

Planning and Zoning Commission

May 6, 2024
Work Session

Case #: **2024-0006**

Case Title: **Title 21 Text Amendments: H.O.M.E.
Initiative (AO 2023-87(S))**

Agenda Item #: **-----** Supplementary Packet #: **4**



Additional information:

— MOA Legal Opinion Updated

- Compliance with the comprehensive plan is mandatory for land use decisions



Other:

Sent by email: **X** yes no



MUNICIPALITY OF ANCHORAGE
Office of the Municipal Attorney
Memorandum

DATE: April 22, 2024 (revised from the February 27, 2024 version)
TO: Craig Lyon, Director of Planning
FROM: Allison P. Bolgiano, Assistant Municipal Attorney *QB*
THRU: Anne R. Helzer, Municipal Attorney *CRB for A.H.*
SUBJECT: Consistency between land use decisions and the Comprehensive Plans is required (RFLS 2/5/24)

THE PLANNING DEPARTMENT HAS ELECTED TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE FOR THIS OPINION OF THE OFFICE OF THE MUNICIPAL ATTORNEY BY SHARING THIS OPINION WITH THE PLANNING AND ZONING COMMISSION AS PART OF THE PLANNING DEPARTMENT'S REVIEW OF AO 2023-87(S), THE "HOME INITIATIVE." ACCORDINGLY, THIS OPINION IS PART OF THE PUBLIC RECORD FOR PLANNING AND ZONING COMMISSION CASE 24-0006.

I. Question Presented

Must land use decisions and regulations¹ be consistent with Anchorage's Comprehensive Plan?

II. Short Answer

Yes, under Anchorage Municipal Charter Section 12.01, land use decisions and regulations must be consistent with Anchorage's Comprehensive Plan.

III. Legal Analysis

¹ In this opinion and in AS 29.35.180, the phrase "land use regulation" (or "land use regulations") is synonymous with "municipal code provisions on land use," and does *not* refer specifically to regulations promulgated by a municipal department. The Alaska Supreme Court uses "land use regulations" in this more generic sense in which "regulations" is synonymous with "code" or "laws" or "zoning." See *Native Vill. of Eklutna v. Bd. of Adjustment for Municipality of Anchorage*, 995 P.2d 641, 643-44 (Alaska 2000); *Price v. Dahl*, 912 P.2d 541, 542-43 (Alaska 1996) (citing *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 377-79 (Alaska 1995)).

**a. The Charter Requires the Adoption of a Comprehensive Plan that Governs
Development in the Municipality and is Implemented by Code.**

State law provides that “[a] home rule borough shall provide for planning, platting, and land use regulation.”² In fact, zoning is one of just three mandatory areawide powers of home rule municipalities alongside operating a school system and collecting taxes.³ The Anchorage Municipal Charter, rather than state law, is the authority that requires the Municipality to adopt a comprehensive plan.

The Charter requires adoption of a comprehensive plan that controls land use decisions. Section 12.01 of the Charter provides, “The assembly by ordinance shall adopt and implement, and from time to time modify, a comprehensive plan setting forth goals, objectives and policies governing the future development of the municipality.” During the Charter Commission’s deliberations over the land use planning section of the Charter, commissioners expressed a desire for the Charter to call on the Assembly to adopt, by ordinance, a comprehensive plan so that the Assembly “will pay attention to planning in a comp plan and [the Assembly] will direct the action to make that plan really work” and avoid what happened with the 1980 comprehensive plan that was merely a “policy statement” because the local government “never adopted it . . . never carried it on.”⁴ Commissioner Shari Holmes supported Charter language that would require the Assembly to adopt a comprehensive plan by ordinance to govern the Municipality’s development because, “[W]e wish to serve the legislative body with notice that we expect these

² AS 29.35.180. The provisions of Alaska Statutes Chapter 29.35 apply equally to home rule boroughs and unified home rule municipalities even though the law, in places such as AS 29.35.180, refers only to boroughs. *See* AS 29.04.010. (“A home rule municipality is a municipal corporation and political subdivision. It is a city or a borough that has adopted a home rule charter, or it is a unified municipality. A home rule municipality has all legislative powers not prohibited by law or charter.”)

