Planning, in short, must be incremental. In its extreme version the argument is: "Solutions will be found and their arrival is hastened by unfettered market processes."^{16} A less extreme view is that planners can serve some useful function by assembling forecasts of information on anticipated regional change. Although this information should be available as a resource to local governments, it should not dictate their choices.

Planning as a process excludes the public from participating in government by taking major choices out of the hands of their elected representatives. Attempts by planners to select individuals or organizations to represent alternative viewpoints are arbitrary and ineffective.

A strict consistency requirement removing the power of choice from local elected officials raises constitutional issues. Local governments lack the time and information to address all the issues posed by an initial plan at the time it is first offered for approval. Since they enact it originally, the plan should not have the force to tie their hands so as to prevent major changes when they address specific issues. Against this defense of home rule, the planners are really arguing that home rule is bad because it is exclusionary, parochial, and myopic.

After having presented both sides of the debate so well, Professor DiMento attempts, unsuccesssfully, to decide the controversy by weighing the merits on each side. His evaluation fails, not because the scales are so evenly balanced, but because he attempts actual

---

measurement of the comparative merits using a method derived from sociology, expressive of social scientists’ desires to mimic the utility of quantitative measurement in physical sciences.

In a single table he lists the assumptions favoring and opposing consistency requirements. Next to each assumption he lists the areas of research or academic disciplines through which the assumption might be evaluated. In a final column he characterizes the extent to which the assumption is supported, explaining, “[t]he scale employed is little support, moderate support, considerable support; it is based upon the author’s assessment of the literature.” The table is intended to summarize “the consistency debate in a way that allows social scientific analysis of proposed changes in planning law.” In deciding the extent to which the assumption is supported, he, instead, recapitulates the arguments for and against each and inserts his own choice, whether an argument is persuasive or unpersuasive, as a measurement of value. So, a pro-consistency assumption, that planners are capable of identifying community objectives, is deemed to be “moderately” supported because survey research and community workshops have been used to evaluate various forms of support for various formulations of community values. On other assumptions, he lists studies supporting one side of an issue and those opposing it, and apparently decides the extent to which the assumption is “supported” by the relative numbers of the research papers or articles favoring and opposing it. His conclusion to this evaluation of the opposing views, quantitative or not, is: that no clearly persuasive side emerges in the consistency debate.

While this evaluation procedure seems an exercise in self-delusion, the summarized arguments are, again, informative and fair. One longs to relieve Professor DiMento of his misplaced affection for “social scientific analysis,” but it has not dimmed his insights into the intractability of the conflicting forces he observes.

Against this background of unresolved conflict, Professor DiMento offers a collection of alternatives, some, perhaps all, compatible with one another; some compatible with consistency, some not. Don’t force planning upon the community. Let planning increase in states as planning improves and public understanding of it increases. Scrap general zoning and compulsory consistency and use the plan to supplement other sources of information while making case-by-case...
decisions. Reform the process by which land use planning is done by procedural reforms that reduce the incidence of graft, conflicts of interest, and \textit{ex parte} discussions. Improve the quality of advocacy representing different interests in resolving land use planning and zoning conflicts. Involve the community more in the planning process so that the involvement educates the community. Improve the quality of planning itself; make planners more professional, better paid, and improve the evaluation procedures for testing results. Segregate consistency requirements into two tiers, detailed, near-term action to be subject to a degree of consistency with a previously accepted plan, and long-term decisions to be unfettered by existing formulations.

In his concluding recommendations, Professor DiMento presents a series of suggestions to the advocate of consistency. Don’t rush into it. Adopt a two-tiered approach. Decide what the functions of administrative agencies and private citizens will be. Determine the extent to which private litigation will be used as an enforcement mechanism. Plan a strong state compliance program. Define consistency with more precision. Decide what it shall apply to, and whether it will be a set of map designations or of policies. Decide whether planning will be state subsidized. Be flexible in implementation when consistency conflicts with other state goals.

The author concludes his epilogue with a flat assertion: “Plans that reflect responsible and knowledgeable participation, that are assembled by those who are committed to increasing the predictability and fairness of decisions, that are technically informed, and that balance the interest of all those groups who would be involved deserve to be translated into regulations—official development controls.”

This reader of \textit{The Consistency Doctrine} may still ask “Why?”; he may wonder whether anything has changed to make the future more predictable, or civil servants better able to weigh competing interests or more appropriate representatives of the public interest than elected officials, but he does so with considerable deference to the knowledge and balanced judgment that have brought Professor DiMento to his conclusion.

\footnote{20. \textit{Id.} at 147.}