The Big Box Challenge: How to Handle it Successfully

2:45—4:00 p.m.
Friday, March 10, 2006
Sturm College of Law/Frank J. Ricketson Law Building

Presentations review how three communities weighed the pros and cons of large retail stores and changed their land use regulations to limit or control this type of development.

**Moderator/ Speaker:** Dan Curtin, Jr., Esq.
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**Panelists:**
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THE BIG BOX CHALLENGE: HOW TO HANDLE IT SUCCESSFULLY

REGULATING BIG BOX STORES: THE PROPER USE OF THE CITY OR COUNTY’S POLICE POWER AND ITS COMPREHENSIVE PLAN

CALIFORNIA’S EXPERIENCE

March 10, 2006

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Daniel J. Curtin, Jr. concentrates his practice on local government and land use law representing both private and public-sector clients. He is a member of the firm of Bingham McCutchen LLP in the Walnut Creek office.

Mr. Curtin served as Chair of the State and Local Government Law Section of the American Bar Association, 2001-2002. He was Past Chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly NIMLO). He is past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as President of the City Attorneys’ Department of the League of California Cities, as a member of the Board of Directors of the League, and as Regional Vice President of the International Municipal Lawyers Association.

In honor of his outstanding contributions to the practice of state and local government law for over 45 years, the State and Local Government Law Section of the American Bar Association awarded Mr. Curtin with the Jefferson Fordham Lifetime Achievement Award.

In recognition of his extensive contributions to NIMLO and to the entire municipal law community nationwide, as well as his years of leadership and service to the legal profession, Mr. Curtin was honored with NIMLO’s Charles S. Rhyne Award for Lifetime Achievement in Municipal Law. He is the recipient of the American Planning Association’s National Distinguished Leadership award for 20 years of writing, teaching, encouraging and supporting planning ideas. He also was named Honorary Life Member of the California Park and Recreation Society in recognition of his exceptional service to the field of parks and recreation.

Mr. Curtin is the author of numerous publications on California land use and subdivision law, which have been cited frequently by the California Courts, including “Curtin’s California Land Use & Planning Law,” published and revised annually by Solano Press, "Subdivision Map Act Manual," published by Solano Press and “Subdivision Map Act and the Development Process,” published by California Continuing Education of the Bar, Berkeley, California. He is a frequent lecturer for the University of California Extension and Continuing Education of the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law.

Mr. Curtin received his A.B. from the University of San Francisco and his J.D. from its School of Law. He has served as assistant secretary of the California State Senate, Counsel to the Assembly Committee on Local Government, Deputy City Attorney of Richmond, and City Attorney of Walnut Creek.
The following article *Regulating Big Box Stores: The Proper Use of the City or County’s Police Power and its Comprehensive Plan* published in the Vermont Journal of Environmental Law, 2005 Symposium entitled “Small Town America: In An Era of Big Box Development” is reprinted here with the kind permission of Vermont Journal of Environmental Law, Vermont Law School. See cover page and table of contents at end.

*Also see* Zoning Practice, “Practice Big Box Regulation” (APA, December 2005).
REGULATING BIG BOX STORES: THE PROPER USE OF THE CITY OR COUNTY’S POLICE POWER AND ITS COMPREHENSIVE PLAN

CALIFORNIA’S EXPERIENCE

Daniel J. Curtin, Jr.*

I. INTRODUCTION

In the last few years, there has been a great deal of controversy relating to land use controls over big box retail development. Most of this recent controversy has been prompted by a city or county’s action in processing applications by Wal-Mart in expanding its retail empire.1 However, not all applications have come from Wal-Mart: there are other similar big box retail applicants, such as Costco, Target, K-Mart, and others. In addition to the normal land use issues—such as location, design, size, environmental impacts, and traffic issues—there are many other secondary issues. For example, the proposed big box retailer might not be paying an adequate wage, they might not offer affordable health insurance coverage, or the developer might not be concerned with the end of “Ma and Pa” type small store ownership in the region. Some of these issues were discussed recently in an appellate court case in California, Bakersfield Citizens for Local Control v. City of Bakersfield,2 where the court held that a city must assess both individual and cumulative environmental impacts on two shopping centers, each of which included a Wal-Mart Super Center and were located 3.6 miles apart.

In Bakersfield, two different developers, Panama 99 Properties and Castle and Cooke Commercial-CA (C&C), applied for project approvals in early 2002, including general plan amendments and zoning changes for

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their respective retail shopping centers located 3.6 miles apart in the City of Bakersfield, California. Pursuant to state law, an Environmental Impact Report (EIR) was prepared for each project. On February 12, 2003, the Bakersfield City Council certified both EIRs and, after a public hearing, approved both projects. In March 2003, the Bakersfield Citizens for Local Control (BCLC) filed two CEQA actions challenging the sufficiency of the EIRs. While the suit was pending, construction began at both sites. The trial court decertified the EIRs, but left the project approvals intact. Both BCLC and C&C partially appealed the judgment to the appellate court.

