Zoning in Accordance with a Comprehensive Plan: (Apple Group v. Granger Township)

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ZONING IN ACCORDANCE WITH A COMPREHENSIVE PLAN (LEGAL ISSUES):

APPLE GROUP v. GRANGER TOWNSHIP

at

27th ANNUAL APA CLEVELAND PLANNING & ZONING WORKSHOP

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I. THE GENERAL RULE

In Ohio, separate document known as a "comprehensive plan" not required to be adopted by local governments in order to promulgate and enforce planning and zoning regulations.

- Apple Group, Ltd. v. Granger Township, Ohio Supreme Court (2015)
- Columbia Oldsmobile, Inc. v. City of Montgomery,
 Ohio Supreme Court (1990)



Caveat: certain charters and ordinances of municipal corporations (cities and villages) in Ohio may require a comprehensive plan to be adopted and periodically updated to serve as a basis for local planning and zoning regulations.



A. Cities and Villages (Municipal Corporations)

Ohio municipal corporations derive their power to enact zoning and land use regulations directly from Ohio Constitution (Section 3 of Article XVIII). *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 225; *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St.3d 69, 71; and *Pritz v. Messer* (1925), 112 Ohio St. 628, 627.



Section 3 of Article XVIII reads: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Zoning regulations are an exercise of the police power granted municipalities by Ohio Constitution. *Garcia v. Siffrin* (1980), 63 Ohio St.2d 252, syl. 2.



A municipal corporation need not have adopted a charter to exercise these home rule zoning powers. *See Northern Ohio Patrolmen's Benev. Ass'n. v. Parma* (1980), 61 Ohio St.2d 375, and *Perrysburg v. Ridgway* (1923), 108 Ohio St. 245.



Municipal zoning ordinances may deviate from state statutes, provided municipal regulations not less strict than state law or the particular state statute prescribes a rule of conduct upon citizens of the state generally and there is a direct conflict between the municipal law and the state statute. *City of Canton v. State of Ohio* (2002), 95 Ohio St.3d 149; *Garcia, supra; see also, City of Avon v. Samanich* (Lorain Cty. App. 1995), 1995 WL 500141 (home day care).



Ohio Revised Code 713.07 related to municipal zoning and land use powers states:

whenever the planning commission of any municipal corporation or any board or officer with city planning powers certifies to the legislative authority of the municipal corporation any "plan" for the districting or zoning thereof according to the uses of buildings and lands, such legislative authority, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity, or general welfare, may regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence or other specified uses, and for such purposes, may divide the municipal corporation into districts to carry out this purpose.



Although this Revised Code section would not be applicable to a municipal corporation which has adopted a conflicting procedure, it is significant to note that the term "comprehensive plan" has <u>not</u> been used in the statute.



Ohio Supreme Court and lower courts have consistently held that a specifically adopted "comprehensive plan" is not a prerequisite to a valid municipal zoning ordinance. In *Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60, cert. denied, 111 S.Ct. 2854, 115 L.Ed.2d 1022 (1991), Ohio Supreme Court held that the court of appeals erred by requiring the City of Montgomery to enact a comprehensive community plan as a prerequisite to a valid zoning ordinance.



B. Counties and Townships

Ohio counties and townships are statutory creatures whose powers not derived from the Constitution, but from specific state statutes. So, zoning authority of counties and townships is much narrower than municipal corporations and cannot deviate from state statute. *Bainbridge Twp. v. Funtime, Inc.* (1990), 55 Ohio St.3d 106 (hours of operation at Geauga Lake Park).



Statutory provisions in Ohio Revised Code dealing with the zoning powers of counties and townships virtually identical. O.R.C. 303.02 recounty zoning powers states in pertinent part:

"Except as otherwise provided in this section, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, the board of county commissioners, may *in accordance with a comprehensive plan*, regulate by resolution the location, heights, bulk, number of stories, and size of buildings and other structures...and, for all these purposes, the board may divide all or any part of the unincorporated territory of the county into districts or zones of such number, shape, and area as the board determines."



The language of O.R.C. 519.02 applicable to townships is virtually identical:

Except as otherwise provided in this section, in the interest of promoting the public health, safety, convenience, comfort, prosperity or general welfare, the board of township trustees may, *in accordance with a comprehensive plan*, regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures... and, for all these purposes, the board may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. *All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.* * * *"(Emphasis added.)





Apple Group, Ltd. v. Granger Township Bd. of Zoning Appeals, Ohio Supreme Court, Slip Opinion 2015-Ohio-2343. (6 to 1 decision.) Held:

Comprehensive plan per O.R.C. 519.02 may be included within township zoning resolution—need **not** be a separate distinct document.



