

Delaware Comprehensive Plan Laws
League of Women Voters
of Sussex County

May 24, 2017

Max Walton

Connolly Gallagher LLP

mwalton@connollygallagher.com

Tel. (302) 888-6297



CONNOLLY
GALLAGHER LLP

Comprehensive Plan Statutes

- The Sussex County comprehensive plan is intended to guide “future development and growth” of the County. *9 Del. C. § 6953(a)(2)*.
- The required and optional elements of the comprehensive plan are set forth in *9 Del. C. § 6956*.



Comprehensive Plan Statutes, Cont'd.

- The plan must include:
 - A future land use plan
 - A mobility element
 - A water and sewer element
 - A conservation element
 - A recreational and open space element



Comprehensive Plan Statutes, Cont'd.

- A housing element
- An intergovernmental coordination element
- A community design element
- A historical preservation element
- An economic development element



The Map and Series of Maps Limitation

- While the comprehensive plan must contain all of these elements, not all of the elements are enforceable under the law, meaning that the County is not required to do anything set forth most of these sections of the plan.
- The Quality of Life Act makes clear that only the maps and series of maps that make up the comprehensive plan are mandatory.



The Map and Series of Maps Limitation, Cont'd.

- 9 *Del. C.* § 6952 (2) defines the term “Comprehensive Plan” as follows:
 - "Comprehensive plan" or "comprehensive development plan" shall mean, from and after the respective dates by which the counties must be in compliance with this subchapter, a plan that meets the requirements of this subchapter. Whenever in this subchapter land use regulations are required to be in accordance with the comprehensive plan, **such requirements shall mean only that such regulations must be in conformity with the applicable maps or map series of the comprehensive plan.** Whenever in this subchapter land use orders, permits or zoning district changes are required to be in accordance with the comprehensive plan, such requirements **shall mean only** that such orders, permits and changes **must be in conformity with the map or map series of the comprehensive plan** and county land use regulations enacted to implement the other elements of the adopted comprehensive plan.



The Map and Series of Maps Limitation, Cont'd.

- The maps or series of maps limitation is set forth in two other places. *9 Del. C. § 6951(b)* states:
 - It is also the intent of this subchapter to encourage and assure cooperation between and among municipalities, counties and the State and to encourage and assure coordination of planning and development activities of units of county government, municipalities, regional agencies and state government in accord with applicable provisions of law. A growth management plan or policy plan that meets the standards and requirements of this subchapter shall be an acceptable comprehensive plan. **The land use map or map series forming part of the comprehensive plan as required by this subchapter shall have the force of law, and no development, as defined in this subchapter, shall be permitted except in conformity with the land use map or map series** and with county land development regulations enacted to implement the other elements of the adopted comprehensive plan.



The Map and Series of Maps Limitation, Cont'd.

- The limitation is also contained in 9 *Del. C.* § 6959(a). That section states:
 - After a comprehensive plan or element or portion thereof has been adopted by County Council or Levy Court in conformity with this subchapter, **the land use map or map series forming part of the comprehensive plan as required by this subchapter shall have the force of law,** and no development, as defined in this subchapter, shall be permitted **except in conformity with the land use map or map series** and with land development regulations enacted to implement the other elements of the adopted comprehensive plan.



The Map and Series of Maps Limitation, Cont'd.

- So what elements comprise the “map or series of maps.”
- That phrase is only used in two sections of the Quality of Life Act.
- The future land use element (*9 Del. C. § 6956(g)(1)*); and
- The conservation element which requires the future land use map to “generally identify and depict natural areas classifications.” *9 Del. C. § 5956(g)(4)*.



The Map and Series of Maps Limitation, Cont'd.

- While no court to my knowledge has definitively stated, it appears that only the future land use map, with the conservation element, has the force of law.
- This makes other statements in the plan advisory and not mandatory.



County and Municipal Comprehensive Plans Are Different

- While the text of a County comprehensive plan is only advisory, the text of a municipal comprehensive plan is mandatory.
 - In *O’Neill*, the Court was careful to describe that “the Delaware Code provides only that ‘the land use map or map series’ have the force of law with respect to county plans, while a municipality’s entire comprehensive plan carries the force of law.” **Unlike comprehensive plans for counties . . . the text and the map of a municipal comprehensive plan have the force of law pursuant to 22 Del. C. § 702.**
- *Donnelly v. City of Dover*, 2011 WL 2086160, at *5 (Del. Super. Ct. Apr. 20, 2011).