In ruling against the City, the Court of Appeals reversed and remanded. Before rendering its opinion, the court said “it [was] necessary to explicitly reject certain philosophical and sociological beliefs that some of the parties had vigorously expressed.” For the record, the court stated that “[it did] not endorse BCLC’s elitist premise that so-called ‘big box’ retailers are undesirable in a community and are inherently inferior to smaller merchants, nor did it affirm its view that Wal-Mart, Inc. [was] a destructive force that threatened the viability of local communities.” The court said, “Wal-Mart [was] not a named party in these actions and . . . rebut[ted] BCLC’s transparent attempt to demonize [the] corporation.” The court “[did] not know whether Wal-Mart’s entry into a geographic region or expansion of operations within a region [was] desirable for local communities. Similarly, [it] did not know whether Wal-Mart was a ‘good’ or a ‘bad’ employer.” The court offered “no comment on Wal-Mart’s alleged miserly compensation and benefit package because BCLC did not link the asserted low wages and absence of affordable health insurance coverage to direct or indirect adverse environmental consequences.” The court said, “[it] would not dignify with extended comment C&C’s complaint that BCLC [was] just a ‘front’ for a grocery worker’s union whose disgruntled members [felt] threatened by nonunionized Wal-Mart’s entry into the grocery business.”

The court further stated that it “had no underlying ideological agenda

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3. *Id.* at 211.
4. *Id., see also* California Public Resources Code (CEQA) §§ 21000-21177 (West 2005).
5. *Id.* at 211.
6. *Id.*
7. *Id.* at 212.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
and had strictly adhered to the accepted principle that the judicial system ha[d] a narrow role in land use battles that were fought through CEQA actions." 14 The court said that "[t]he only role in reviewing an EIR was to ensure that the public and responsible officials were adequately informed of the environmental consequences of their decisions before they [were] made." 15

In this situation, the court was absolutely correct. It should only look at whether the city of Bakersfield complied with the law. However, if the city had definitive, mandatory criteria in its general plan as to the placement and regulation of big box-related development, including impacts of secondary effects, and the city had not complied with those in its approval process, then a citizens group might be successful in court to have the approvals overturned. 16

This controversy has spread nationwide; in Vermont, California, and elsewhere, much publicity has been given to this subject. As mentioned in a May 24, 2004 news release, "[o]ver 70 percent of Vermonter prefer to shop in their neighborhoods or in a nearby downtown or village center, according to a poll released . . . by the Center for Rural Studies on behalf of the Vermont Forum on Sprawl. Vermonters also most frequently say they want big box retail stores to be located in downtowns." 17 Further, the release noted that the National Trust for the Historic Preservation designated the entire State of Vermont—"its landscape, its historic villages and towns and strong sense of community—one of the nation’s eleven most endangered, historic places." 18 As the poll indicated, "Vermonters are not against Wal-Mart. . . . They simply believe big box retailers should adapt their plans to fit into the Vermont landscape—not supplant it." 19

Some of this discussion was earlier highlighted by the Vermont Supreme Court in In re Wal-Mart Stores, Inc., 20 upholding the order of the Environmental Board denying Wal-Mart’s project. In doing so, the court held that the "project’s impact on market competition was a relevant factor" for consideration by the board. 21 The court held: (1) the board did not err in

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14. Id.
15. Id. (quoting Berkeley Keep Jets Over The Bay Com. v. Board of Port Comm’rs., 111 Cal. Rptr. 2d 598 (Cal. Ct. App. 2001)).
18. Id.
19. Id (quoting Executive Director Beth Hurstorne, Vermont Forum on Sprawl).
21. Id. at 401.
requiring Wal-Mart to provide secondary-growth studies;\textsuperscript{22} (2) the term “growth,” within the meaning of impact of growth criterion includes economic as well as population growth;\textsuperscript{23} (3) the board was not bound by the Agency of Transportation’s (AOT) determination of acceptable traffic flow levels;\textsuperscript{24} and (4) “the board could properly require Wal-Mart to produce additional evidence demonstrating its plan to reduce or eliminate the burden” on regional education services.\textsuperscript{25} Therefore, the court rejected Wal-Mart’s application for the permit.

The big box controversy in California was highlighted in an article noting that many California cities and counties of all sizes adopted regulations limiting development by big box stores.\textsuperscript{26} The article discussed the land use and social concerns that arise when such applications are processed. It further discussed that “big boxes and even Wal-Mart supercenters are not meeting resistance everywhere in the state.”\textsuperscript{27} Wal-Mart’s first California supercenters are scheduled to open this spring in La Quinta and Palm Springs.\textsuperscript{28} That article, in also noting that “Wal-Mart projects have sparked controversy from Vermont to California,” discussed the recent processing and approval of a Wal-Mart supercenter in New Orleans.\textsuperscript{29}

The regulation of big box developments, like the regulation and control of all types of development, is based on the proper exercise of a city’s or county’s police power.