Held: A zoning resolution is enacted in accordance with a comp plan, as required by 519.02 if it:

- 1) reflects current land uses
- 2) allows for change
- 3) promotes public health and safety
- 4) uniformly classifies similar areas
- 5) clearly defines district locations and boundaries
- 6) identifies the use/uses to which each property may be party



Facts/Court Opinions:

- Apple purchased 88 vacant acres.
- Property zoned R-1 residential = 1 & 2-family homes on min. 2-acre lots.
- Twp. has R-2 District = 2 to 3 units/acre if served by central water and sewer.
- Apple sought rezoning to cluster zoning and rebuffed.
- Apple sought residential subdivision = 44 single family homes on one-acre lots (no central water and sewer).
- Applied for 176 variances (4 per lot—frontage, lot width, side yards) → Denied by BZA. (Exhaustion of Administrative remedies)



- Appeal to Court, also declaratory judgment action to declare R-1 <u>as</u> <u>applied, unconstitutional and violating R.C. 519.02.</u>
- Court denied appeal of variances denials as being veiled attempt to rezone (not within authority of BZA) and denied relief on declaratory action.
- Court of Appeals denied Apple's appeal on Apple's argument that zoning was not based on separate, distinct comp. plan.
- Supreme Court upheld Ct. of Appeals decision. (Apple did not challenge reasonableness of zoning, as applied.)
- 7 pages of opinion analyzes what meant by "in accordance with a comprehensive plan".
- No std. definition of "comprehensive plan" in zoning law across the U.S. back to 1922.



- "Some form of forethought and reasoned consideration", as opposed to separate plan document (cites law review articles).
- Minority of states require an independent document separate from the code/resolution.
- Supreme Court followed 6 points in White Oak Property Dev., LLC v. Washington Twp., 12th Dist. Brown, 2012-Ohio-425, for zoning legislation to constitute a comprehensive plan.
- Note: 20-page dissent by Justice Kennedy only—majority opinion ignores expert testimony as to what is a "comprehensive plan" vs. a "resolution". Both sides' experts testified that the resolution is the implementation of a comprehensive plan. (Hartt and Hirsch)



In past, Ohio courts of appeals have specifically held that a specific document called a "comprehensive plan" is not required of a township to have a valid zoning resolution. Arendas v. Bd. of Trustees of Coitsville Twp. (Mahoning) 2008 Ohio App. LEXIS 5493; Reese v. Bd. of Trustees of Copley Twp. (Summit 1998), 1998 Ohio App. LEXIS 2995; BGC Properties v. Township of Bath (Summit 1990), 1990 Ohio App. LEXIS 1026; Midwest Fireworks Mfg. Co., Inc. v. Deerfield Township BZA (Portage 2001), 2001 Ohio App. LEXIS 5861 (a separate, independently-adopted plan from the township zoning resolution is not required particularly where the zoning resolution sets forth the purpose of the district regulations, enumerates permitted and conditionally permitted uses, and is accompanied by a zoning districts map); and Curtis v. Geneva Twp. Trustees (Ashtabula 1996), 1996 Ohio App. LEXIS 2447, unreported



B.J. Alan Co. v. Congress Twp. Bd. of Zoning Appeals (2009), 124 Ohio St.3d 1, Ohio Supreme Court did not specifically answer the question of whether a separate and distinct comprehensive plan document is required by R.C. 519.02

Court held a countywide comprehensive plan can fulfill the "comprehensive plan" requirement of R.C. 519.02

On remand, Court of Appeals reversed the decision of lower court concluding that the Township's zoning resolution is not in accordance with the Wayne County Comprehensive Plan. Resolution had only two districts: agricultural and business/industry.

Zone map showed only one district, agricultural.



II. Basis for Land Use Control; Policy, Map, or No Plan at All?

Based on the foregoing discussion, very clear that the law of Ohio generally considers a comprehensive plan as a <u>policy guide</u> for the promulgation of a local government's planning, zoning, and other land use regulations.



Even though the case law of Ohio generally indicates that a comprehensive plan is a policy guide for local governments, in *K-Mart Corp. v. City of Westlake* (July 10, 1997), 1997 Ohio App. LEXIS 3025, held City of Westlake's "Guide Plan" had the force of law where the Guide Plan was incorporated by reference into the city's zoning code.



This case, however, appears to be an aberration in Ohio law and a close reading of the City of Westlake's Zoning Code does not indicate the intent that the City's comprehensive plan have the force of law. Obviously, comprehensive plans are generally written based upon general land use principles and do not contain the details of regulation found in a zoning code.



Neither land owners, developers, nor local government officials should be legally tied to the comprehensive plan with respect to land use, but more specifically they should be bound to the regulations in a properly adopted zoning code or zoning resolution that reflects the general principles in a comprehensive plan.



Nevertheless, a comprehensive plan serves as an important piece of evidence in both challenging and upholding a zoning regulation.

Comprehensive plan evidence is highly relevant to the issue of whether the community has a legitimate interest in promoting the health, safety and welfare of the community through the particular zoning regulation.



Does not mean that the zoning regulation cannot deviate from the comprehensive plan, but if it does deviate from the comprehensive plan there should be evidence in the legislative record from the planning authority and the local legislative authority as to why this particular zoning regulation deviates from the comprehensive plan.



A concrete example of the importance of a comprehensive plan which has been followed by the municipality and its importance to the success of litigation is the case of *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997).



City of Hudson adopted a growth management ordinance, which the Court called a "slow growth" ordinance, limiting number of residential building permits that could be issued in any given year and a system for allocation of those limited permits among applicants.



In upholding this land use regulation against a federal substantive due process challenge, the federal appeals court cited as a key piece of evidence in support of the City's growth management ordinance the fact that the ordinance was grounded in a comprehensive plan adopted one year earlier.