³ AS 29.35.150-.180.

⁴ Hearing tape, Charter Commission, March 28, 1975, statements of Commissioner Arliss Sturgulewski.

things to be done in concurrence with the comprehensive plan.”⁵ Her words “these things,” refers to “subdivision regulations and ... zoning,” from two sentences earlier in the same statement.⁶

The minutes and tapes of the Charter Commission provide no guidance on the meaning of the word “governing” as used in Section 12.01.⁷ Given the absence of legislative history about the meaning of “govern” as used in Section 12.01 and lack of a statutory definition for “govern” in the Charter, “govern” should be given its common meaning.⁸ A dictionary definition “ ‘provides a useful starting point’ for this exercise.”⁹ “Govern” means “to control, direct, or strongly influence the actions and conduct of; to exert a determining or guiding influence over; to serve as a precedent or deciding principle for.”¹⁰ The Charter thus requires that Anchorage’s comprehensive plan direct and provide a deciding principle for future development in the Municipality.

The language the Commission initially considered for the Charter’s planning section did not include wording requiring the Assembly to adopt and *implement* a comprehensive plan by ordinance.¹¹ Commissioner Mary Frohne proposed adding “implement by ordinance” to the section.¹² Commissioner Frohne believed that adding “implement” would “make the assembly go back and make . . . everything else conform to [the comprehensive plan].”¹³ The Charter Commission minutes reveal an intention that Anchorage’s zoning regulations should conform to the comprehensive plan in order to implement the plan. All but one commissioner voted in favor

⁵ Hearing tape, Charter Commission, March 28, 1975.

⁶ *Id.*

⁷ *Id.* (absence); Anchorage Municipal Charter (absence).

⁸ See *State of Alaska v. Recall Dunleavy*, 491 P.3d 343, 359 (Alaska 2021) (quoting *Alaska Pub. Def. Agency v. Superior Court*, 450 P.3d 246, 253 (Alaska 2019)).

⁹ *Id.*

¹⁰ *Govern*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/govern>.

¹¹ Hearing tape, Charter Commission, March 28, 1975 (motion of Commissioner Mary Frohne).

¹² *Id.*

¹³ *Id.*

of the amendments calling up the Assembly to adopt and implement, by ordinance, a comprehensive plan. The Charter Commission expressed its belief that the comprehensive plan was “in essence, mandating” the Assembly to adopt goals, objectives, and policies to control the future development of the municipality.¹⁴

Although the Commission minutes reveal the Commissioners’ intent behind including the word “implement” in the Charter, the legislative history and Charter itself do not define implement, so a common definition fills the gap.¹⁵ Implement means to “carry out, accomplish; especially to give practical effect to and ensure actual fulfillment by concrete measures.”¹⁶ The inclusion of “implement” in Section 12.01 makes clear that the comprehensive plan must be given practical effect through the land use code. Because the land use code is the tool by which the Municipality implements¹⁷ its comprehensive plan, it follows that the code must be consistent with the comprehensive plan if the plan is to govern, or exert a determining influence, over Anchorage’s development.

This conclusion—that the land use code implements the comprehensive plan—is also plainly stated in the Anchorage Municipal Code. The Code specifies that the purpose of Title 21, the Code’s land use title, is to “implement the comprehensive plan in a manner which protects the public health, safety, and economic vitality.”¹⁸ The comprehensive plan cannot be put into effect by legislation or decisions that contradict it—such actions would undermine the comprehensive plan rather than implement it. Phrasing it another way, Title 21 provides, “The elements of the comprehensive plan shall be implemented as provided in this title.”¹⁹

¹⁴ Hearing tape, Charter Commission, March 28, 1975.

¹⁵ See supra p. 3.

¹⁶ Implement, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/implement>.

¹⁷ “Implement” also means to “to put into effect according to or by means of a definite plan or procedure.” *Implement*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/implement>.

¹⁸ AMC 21.01.030.