II. POLICE POWER

A. In General

The legal basis for all land use regulation is the police power of the city\textsuperscript{30} to protect the public health, safety, and welfare of its residents.\textsuperscript{31} A land use regulation lies within the police power if it is reasonably related to

\textsuperscript{22} Id. at 402.
\textsuperscript{23} Id. at 404.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 405.
\textsuperscript{26} Paul Shigley, Big Box Regulations Sweep the State: Proposed Wal-Mart Supercenters are at Center of Debate, CAL. PLAN. & DEV. REP., Vol. 19, No. 1 (Jan 24, 2004).
\textsuperscript{27} Id.
\textsuperscript{28} Id., see also Historic Wal-Mart Controversy, 27 State & Local Law News, No. 4 (Section of State and Local Government Law, Summer 2004).
\textsuperscript{29} Id.
\textsuperscript{30} When the word “city” is used, it also means “county,” “city council” also means “county board of supervisors.”
the public welfare.\textsuperscript{32}

As Justice William O. Douglas, speaking for the United States Supreme Court, stated:

\begin{quote}
The concept of the public welfare is broad and inclusive... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.\textsuperscript{33}
\end{quote}

Regulations are sustained under current complex conditions that at one time might have been condemned as arbitrary and unreasonable.\textsuperscript{34} In the 1970s, Justice Douglas, speaking for the United States Supreme Court, upheld a village’s zoning ordinance relating to land use restrictions on single-family dwelling units.\textsuperscript{35} His opinion identified the interests that supported the village’s exercise of its police power at the time:

\begin{quote}
A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within \textit{Berman v. Parker}... The police power is not confined to elimination of filth, stench, and unhealthy places; it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.\textsuperscript{36}
\end{quote}

Today, many cities face different needs and interests than those identified in \textit{Village of Belle Terre}. Cities face concepts of “smart growth,” “sustainable growth,” “new urbanism,” and “stopping sprawl.” In addition, they are at times confronted with big box retail uses. Local regulations addressing those concepts are as proper an exercise of a city’s police power as were those in \textit{Village of Belle Terre}, due to the elasticity of that power.

\textbf{B. California}\textsuperscript{37}

California courts recognize the above-cited U.S. Supreme Court statements as “a correct description of the authority of a state or city to

\textsuperscript{32} See \textit{Associated Home Builders, Inc. v. City of Livermore}, 135 Cal. Rptr. 41, 51 (Cal. Ct. App. 1976).
\textsuperscript{33} \textit{Berman}, 348 U.S. 26, 33.
\textsuperscript{34} \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 387 (1926).
\textsuperscript{36} Id. at 9.
enact legislation under the police power.” The police power, even though established by common law, is set forth in the California Constitution, which confers on cities the power to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.”

The California Supreme Court has stated:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation omitted]. Apart from this limitation, the ‘police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.”

Land use regulations are a manifestation of the local police powers conferred by the California Constitution, not an exercise of authority delegated by statute. For example, state zoning laws pertaining to the adoption of local zoning regulations are not intended as specific grants of authority, but as minimum standards to be observed in local zoning practices. Likewise, the California Supreme Court has held that: “a city’s or county’s power to control its own land use decisions derives from [its] inherent police power, not from the delegation of authority by the state.”

In exercising its police power, a city must act within all applicable statutory provisions so there will be no “conflict with general laws.” The city’s actions must also meet constitutional principles of due process: they must be reasonable, nondiscriminatory, and not arbitrary or capricious.

The police power is an elastic power. It allows cities to tailor regulations to suit the interests and needs of a “modern, enlightened and progressive community,” even as those interests and needs change. A full range of interests can support a city’s exercise of its police power. The California Supreme Court has held that aesthetic reasons alone can justify

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41. See Scrutton v. County of Sacramento, 79 Cal. Rptr. 872, 876 (Cal. Ct. App. 1969); see, e.g., Candid Enters, 705 P.2d 876 (upholding a school facility’s impact fee imposed by a county without statutory authorization); Berkenfield, 550 P.2d 1001 (upholding city’s rent control initiative despite lack of express statutory authority).
42. DeVita v County of Napa, 889 P.2d 1019, 1030-31 (Cal. 1995).
43. CAL. CONST. art. XI, § 7, supra note 39.
the exercise of the police power. 46

The United States Supreme Court has cited to aesthetics in supporting land use regulations. In upholding a local ordinance prohibiting the posting of signs on public property, the Court stated that aesthetic concerns are substantial governmental interests properly addressed under a city’s police power. 47 Similarly, in upholding New York City’s Landmark Preservation Law, the Court approved the city’s use of its police power to enhance the quality of life by preserving “desirable aesthetic features of a city.” 48

Courts have also held that regulations affecting economic interests in real property are an appropriate exercise of the police power. 49