One of the goals of the comprehensive plan was to manage the City's growth rate so that it did not exceed the capabilities of its infrastructure and to preserve the City's unique character. Numerous studies, public meetings and other community input developed the comprehensive plan over a 2-year period.



Another example, *B.P. America, Inc. v. Avon City Council* (Lorain 2001), 142 Ohio App.3d 38, where court upheld a zoning regulation in Avon's central district which limited development in that area to residential and small retail businesses in order to preserve the area's historically rural atmosphere, which was quickly vanishing.



Although *dictum* in the case opinion, it is significant that the first sentence in the court's opinion states that the city ... "adopted a master plan that set the city's official policy regarding its future growth and development, including land use" one year prior to passage of the restrictive "central district" zoning. *Id.* at 40.



• See also, The Bryco Co. v. City of Milford (Clermont Cty. App. 1999), 1999 Ohio App. LEXIS 4750 (court cites city's comprehensive plan goal of more single-family, owner occupied homes in the city, rather than multi-family dwellings, as a basis to uphold city council's denial of request zoning change request).



• See also, Baur v. Wadsworth (Medina Cty. App. 2002), 2002 Ohio App. LEXIS 3944 (court cites to the city's comprehensive plan to uphold residential zoning against a request for rezoning to commercial uses where city had approved the rezoning and the voters restored the residential zoning by referendum).



III. Conditional Uses and Comprehensive Plan

Ohio case law reveals municipalities often state in their zoning codes that one condition for the grant of a conditional or special use permit is that the proposed use <u>not</u> be incompatible with the provisions of a comprehensive plan. This condition has been upheld by the courts. *E.g., Oberer Development Company v. City of Fairborn* (Green Cty. App. 1999), 1999 Ohio App. LEXIS 1812; *Varhola v. City of Akron* (Summit Cty. App. 1999), 1999 Ohio App. LEXIS 3263; *Dingledine Basic Materials, Inc. v. Butler County Board of Zoning Appeals* (Butler Cty. App. 1999), 1999 Ohio App. LEXIS 1415. However, the Code should specifically refer to the comprehensive plan in its review standards. *Gross Bldrs. Of Tallmadge* (Summit) 2005 Ohio App. LEXIS 3865.



IV. The Relevant Real Estate Market and Updates

A comprehensive plan should be updated periodically to comport with actual land use trends and land use needs of the local community.

Many municipal charters require periodic updates of the comprehensive plan.

A necessary corollary to the update of comprehensive plans should be amendments to the zoning regulations and zoning map to further the policies set forth in the updated comprehensive plan.



Not only should it be the responsibility of the local government officials to reconsider and update comprehensive plans, but it should also be the responsibility of land owners and developers to inform local government officials of needed land use policy changes on a periodic basis.



One thing is certain, litigation over rezonings and other land use regulations is lengthy and expensive. Local governments continue to benefit from a presumption of validity of local regulations applied by the courts. *Goldberg Cos., Inc.,* 81 Ohio St.3d at 209; *Jaylin Invs., Inc. v. Moreland Hills,* 107 Ohio St.3d 339, 341. The landowner's/developer's burden of proof in such litigation continues to be significant. A key piece of evidence available to a municipality to defend a zoning challenge can be an up-to-date comprehensive plan coupled with an up-to-date zoning code and map generally adhering to the plan.



Zoning in Accordance with a Comprehensive Plan: Apple v. Granger Township

The Planners' Perspective

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APPLE GROUP V. GRANGER TOWNSHIP

- "Granger Township's desire to maintain the rural character of its land is a legitimate governmental goal, which may be regulated by its zoning resolution."
- "The zoning resolution itself meets the statutory requirements of a comprehensive plan, because it has the essential characteristics of a comprehensive plan; it encompasses all geographic parts of the community and integrates all functional elements."



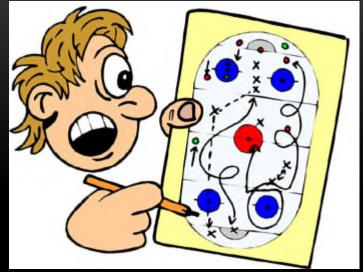


APPLE GROUP V. GRANGER TOWNSHIP

- "there is no standard definition for 'comprehensive plan' in the context of zoning law"
- "comprehensive planning requires a form of forethought and reasoned consideration, as opposed to a separate plan document that becomes an overarching constitution guiding development.



KEY WORDS...



• "... forethought and reasoned consideration"

So.... We don't need a separate comprehensive plan, but we need to have done some planning.....

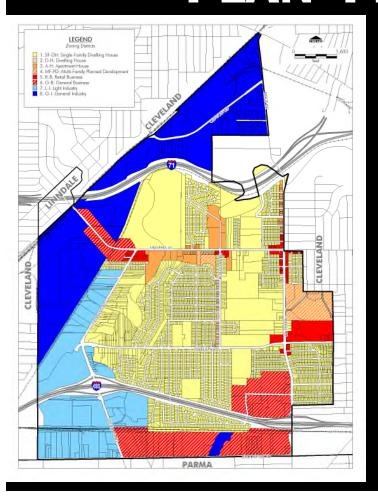


Do we need more economic development?