¹⁹ AMC 21.01.080D.1.

b. Title 21 Explicitly Requires Many Decisions to be Consistent with the Comprehensive Plan, but Even Where Consistency is not Overtly Mandated, it is Nonetheless Required.

Title 21 of the Code mandates that many land use actions and decisions be consistent with the comprehensive plan. Even where the Code does not explicitly require that a certain type of land use action comply with the Comprehensive Plan, such consistency is still required by the Charter. The Comprehensive Plan may be amended when a change is necessary to address a change in assumptions from those on which the plan is based; identification of new issues or needs not adequately addressed in the plan; a change in the policies or goals governing the municipality's physical development, or identification of an error or omission in the plan.²⁰ When rezoning or updates to Title 21 are needed to address a change on the ground or in policy goals, the Municipality must first, or concurrently, amend the Comprehensive Plan so that the new land use regulations or zoning will be consistent with the Comprehensive Plan.²¹

Below is an illustrative, but not exhaustive, list of examples of provisions in Title 21 requiring land use decisions comply with the comprehensive plan:

- The Assembly may approve a text amendment to Title 21 if the amendment meets three criteria, one of which is: "The proposed amendment is consistent with the comprehensive plan and the stated purposes of this title."²²
- When the Planning and Zoning Commission reviews applications for conditional uses, it must find that "[t]he proposed use is consistent with the comprehensive plan," among other criteria.²³

²⁰ See AMC 21.03.070C.2.a.

²¹ See AMC 21.01.080D.1; AMC 21.03.210C.3.a.

²² AMC 21.03.210C.2.

²³ AMC 21.03.080D.1.

- One purpose of site plan review is “to ensure compliance with the . . . objectives of the comprehensive plan.”²⁴
- When an applicant seeks a minor modification of otherwise applicable development regulations for a project, the Planning and Zoning Commission or Urban Design Commission can only approve the requested modification if it is “consistent with the comprehensive plan.”²⁵
- “The residential zoning districts established in [AMC 21.04.020] generally are intended to . . . [p]rovide appropriately located areas for residential development that are consistent with the comprehensive plan and with standards established by this code[.]”²⁶
- “Zoning map amendments may also require an amendment to the comprehensive plan. Determination of whether the comprehensive plan map must also be amended is based upon whether the proposed zoning map amendment is to a zone consistent with the comprehensive plan map.”²⁷ When a comprehensive plan amendment is needed for new zoning and the comprehensive plan to be consistent, a concurrent change can be made.²⁸ “Requests for rezonings (zoning map amendments) may be considered

²⁴ AMC 21.03.180A.

²⁵ AMC 21.03.120D.1.

²⁶ AMC 21.04.020A.1.

²⁷ AMC 21.03.160C.

²⁸ When undertaking a rezoning and concurrent comprehensive plan amendment, the Municipality must follow the procedures of both AMC 21.03.070 for the comprehensive plan amendment and AMC 21.03.160 for the rezoning and update to the official zoning map described in AMC 21.01.150. These procedures involve public notice, community meetings, review by the Planning Department, planning and zoning commission review and recommendations after a public hearing before the PZC, and finally Assembly review.

Furthermore, “Where a board or commission has authority under this title to review and comment on a land use matter, *the assembly shall not take final action* on the matter until it has received and taken notice of the review comments and recommendations of the board or commission.” AMC 21.02.090B.2 (emphasis added). The Planning and Zoning Commission has authority under Title 21 to review and make recommendations to the Assembly on rezonings, comprehensive plan amendments, and Title 21 text amendments. *See* AMC 21.02.030A. The Assembly, therefore, is prohibited from taking final action on a rezoning, comprehensive plan amendment, or Title 21 Text amendment without first receiving and taking notice of the Planning and Zoning Commission’s comments and

concurrently with a comprehensive plan map amendment. The zoning map amendment shall be to a zone corresponding to the requested comprehensive plan map designation. Concurrent zoning map amendments shall meet all of the approval criteria of subsection 21.03.160E.”²⁹