Protection of a city’s “character” and “stability” has served to justify a city’s invocation of its police power. In Ewing v. City of Carmel-by-the-Sea, homeowners challenged the constitutionality of the city’s zoning ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days (basically renting your residence for less than 30 days). 50 The homeowners claimed the ordinance amounted to a taking, was void as being arbitrary and vague, and violated their right of privacy. 51 In ruling for the city, the appellate court held that the ordinance was a proper exercise of the city’s land use authority under its police power “to enhance and maintain the residential character of the city.” 52 The court stated that this is a wholly proper purpose of zoning:

It stands to reason that the ‘residential character’ of a neighborhood is threatened when a significant number of homes—at least 12 percent in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days . . . [Transient] rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly

49. See, e.g., Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1022 (Cal. 1976) (holding that regulations implementing local rent control laws are valid); Griffin Dev. Co. v. City of Oxnard, 703 P.2d 339, 340-42 (Cal. 1985) (holding that regulations relating to condominium conversions are proper).
51. Id. at 383
52. Id. at 387
neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.53

In holding that the ordinance was related to a legitimate governmental goal, the Court continued:

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is ‘sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’54

A city’s concern about appearances of a project is also properly a part of the police power. The leading case on this issue is Novi v. City of Pacifica, where the court held that a city’s land use ordinance, which precluded uses that were detrimental to the “general welfare” as well as developments that were “monotonous” in design and external appearance, was not unconstitutionally vague—either facially or as applied—and upheld the city’s denial of the project.55 Novi was a developer who sought to construct a forty-eight unit condominium project.56 The project was turned down because it would have violated the city’s anti-monotony ordinance.57 Novi argued that the city’s ordinance lacked objective criteria for reviewing the element of monotony, and that such criteria are required for aesthetic land use regulations.58 However, the Court disagreed, stating:

[A] substantial amount of vagueness is permitted in California zoning ordinances: ‘[I]n California, the most general zoning standards are usually deemed sufficient. The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety, and welfare standard. . . . California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the community’s zoning business is to be done without paralyzing the legislative process.’59

53. Id. at 388.
54. Id. at 388-89 [internal citations omitted]
56. Id.
57. Id.
58. Id. at 440.
59. Id. at 441 (quoting People v. Gates, 116 Cal. Rptr. 172, 176 (Cal. Ct. App. 1974)).
The Court then proceeded to apply this California rule to the Pacifica city council’s anti-monotony ordinance:

Here, subdivision (g) of section 9-4.3204 requires ‘variety in the design of the structure and grounds to avoid monotony in the external appearance.’ The legislative intent is obvious: The Pacifica city council wishes to avoid ‘ticky-tacky’ development of the sort described by songwriter Malvina Reynolds in the song, ‘Little Boxes.’ No further objective criteria are required, just as none are required under the general welfare ordinance. Subdivision (g) is sufficiently specific under the California rule permitting local legislative bodies to adopt ordinances delegating broad discretionary power to administrative bodies.  

Similarly, another appellate court, relying on Novi, held that a view protection ordinance was not unconstitutionally vague, and that such an ordinance supported denial of a building permit.

In Guinnane v. San Francisco Planning Commission, the Court provided support for a city’s concerns regarding neighborhood aesthetics. Guinnane sought “a building permit to construct a four-story, 6,000 square-foot house with five bedrooms, five baths, and parking for two cars.” The planning commission rejected Guinnane’s application during design review because the proposed building was too massive and thus “not in character” with the neighborhood. The board of permit appeals also denied the permit.

The court upheld the city’s action. It stated that the planning commission and the appeals board had the authority to exercise discretion in deciding whether to issue the permit. The court noted that such a review is not limited to “a determination [of] whether the applicant has complied with [the city’s] zoning ordinances and building codes.” The San Francisco Planning Code specifically directed the commission to

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60. Id.
61. See Ross v. City of Rolling Hills Estates, 238 Cal. Rptr. 561, 564 (Cal. Ct. App. 1987); see also Briggs v. City of Rolling Hills Estates, 47 Cal. Rptr. 2d 29, 31(Cal. Ct. App 1995) (a “neighborhood compatibility” ordinance requiring that designs “respect the existing privacy of surrounding properties” was not void for vagueness); Echeverrieta v. City of Rancho Palos Verdes, 103 Cal. Rptr. 2d 165, 173-74 (Cal. Ct. App. 2001) (an ordinance that prohibited residents from significantly impeding a view by permitting foliage to grow to heights in excess of certain limitations was not unconstitutionally vague).
63. Id. at 743
64. Id.
65. Id. at 744
66. Id. at 747.
67. Id.
"protect the character and stability of residential... areas..." Such concern for neighborhood aesthetics has long been justified as a legitimate governmental objective. Sufficient evidence existed in this case to uphold the commission’s finding that the proposed house would increase traffic, cause parking problems, and have a negative effect on the neighborhood.59