The Force of Law Requirement

- The comprehensive plan “shall have the force of law, and no development, as defined in this subchapter, shall be permitted except in conformity with the land use map or map series”
- This passage creates two separate obligations.



The Force of Law Requirement, Cont'd.

- The use of the phrase “force of law” means that the comprehensive plan should be adopted by ordinance.
- *Fields v. Kent County*, 2006 WL 345014, at *1 (Del. Ch. Feb. 2, 2006), relying in part on a statute applicable to Kent County which states “[a]ll actions of the county government which shall have the force of law shall be by ordinance,” the Court held that the adoption or amendment of a comprehensive plan must be done by ordinance.
- In footnote 20 of the opinion, the Court went on to describe the differences between resolutions and ordinances.
- In my view, even without a specific statute, I believe the Courts would require a comprehensive plan to be adopted by ordinance to satisfy the “force of law requirement.”



The No Inconsistent Development Requirement

- Development, as defined by the Quality of Life, act means:
 - any construction or reconstruction of any new or existing commercial or residential building(s) or structure(s) upon lands which are not owned by the State or its agencies or its political subdivisions, or are not within the jurisdictional control of the State or its agencies or its political subdivisions. *9 Del. C. § 6952(6)*.
- The statute is clear – no development shall be permitted except in conformity with the maps.
- Courts take the no inconsistent development requirement very seriously.



The No Inconsistent Development Requirement, Cont'd.

- *In Friends of H. Fletcher Brown Mansion v. City of Wilmington Board of Adjustment*, 2013 WL 4436607, at *10 (Del. Super. Ct. June 26, 2013), the Superior Court (later affirmed by the Supreme Court) held:
 - A comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The plan is likened to a constitution for all future development within the governmental boundary.
- The Court's statements likely means that a Board of Adjustment cannot grant a use variance that is inconsistent with the municipal comprehensive plan.



The No Inconsistent Development Requirement, Cont'd.

- In *Brohawn v. Town of Laurel*, 2009 WL 1449109, at *5 (Del. Ch. May 13, 2009), the Court invalidated a rezoning as inconsistent with the comprehensive plan and held:
 - Laurel adopted zoning ordinances that zoned the Car Store Property and the Discovery Lands commercial/business, but in the Comp Plan, as amended in August, 2006, those areas were intended to be zoned mixed-use. . . . **There is a clear substantive difference between the zoning designations “mixed-use” and “commercial/business.”** Mixed-use zoning is specifically designated as a “plan” that would allow a “mix” of residential use combined with integrated “retail, entertainment, office, residential, lodging and civic/cultural/recreation” use. Mixed-use zoning, as defined by Laurel, envisions a combination of residential and commercial use harmonized in a coherent and specific plan. Commercial/business zoning, however, could completely exclude residential use.



Designations

- If the future land use maps of the comprehensive plan change the use classification of an area (i.e. a change of an area from commercial to residential), the County is required to rezone within 18 months of the plan's adoption. *9 Del. C. § 6960(e)*.
- The County is likely required to follow the formality of a rezoning for such changed areas (posting, notice, public hearing, and mailing requirements) in the comprehensive plan.



Designations, Cont'd.

- *In Farmers for Fairness v. Kent County Levy Court*, 2012 WL 295060, at *3 (Del. Ch. Jan. 27, 2012) (*Farmers for Fairness III*), the Court held that changing the use designation on the comprehensive plan maps is effectively a rezoning. The Court held:
 - While Delaware case law has addressed whether development would be inconsistent with a comprehensive plan, no court has decided whether properties included for downzoning in a land use map have been thereby rezoned, or whether such rezoning lacks the force of law without an enforcing ordinance. I find that because, by statute, no development of affected properties may take place in a manner inconsistent with the New Land Use Map, the Petitioners' lands (which, according to the Petition, have suffered a diminution in development density) were effectively rezoned upon the adoption of the Comprehensive Plan.



Development Permits

- The Quality of Life Act defines a development permit as including:
 - any building permit, zoning permit, subdivision approval, rezoning, certificate of occupancy, special exception, variance or any other official action of local government having the effect of permitting the development of land.
9 Del. C. § 6952(8).



Development Permits, Cont'd.

- If a development permit application is filed prior to adoption of a comprehensive plan, that permit has a statutory right to proceed in accordance with the prior comprehensive plan.
- “Any application for a development permit filed or submitted prior to adoption or amendment under this subchapter of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application.” 9 *Del. C.* § 6959(c).