The Code provisions in the bullet point immediately above demonstrate that consistency between the official zoning map and the comprehensive plan is of such importance that the Code specifies a process for maintaining consistency between the zoning map and the plan. The Code recognizes that sometimes rezonings are necessary before the next periodic comprehensive plan update, but Code nonetheless requires that such rezonings be consistent with the comprehensive plan even if achieving consistency requires amending the comprehensive plan.³⁰

IV. A Rezoning or Title 21 Text Amendment Inconsistent with the Comprehensive Plan would Likely Be Struck Down by the Alaska Supreme Court for Violating the Charter and the Inherent Purpose of Comprehensive Planning

Although the Alaska Supreme Court has never struck down an Anchorage land use regulation or decision for failing to follow the Municipality’s comprehensive plan, a review of the case law indicates that the Court would very likely strike down zoning regulations that are inconsistent with Anchorage’s comprehensive plan as violations of Charter Section 12.01.

“[Z]oning ordinances, whether they are enacted by the voters or by the city council, are subject to post-enactment review,” in Alaska.³¹ When the Alaska Supreme Court has reviewed local zoning ordinances, the Court has repeatedly held that the zoning regulations of localities required

recommendations on the matter. “The land use review and approval procedures specified in Chapter 21.03, Review and Approval Procedures, *supplement the assembly’s procedures under Title 2,*” meaning that the Assembly must follow Title 21’s processes in addition to its own legislative procedures for public notice, hearings, and review. AMC 21.02.090B.1 (emphasis added).

²⁹ AMC 21.03.070C.3.a.

³⁰ *See id.*

³¹ *Griswold v. City of Homer*, 186 P.3d 558, 567 (Alaska 2008) (Carpeneti, J. dissenting).

to adopt comprehensive plans by state law must implement those jurisdictions' comprehensive plans.³² The Court is unlikely to stray from its longstanding comprehensive plan jurisprudence requiring consistency between plans and regulations simply because Anchorage enacts a plan under its Charter rather than state law.

Both local governments and state agencies required to engage in comprehensive planning must plan first and then make land use decisions in accordance with their plans under binding Alaska precedents. The Court held that the Department of Natural Resources' decision to dispose of state lands for agricultural homesteading before the adoption of a regional plan for those public lands "defie[d] logic" as it "ma[de] little sense to require comprehensive regional planning after the relevant land use decisions have been made."³³ Similarly, it would make little sense for Anchorage to have a comprehensive plan designed to govern the future development of the Municipality and then not to follow that plan. The Alaska Supreme Court would be unlikely to allow such an illogical land use planning situation to persist.

In an opinion about Anchorage's compliance with its comprehensive plan when issuing a conditional use permit for a gravel mine near Eklutna Lake on lands of cultural significance to the Native Village of Eklutna, the Court wrote, "The Municipality of Anchorage is required by AS 29.40.030 to adopt [] a comprehensive development plan and *implement* land use regulations *in accordance* with the plan."³⁴ Arguably, this is a misstatement of law since AS 29.40.030

³² See *Price v. Dahl*, 912 P.2d 541, 542–43 (Alaska 1996); *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 377–79 (Alaska 1995); *Griswold v. City of Homer*, 186 P.3d 558, 562–563 (Alaska 2008) (holding that state statutes require planning commission create comprehensive plan implemented through zoning regulations).

³³ *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 378 (1995) (quoting *Alaska Survival v. State, Department of Natural Resources*, 723 P.2d 1281, 1289 (Alaska 1986)). See also *Price v. Dahl*, 912 P.2d 541, 542–43 (Alaska 1996) ("A comprehensive plan must be in place before borough zoning regulations can be implemented.")