Similarly, in Saad v. City of Berkeley, the court upheld the City of Berkeley’s denial of a use permit for a three-story home in a single-family zone because it would impair the view of neighboring property owners and have a towering effect.70

Another court clarified that a city can regulate tree growth for aesthetic reasons alone.71 In Kucera v. Lizza, the court upheld the Town of Tiburon’s land use ordinance preserving access to views and sunlight by regulating obstructing trees and tree growth as a valid exercise of police power.72

Judicial review of a city’s exercise of its police power is closely circumscribed. The California Supreme Court established the following rule:

It is a well settled rule that determination of the necessity and form of regulations enacted pursuant to the police power ‘is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity?’73

Predictably, this test has resulted in substantial deference by courts reviewing cities’ decisions to exercise the police power.74 Indeed, so long as “it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare,” a land use regulation should withstand constitutional attack.75

As can be seen from the above examples, cities, especially in California, have the upper hand in adopting land use regulations and

68. Id at 745.
69. Id at 748.
70. Saad v. City of Berkeley, 30 Cal. Rptr. 2d 95, 101 (Cal. Dist. Ct. App. 1994); Harris v. City of Costa Mesa, 31 Cal. Rptr. 2d 1, 6 (Cal. Dist. Ct. App. 1994) (denial of a use permit for second residential unit on one lot based on incompatibility with the neighborhood was proper).
72. Id at 589.
74. See Remmenga v. California Coastal Comm’n, 209 Cal. Rptr. 628, 632 (Cal. Ct. App. 1985); Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993, 999 (Cal. 1999) (where the California Supreme Court advocated a hands-off policy for reviewing local legislative acts).
processing land use applications in their jurisdictions to deal with all types of situations. Cities must properly exercise their police power, without infringing upon the Fifth Amendment, Equal Protection, or the Due Process clauses of the United States Constitution. These situations include the issue of whether big box development is appropriate in a city’s jurisdiction. In implementing its police power, a city is further guided by the use of the general plan—as discussed in the next section.

III. USE OF THE GENERAL PLAN

In the United States, more and more cities and counties are using the general plan to implement this land use planning process. Although practice varies from state to state, many cities view the general plan as the “constitution” for development within that jurisdiction. Therefore, all subsequent land use decisions must be consistent with a vision for growth and development as reflected in the plan.

A. California

The general plan has been declared by the California Supreme Court as the single most important document; the “constitution for all future development.” Since the general plan is the “constitution for all future development,” any decision of a city affecting land use, development, and public works projects must be consistent with the general plan. Under Government Code Section 65860(a), for example, a zoning ordinance is consistent with such plans only if: the city has officially adopted such a plan; and the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general uses, and programs specified in such a plan.

In Leshner Communications Inc. v. City of Walnut Creek, the California Supreme Court struck down a growth management initiative that conflicted with the City of Walnut Creek’s general plan. Leshner thus marked the first occasion where the court squarely addressed the general plan’s position.

76. CAL. GOV’T CODE § 65860 (2005). The term “general plan” sometimes is labeled “master plan” or “comprehensive plan.” Today, the term “general plan” is being more commonly used. In California, land use regulations and all approvals must be consistent with the general plan.
77. Leshner Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990); see CURTIN & TALBERT, supra note 36, ch. 2 (For a general discussion of General Plan Law and its effect in California).
78. Citizens of Goleta Valley v. Board of Supervisors of the County of Santa Barbara, 801 P.2d 1161, 1171 (Cal. 1990).
79. CAL. GOV’T CODE § 65860 (West 2005).
80. Leshner, 802 P.2d at 319.
in the planning hierarchy, and especially its interplay with the initiative process.\footnote{Id. at 317.}

\textit{Lesher} arose from a challenge to Measure H, a traffic-based growth management initiative adopted by Walnut Creek voters in 1985. The trial court had determined that Measure H was not a general plan amendment, but rather a zoning ordinance or other land use regulation.\footnote{Id. at 320.} As a mere regulation, Measure H was required to be consistent with the city’s general plan.\footnote{Id. at 319} Because it was not consistent, the trial court declared it invalid.\footnote{Id. at 320.}

This holding was overturned on appeal.\footnote{Id.} The Court of Appeals agreed that Measure H was inconsistent with the city’s general plan, but interpreted it as a general plan amendment in order to give the greatest possible protection to the initiative process.\footnote{Id.} The California Supreme Court rejected this interpretation and struck down the initiative, thereby upholding the trial court’s decision.\footnote{Id. at 326.}

The California Supreme Court began its decision by emphasizing that all laws are subject to the same constitutional and statutory limitations and rules of construction, whether enacted by the local legislative body or the electorate.\footnote{Id. at 322 (quoting Legislature v. Deukmejian, 669 P.2d 17 (Cal 1983)).} Focusing on the absence of any ballot materials that labeled Measure H a general plan amendment, as well as the detailed scope and self-executing nature of its text (resembling a zoning ordinance), the court ruled that Measure H was a land use regulation subordinate to the city’s general plan and therefore invalid under the consistency doctrine.\footnote{Id.} “The tail does not wag the dog,” pronounced the court.\footnote{Id. at 324.}