Where should businesses go?

Should we allow townhouses?

PLAN FIRST...

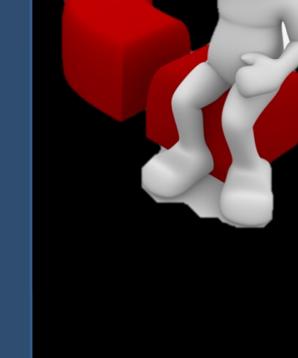


ZONE SECOND...

Commits Goals and Policies to Rules and Regulations

FUNDAMENTAL QUESTION...

Is it
BETTER to
have a separate
planning
document?





WHAT IS A COMPREHENSIVE PLAN?

Basic, traditional definition:



Set of policy statements (& maps) to guide future land use and development

Supported by analytic tables, maps, narrative

Covers the entire land area of the jurisdiction

Covers all elements related to physical development

Has a long-range outlook (10 years plus)

Is general, rather than overly specific

Guiding document, not regulatory



HOW CAN IT HELP?

Provide guidance for adapting to change

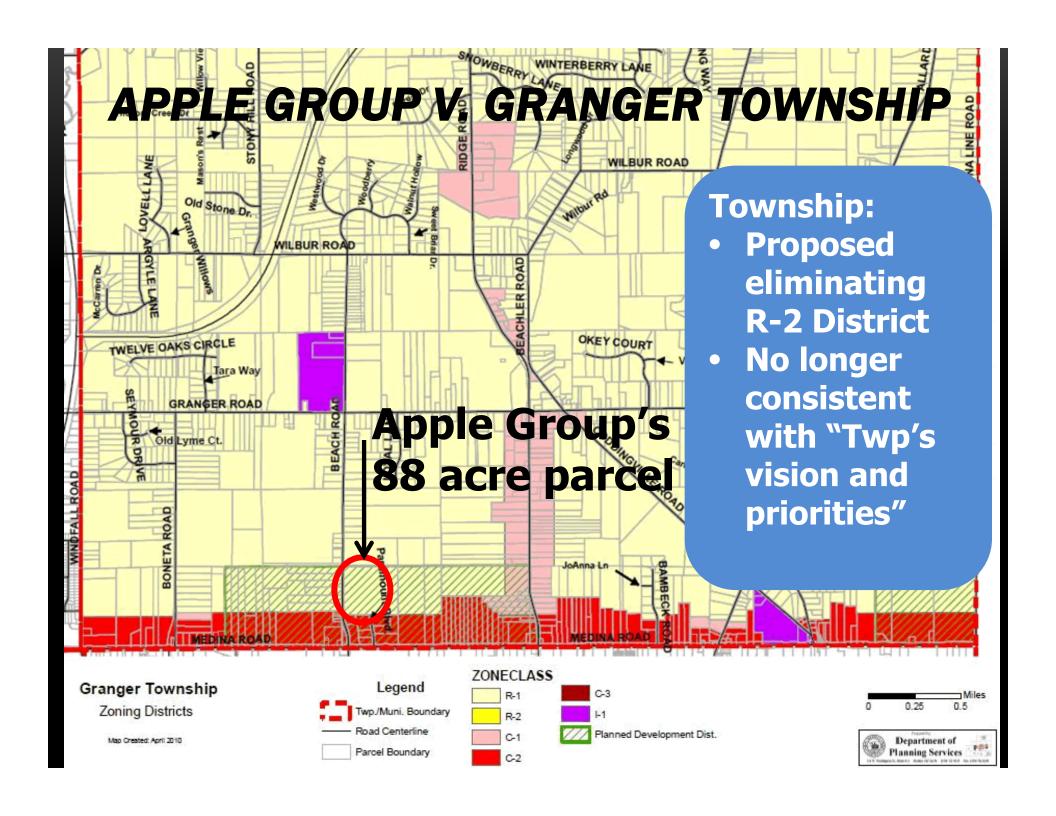
Apple Group, LTD., v. Granger Township BZA