³⁴ *Native Vill. of Eklutna v. Bd. of Adjustment for Municipality of Anchorage*, 995 P.2d 641, 643–44 (Alaska 2000) (emphasis added).

applies to first- or second-class boroughs and not home rule municipalities. If “AS 29.40.030” were replaced with the words “the Anchorage Municipal Charter,” then the statement would certainly be correct. The important thing is that the action required of the Anchorage Assembly, adopting a comprehensive plan and implementing it through land use regulations, is the same whether that action is required by state law or the Charter. In other words, because Anchorage has imposed a comprehensive planning requirement on itself, the Court would very likely hold that comprehensive planning in Anchorage serves the same purpose as it does in first- and second-class boroughs controlled by AS 29.40.030. A holding by the Alaska Supreme Court that Anchorage’s land use regulations must be consistent with its Comprehensive Plan would harmonize Alaska’s comprehensive planning jurisprudence across different types of local government and uphold a fundamental tenant of land use law nationwide.

In states like Washington and Oregon with well-developed bodies of land use law, local governments’ land use decisions and regulations comply with their comprehensive plans. The underlying logic of this requirement is the same as the Alaska Supreme Court has expounded: a plan is of little use if it is not followed. In Washington State, counties that must engage in comprehensive planning under the state’s Growth Management Act (“GMA”) “shall adopt a comprehensive plan . . . and development regulations that are consistent with and implement the comprehensive plan.”³⁵ In a leading case interpreting the GMA’s consistency requirement, the Washington State Supreme Court held:

Comprehensive plans serve as ‘guides’ or ‘blueprints’ to be used in making land use decisions . . . A comprehensive plan does not directly regulate site-specific land use decisions. Instead, local development regulations, including zoning regulations, directly constrain individual land use decisions. Such regulations must be consistent with the comprehensive plan.³⁶

³⁵ RCW 36.70A.040.

³⁶ *Woods v. Kittitas County* 162 Wash.2d 597, 174 P.3d 25 (Wash. 2007) (quoting *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 873, 947 P.2d 1208 (Wash. 1997)) (citing *Id.*; then citing *Viking Props.*,

Oregon requires each city and county in the state to “[p]repare [and] adopt . . . comprehensive plans . . . ; [e]nact land use regulations to implement their comprehensive plans; . . . make land use decisions . . . in compliance with the . . . plan and land use regulations.”³⁷ Based on this statutory language, the Oregon Supreme Court held, “The basic instrument for county or municipal land use planning is the ‘comprehensive plan.’ . . . The plan has been described as a general plan to control and direct the use and development of property in a municipality.”³⁸ Under Oregon law “a local government’s comprehensive plan holds the preeminent position in its land use powers and responsibilities. Zoning and subdivision ordinances, and local land use decisions, are intended to be the means by which the plan is effectuated and, to such an extent, they are subservient to the plan.”³⁹ In Washington and Oregon, like Alaska, comprehensive plans direct future growth while zoning regulations implement the goals embodied in comprehensive plans.

V. Conclusion

The requirement of consistency between a municipality’s comprehensive plan and land use regulations emanates from the basic purpose of a plan: a plan sets a vision whereas specific decisions and regulations are the tools for realizing the vision described in a plan. Anchorage’s Comprehensive Plan sets the overall goals, trends, and policies of the Municipality’s future development while zoning regulations and land use decisions implement the comprehensive plan. In short, under the Anchorage Municipal Charter, land use decisions and the zoning code

Inc. v. Holm, 155 Wash.2d 112, 126, 118 P.3d 322 (2005); then citing RCW 36.70B.030(1) and WAC 365-195-800(1)).

³⁷ ORS 197.175(2)(a)-(d).

³⁸ *Baker v. City of Milwaukie*, 271 Or. 500, 506, 533 P.2d 772, 775 (Ore. 1975) (quoting *Fasano v. Washington Co. Comm.*, 264 Or. 574, 582, 507 P.2d 23, 27 (Ore. 1973)) (internal citations omitted in original).

³⁹ *Philippi v. City of Sublimity*, 294 Or. 730, 735, 662 P.2d 325, 328 (Ore. 1983) (quoting *Baker v. City of Milwaukie*, 271 Or. 500, 533 P.2d 772 (1975) (citing ORS 92.044(6) and ORS 197.175(2)(d))).

must be consistent with the Comprehensive Plan. Land use decisions or regulations inconsistent with the Comprehensive Plan violate the Charter and Title 21 and would be unlikely to withstand judicial scrutiny if challenged.