Therefore, under \textit{Lesher}, any subordinate land use action—such as a zoning ordinance, tentative map, or development agreement—that is not consistent with a city’s current and legally adequate general plan is “invalid at the time it is passed.”\footnote{Id. at 325.} The court’s only task is to “determine the existence of the conflict.”\footnote{Id.} Further, it does not matter how the conflict arises. If a conflict is present, under state law, the action is void.\footnote{Id.}
In *City of Irvine v. Irvine Citizens Against Overdevelopment*, the Court of Appeal held that a land use regulation “is consistent with [a] city’s general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment.” The Court of Appeals has also held that “[a] city’s findings that [a land use regulation] is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.”

**B. Other States**

Nearly all states require that zoning, and at times other related land use actions, take place “in accordance with” some sort of comprehensive or master plan. The states vary, however, in the use of the general plan as a significant or decisive factor in evaluating land use regulations or decisions; although over time there has been a slow and incremental increase nationwide in the quasi-constitutional status of the general plan. As labeled by one of the nation’s leading commentators on the general plan, the states currently fall into three major categories in terms of the role of the comprehensive plan in the land use regulatory process.

The first category, the “unitary view,” probably reflects the majority of the states. In this category, the general plan is accorded no special significance, meaning there is no requirement that local governments prepare a plan that is separate from the zoning regulation. Examples of states falling into this category with recent judicial decisions upholding the “unitary view” are Arkansas, Connecticut, Illinois, New York and Massachusetts.

States in the second category, termed the “planning factor,” give some

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97. Id.
100. See Sullivan & Michels, supra note 98, at 90 (for chart showing breakdown of states according to how their treatment of the General Plan).
significance to the general plan, if it exists, as a factor in evaluating land use regulations, but do not make it the exclusive factor. The weight to be given to the plan varies from state to state. Examples of states in this category are Missouri, Montana, New Jersey, and Vermont.

In Vermont, each city and county may develop a "municipal development plan" or "municipal plan." The "municipal plan" includes (but is not limited to):

- a statement of objectives, policies and programs of the municipality to guide the future growth and development of the land, public services and facilities; and to protect the environment; a land use plan, consisting of a map and statement of present and prospective land uses, indicating those areas proposed for forests, recreation, agriculture . . . residence, commerce, industry, public and semi-public uses and open spaces reserved for flood plain, wetland protection, or other conservation purposes; and setting forth the present and prospective location, amount, intensity and character of such land uses and the appropriate timing or sequence of land development activities in relation to the provisions of necessary community facilities and service; a transportation plan, consisting of a map and statement of present and prospective transportation and circulation facilities, transit routes, terminals, bicycle paths and trails, scenic roads, airports, railroads and port facilities, and other similar facilities or uses, with indications of priority of need. . . .

The third category of states, called "plan as the constitution or the law," is made up of those states like California, which grant the general plan quasi-constitutional status regulating ordinances and other actions of the local government in implementing the plan. Other states within this category include Florida, Oregon, and Washington.

In California and the other states that treat the general plan as the constitution, the general plan is the most important legal planning tool for city and county officials to utilize in their efforts to regulate development. It is clearly the "constitution for all future development." The goals and policies of the general plan can be used not only in managing growth, regulating development, and imposing land use regulations, but also in evaluating big box retail development.

102. Id at § 4382.
103. Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 317 (Cal. 1990); see CURTIN & TALBET, supra note 37, at ch. 2.
C. Implementation

In regulating big box retail development, a city should have proper goals and policies in its general plan relating to this issue of whether or not the city desires to have that type of development; or, if it does have such goals and policies, the city should indicate what design features it requires for big box retail development. Some cities might prefer to have a big box retail store to implement its general fund via sales tax income, business license tax, or similar taxes; others might like to have a modified, smaller big box retailer; and again others might not want a big box retailer at all. However, by the proper use of the police power and by properly having goals and policies addressed in its general plan, a city can act accordingly. It is especially true in California, where the general plan is the constitution for development. California courts have made it quite clear that there is no right to develop in California; development is merely a privilege.\textsuperscript{104}

In adopting or amending its general plan so as to regulate big box retail development, each city can address issues that are raised in considering whether or not a big box retail development is appropriate for its jurisdiction. According to the \textit{State of California: General Plan Guidelines} (the Guidelines), the general plan is “made up of text describing development policy, including goals and objectives, principles, policies and standards, as well as a set of maps and diagrams.”\textsuperscript{105} These can include discussion of big box retail development. Together, these constituent parts paint a picture of the community’s future development.\textsuperscript{106} In adopting or amending a general plan, the city will focus on the following important points and adopt them to the situation at hand.