 No guidance for making district changes B.J. Allen Co. v. Congress Township BZA

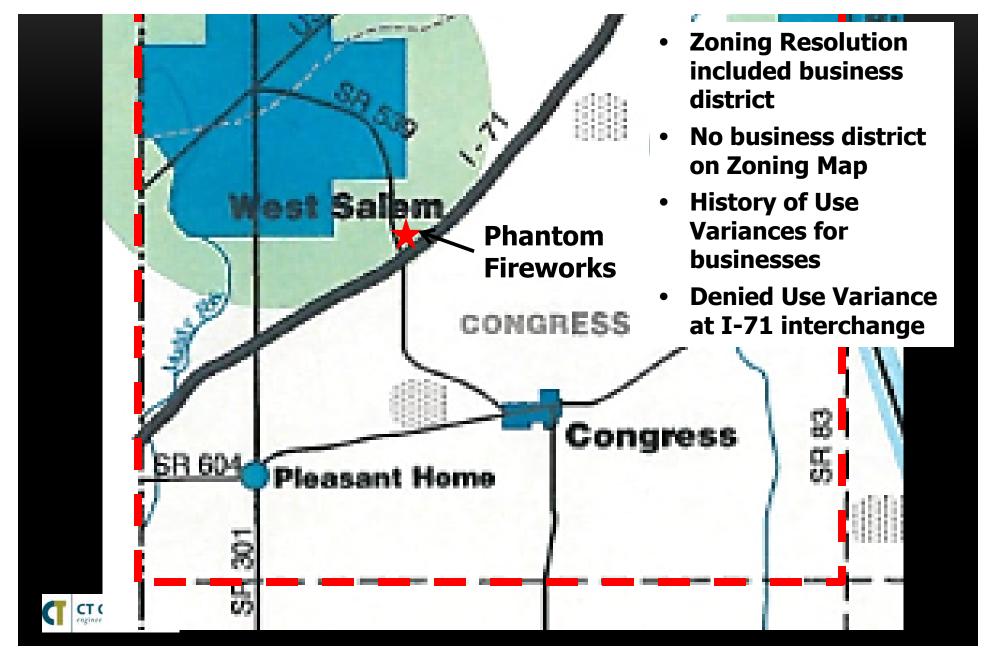
 Mismatch between Zoning Text & Map

"local governments must show that their underlying zoning is based upon a coherent land use policy derived from rational consideration of the needs of a community."





B.J. ALAN V. CONGRESS TOWNSHIP



WHY SOME DON'T DO A PLAN.....



HOW MUCH PLANNING IS NEEDED?



- Middle Of The Road Review,
 Some Change/Rethinking Of Policies
 More Topics, Somewhat Detailed,
 Some Public Engagement
- Major Changes, Many Topics,
 Detailed Analysis, Fine Tuned
 Recommendations,
 Extensive Citizen Participation

It Depends:

- Complexity of community
- Change since last plan
- # of Topics
- Level of Detail
- Amount of Citizen Participation

With no specific (restrictive) definition, there's room for flexibility

ELEMENTS TO CONSIDER

Understand conditions/trends/issues

Analysis of gaps/ potential/ options

Vision/Goals of future state

A description of those goals

The means to get there

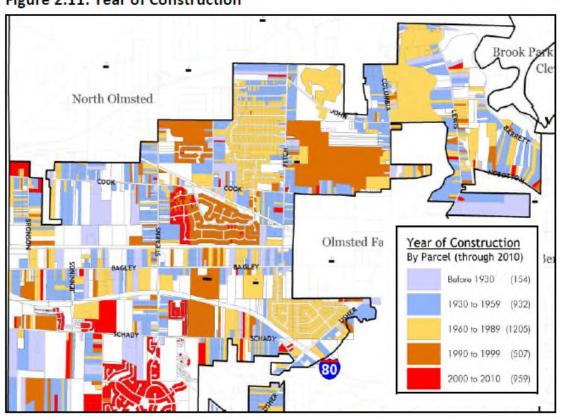


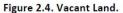
CONDITIONS/TRENDS/ISSUES

- PopulationVacant Land
- Housing

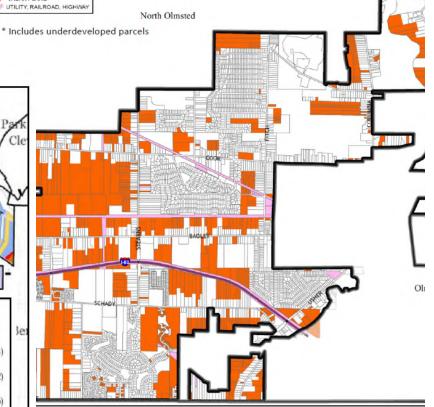
ropalation vacant Earle





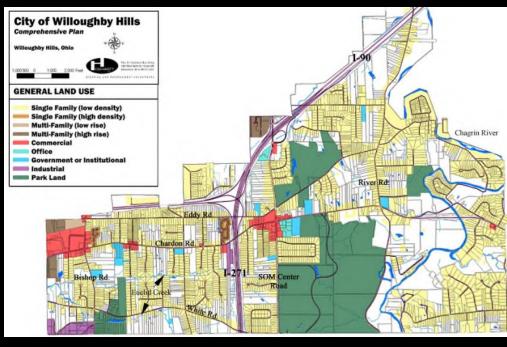


◆ VACANT LAND

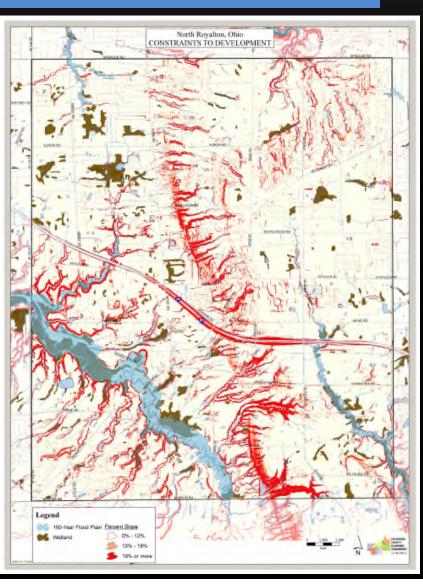


CONDITIONS/TRENDS/ISSUES

- Existing Land Use
- Existing Zoning
- Natural Features







ARTICULATE THE VISION

Vision/Goals — where do we hope to be in the future?

Such As:

- Preserve the existing low-density residential pattern
- Increase residential choices
- Enhance/increase the recreational opportunities

OR

- ☐ Development shall be carefully balanced with the preservation of natural resources
- Housing opportunities shall be expanded, with an emphasis on affordability, quality and revitalization



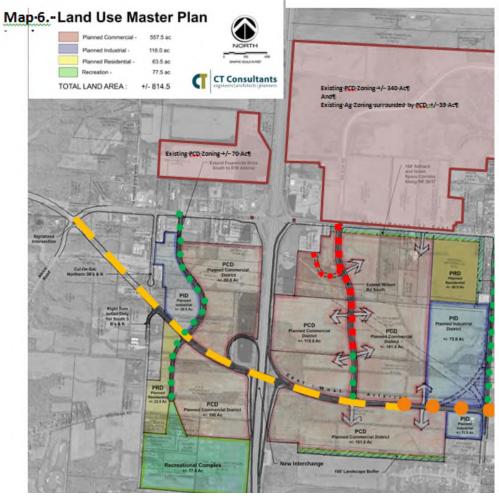
GRANGER TOWNSHIP ZONING RESOLUTION GOALS

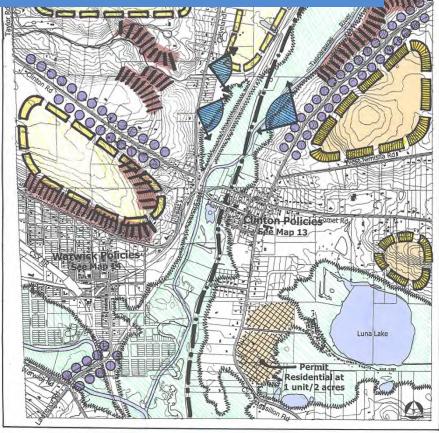
- "To promote and protect the health, safety, morals and welfare of the residents of the unincorporated area of Granger Township, Medina County, Ohio and
- to conserve and protect property and property values, and
- to provide for the maintenance of the rural character of Granger Township, and
- to manage orderly growth and development in said Township."



DESCRIBE GOALS/OBJECTIVES

Thru Maps





General Development Policies Village-Wide



Protect Visual Quality of





Maximize Potential of Historic Canal/ Towpath

> Promote Conservation Development - allow flexible building arrangements require open space to be preserved





Village of Clinton COMPREHENSIVE PLAN





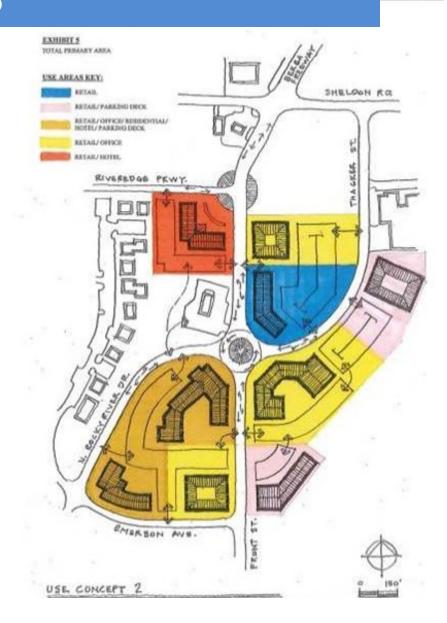
Map

DESCRIBE ASPIRATIONS

Thru Photos/ Illustrations

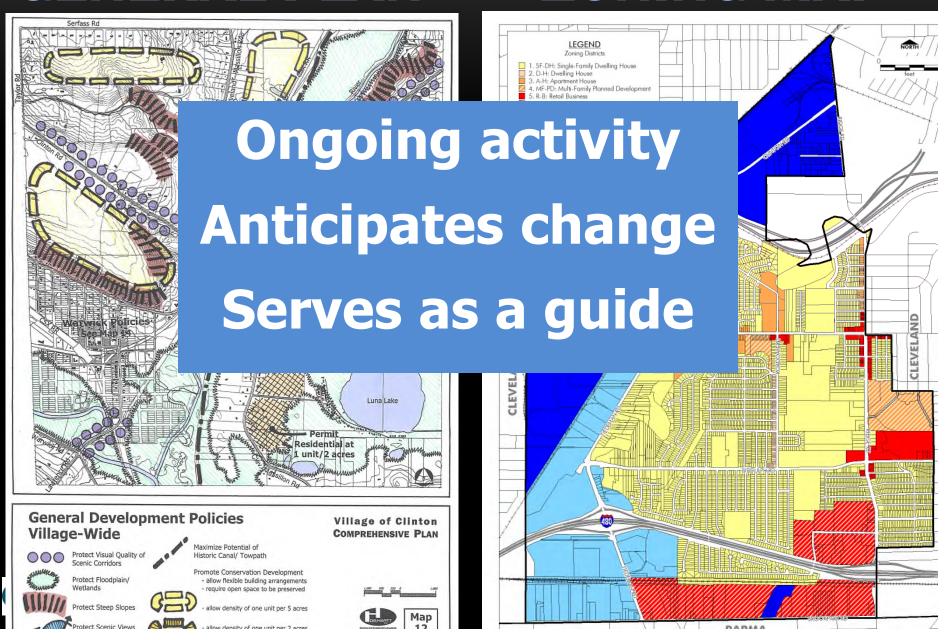






GENERAL PLAN

ZONING MAP



From Todd's Presentation

A comprehensive plan should be updated periodically

- actual land use trends and
- land use needs of the local community.