For example, the Guidelines state that “a development policy is a general plan statement that guides action.”\textsuperscript{107} In a broad sense, development policies include goals and objectives, principles, policies, standards, and plan proposals.

According to the Guidelines, “[a] goal is a general direction-setter. It is an ideal future end related to the public health, safety, or general welfare. [It] is a general expression of community values and, therefore, may be

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{104}] See Associated Homebuilders etc., of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971).
\item[\textsuperscript{105}] See Governor’s Office of Planning and Research, \textit{STATE OF CALIFORNIA GENERAL PLAN GUIDELINES}, ch. 1 “General Plan Basics” (2003), (hereinafter, \textit{the Guidelines}) available at http://www.opc.ca.gov/planning/PDFs/General_Plan_Guidelines_2003.pdf (the author wrote and contributed to the Guidelines and has based a large part of this paper section on that writing).
\item[\textsuperscript{106}] Id. at 14.
\item[\textsuperscript{107}] Id. at 14-15.
\end{itemize}
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abstract in nature." 108 Examples of goals are: a diversified economic base for the city, an aesthetically pleasing community, and a safe community.

The Guidelines define an objective as: "a specified end, condition, or state that is an intermediate step toward attaining a goal. [I]t should be achievable and, when possible, measurable and time-specific." 109

A principle is "an assumption, fundamental rule, or doctrine guiding general plan policies, proposals, standards, and implementation measures." 110 Principles are based on community values, generally accepted planning doctrine, current technology, and the general plan's objectives. In practice, principles underlie the process of developing the plan but seldom need to be explicitly stated in the plan itself.

A policy is "a specific statement that guides decision-making. It indicates a commitment of the local legislative body to a particular course of action." 111 A policy is based on and helps implement a general plan's objectives. A policy is carried out by implementation measures. Examples of policy could be that the city shall not approve plans for the downtown shopping center until an independently conducted market study indicates that the center would be economically feasible, or that the city shall give favorable consideration to conditional use permit proposals involving adoptive reuse of buildings that are designated as "architecturally significant" by the cultural resources element. 112

A standard is "a rule or measure establishing a level of quality or quantity that must be complied with or satisfied." 113 Standards define the abstract terms of objectives and policies with concrete specifications. Examples of some standards are: a minimally acceptable peak hour level of service for an arterial street is level of service C; the minimum acreage required for a regional shopping center is from fifty to sixty acres.

By having the above definitive and proper goals, objectives, principles and standards in its general plan, a city is then guided accordingly in reviewing and approving, as well as modifying or denying, all types of development—including a big box retailer's application. In addition, and maybe more importantly, the developer knows up front what to expect. Moreover, such certainty allows citizens to know the rules that the city's policy makers must follow to permit or deny certain developments.

In *Families Unafraid to Uphold Rural El Dorado County v. County of*...
El Dorado, the appellate court declared invalid the County Board of Supervisors' approval of a residential subdivision since it was not consistent with the county's general plan. The court said that the County's findings of consistency were not supported by substantial evidence. In this situation, the land use policy of the general plan was fundamental, mandatory, and unambiguous, and the project's inconsistency was clear. Likewise, a well-drafted general plan will mandate what commercial development is consistent with that city's overall goals and policies for development.

IV. CONCLUSION

The regulation of big box development properly lies in the hands of the legislative bodies of the cities and counties, with the able assistance of the planning commission and staff. The police power, which is the power to regulate for public health, safety, and welfare, is the basis for such regulation. The cases cited in this paper clearly show how broad that power is even to the extent that a city could deny a monstrous development, as in the power to block development in the City of Pacifica, California. Further, by addressing the issues in their general plans, cities, towns, and villages are able to refer to their general plans to guide them in either permitting or denying proposed big box developments.

115. Id.
VERMONT JOURNAL OF ENVIRONMENTAL LAW
VERMONT LAW SCHOOL

Symposium 2005

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The Big Box Challenge: How to Handle it Successfully

Thomas P. Cody
Robinson & Cole LLP
Hartford, Connecticut

Big-Box Retail Issue Is Contextual

- Location
  - Central city
  - Suburb
  - Rural

"A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

VILLAGE OF EUCLID, OHIO v. AMBLER REALTY CO.
272 U.S. 365
No. 31.
Reargued Oct. 12, 1926.
Decided Nov. 22, 1926.