A necessary corollary ...

.....should be amendments to the zoning regulations and zoning map to further the policies set forth in the updated comprehensive plan.



To "further advance" the case for a separate document...

- The Zoning is:
 - Not responsive to change
 - Overly prescriptive
- The Plan provides:
 - The explanation of the public interest
 - The Why
 - The rationale for when to respond to change

...and doesn't need to be a daunting task



Not being responsive to change

The "White Oak" Criteria - the dilemma

Reflects current land uses

Allows for change

Promotes health and safety

Uniformly classifies similar areas

Clearly defines district locations and boundaries

Identifies the use or uses to which each property may be put



SO, What's the "change" concern?...

- ☐ The world...and even the neighborhood...are constantly in flux and the *current planning* parameters don't require any understanding the "elements of change." "allowing for" is not the same as "preparing for."
- ☐ Yet, we plan because the market is "not doing the job" uses, quality, density, locations. So, we're seeking change; planning strives to manipulate the market within "reasonable bounds."
- ☐ Essential to understand these changing trends...to be equipped to understand and respond.



SO, What's the "too prescriptive" concern?...

- ☐ The zoning prescribes..."this is it;" and... if we said it we mean it...forever!!
- ☐ The zoning often typically includes some unconstitutionally zoned land.
- □ Regular and oversight and monitoring...the planning ... provides the rationale to evaluate and when to be responsive to changes that continuously occur.



To address the "change" potential...need to understand

- Market characteristics and trends
 - Location criteria particularly industrial and office
 - Supply and demand
 - Obsolescence
- No longer "proportional" distribution (in case you think you'll get lots of offices).



To address the "change" potential...need to grasp and balance the differences between...

- Wants that are either
 - more restrictive
 - overly aspirational
- Needs
- What is likely



To address the "change" potential - need to understand that...

Influences change – both inside and outside ... it may not even be your fault

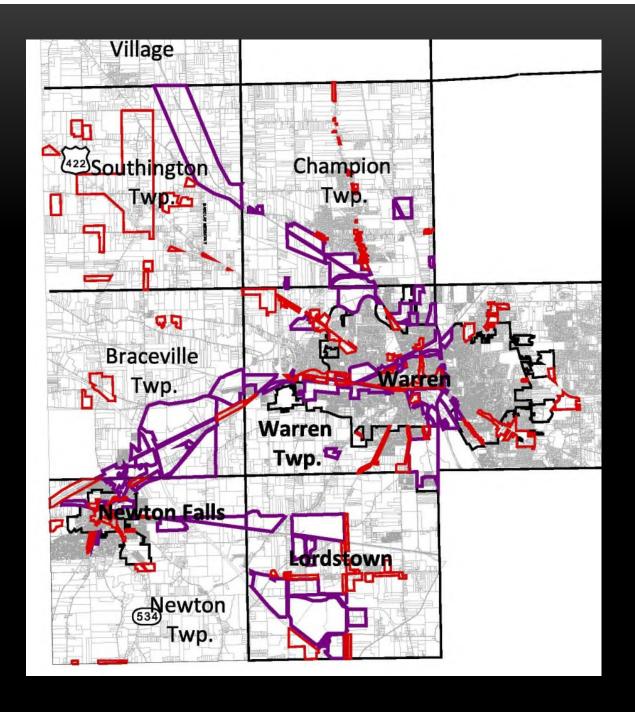
The private sector is the community's partner

The Plan ("needs") assessment is continuous

Change may be warranted in response to the environment constantly changing



Examples of the disconnect

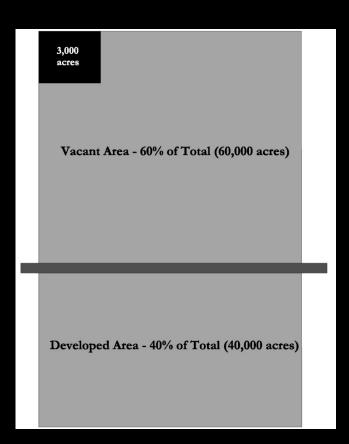




ANALYSIS - POTENTIAL

Development Estimates – "Order of Magnitude"

- 2030 Additional 10,000 new people, additional 5,000 jobs
- Land required –
 Approximately 3,000 acres:
 - Residential 2,000 acres
 - Industrial 400 acres
 - Other 400 600 acres
- Estimate of vacant land with potential sewer lines by 2030 – 21,000 acres.

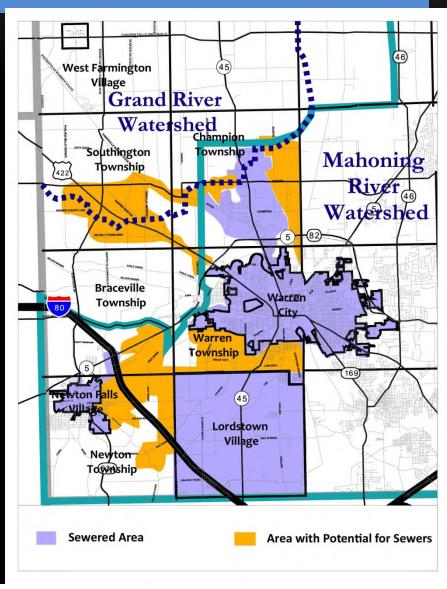




ANALYSIS - POTENTIAL

Sewer Service Area Estimate

Approximately 21,000
 acres of land in the Plan
 Area can be developed.





The zoning is "prescriptive;" the plan doesn't need to be...

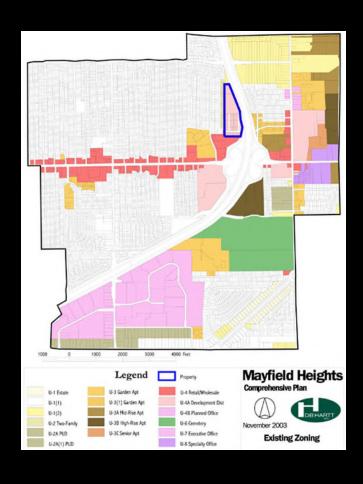
- The future land use map...
 - Doesn't need to be parcel-by-parcel specific
 - Never focuses sufficient resources to "get it right" every time
- Use "bubbles" to convey the policy



When planning - since zoning follows planning - be mindful of the constitutional test for zoning...

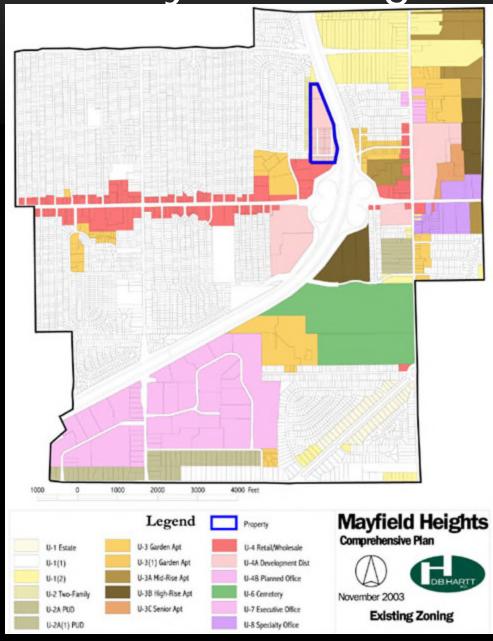
Advance a legitimate public interestand

Permit reasonable economic use of the property





Shemo vs. Mayfield Heights





SHEMO - "FACTS" OF CASE

Decision

- Existing zoning (townhouses) unreasonable
- Imposed Commercial
- Entitled to damages for temporary taking delay/hassle

Zoning History

- Initially: Single Family, 8,000 sq. ft. lots
- Intermediate: Townhouses, 5.75 units/acre
- Currently: Retail (Costco)



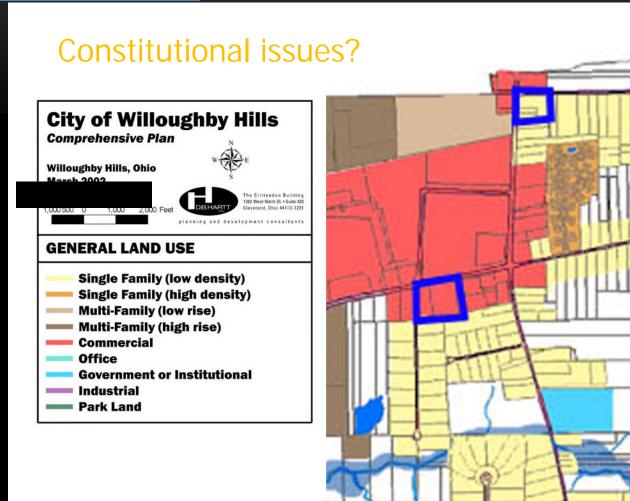
What "SHEMO" Is Not...

• ...<u>not</u> viewed as a good or precedentsetting land use/zoning decision...

... in my humble opinion









Compared to zoning the plan will appropriately give...

- Proportional weight to needs, wants, and what's possible (repeating is a good thing)
- Document the real impacts plus and minus – compared to perceptions
- Recognize that multiple possibilities...in an area... may equally "advance the public interest"
- Identify the reasonableness of alternative development choices ...even if it's not your personal choice



Compared to zoning the plan will appropriately...

- Pay attention to the second prong of defensibility:
 - To permit reasonable economic use of the land
- Help avoid using the courts as a crutch.
- Be a reminder that conditions are rarely static and the job is done!!!



- Preparation of the Plan doesn't need to be daunting.
- Think "Triangle"

Little Change, Few Topics, Broad Brush

Middle Of The Road Review,
Some Change/Rethinking Of Policies,
More Topics, Somewhat Detailed,
Some Public Engagement

Major Changes, Many Topics, Detailed Analysis, Fine Tuned Recommendations, Extensive Citizen Participation



FINALLY.....





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Questions?

Todd Hunt, Kristin Hopkins and David Hartt

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