Some Big Boxes Are “Good”

- They can reduce sprawl
- Stimulate redevelopment
- Push smaller retailers to new efficiencies

They Can Work, If…

- Economics
- Regulation
Institutional Infrastructure Is Lacking
- At appropriate governmental level
  - State
  - Substate regional
  - Local
- Local planning and regulation
  - The least desired development will seek the weakest government

Confused Agendas
- Unionization
- Wage scales
- Benefits for workers
- Adverse impacts on existing retail uses
- Elitism
  - …questionable bases for land use regulation

Planning and Regulation Most Effective At Points of Market Failure
- Location
  - Infrastructure
  - Tax
  - Planning and regulation
- Off-site impacts (externalities)
- Appearance
- Reuse
  - …deflect, not destroy…

Acknowledge Power of the Market
- Most land use decisions market driven
- Roads, water and sewer often lead
  - Simple capital improvement programming could help
- Some locations are “worth” a lot more than others

Regulatory Approaches
- Impact assessment
- Incentive regulation
- Appearance
- Site design
  - …the economics of value retailing leave little room for exactions…think of the bean bag chair…

Appearance
Abandonment and Reuse

What To Do?

- Reuse plan
  - Flexible site plans
- Sinking fund
  - Money to design, market, convert
When You Get Lemons, Make Lemonade…

- Central city development
- Greyfields
  - Dead malls
  - Failed open centers
- Get plans and regulation in place now
- Be flexible
- Assemble land and provide pre-approvals

Greyfield Landscape…

- 1,690 to 2,080 regional malls nationwide
- About 7% greyfields now: Between 114 and 140 greyfield regional malls nationally
- 12% more are vulnerable: Between 203 and 250 additional malls
- 12 New Urbanist redevelopments in 10 states

Greyfields

Dead mall redevelopment:
Malls built in the 1960s, 70s, and even 80s are already failing in cities and older suburbs. But with the help of new urbanists, some are being converted into real neighborhoods.

Shopping Malls Adopting New Strategies to Survive

Mashpee Commons

- Built 1960
- 62,000 square feet
- Food store, a home furnishings/hardware store, a bank, restaurant and a theater

Mashpee Commons
Today

- Grided, walkable street pattern
- Street trees, on-street parking, pedestrian lighting, sidewalks, benches, plazas and plans ultimately for residential development
- Parking lots relocated to the rear of the buildings

And This Might Be Yours…

- Uses include a library, a church, a Boys and Girls Club, a post office, a six-screen movie theater, several restaurants, senior center and elderly housing
- 278946 ft.² of commercial tenants
- 40 residential units above the retail space

Seize the Opportunity…
THE BIG BOX CHALLENGE: HOW TO HANDLE IT SUCCESSFULLY

BIG BOX RETAIL v. THE COMMUNITY’S PLAN
(ALBUQUERQUE COMMONS PARTNERSHIP v. CITY OF ALBUQUERQUE)

March 10, 2006

15th Annual Land Use Conference
ROCKY MOUNTAIN LAND USE INSTITUTE

University of Denver College of Law
Denver, Colorado

Presented by
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INTRODUCTION

New Mexico has had its share of “big box” controversies in recent years. In the mid-1990s, Wal-Mart wanted to build a super-center in the Village of Tijeras, a community of no more than 500 people, but strategically located on I-40 just east of Albuquerque. Due to effective and relentless community organizing for more than a year to oppose the retail giant’s plans, Wal-Mart walked away, and the community organizer was elected to the New Mexico House of Representatives.¹

On the other side of Albuquerque, neighbors organized to protest the new West Bluff Shopping Center and its two main tenants, Wal-Mart and Home Depot. They participated in city council meetings and argued that the project didn’t comply with existing zoning regulations and land use plans. They unsuccessfully appealed the City Council’s approval to the District Court and then to the New Mexico Court of Appeals.² The issue presented to the court was whether the master plan has the force of law similar to that of a “statutory provision, ordinance or agency regulation.” The neighbors argued that since zoning is to be “in accordance with a comprehensive plan,”³ the plan must have the “legal stature on a par with zoning ordinances, regulations and other such restrictions that do have the force of law.” The court of appeals disagreed and concluded that New Mexico’s statutory framework has clearly put New Mexico in the “advisory only” camp, and so the plan does not trump less restrictive zoning ordinances.⁴ This was a blow to the

¹ Representative Kathy McCoy (District 22)
³ NMSA 1978, § 3-21-5(A) (1970)
⁴ But see, Mendota Golf, LLP v. City of Mendota Heights, 2006 WL 44907 (Minn. 2006), in which the Minnesota Supreme Court ruled that the comprehensive plan trumps the zoning ordinance in a similar conflict between the two, albeit under a very different statutory scheme than New Mexico has. (January 10, 2006)
neighbors who thought they could count on the provisions of the comprehensive plan. Planners weren’t very pleased either.

Most recently, a “big box” application under consideration in Santa Fe on Cerrillos Road\(^5\) caught the attention of Stewart Udall, former U.S. Congressman from Arizona, interior secretary under Presidents Kennedy and Johnson, and a resident of Santa Fe. He told city councilors in August 2005 that their vote on the Wal-Mart application would be the “most important of their terms.” Udall exclaimed, “If you vote yes tonight, you’re giving Wal-Mart the biggest box in the city. You are inviting in the richest and the stingiest corporation in America.”\(^6\)

Some startling statistics help put the public’s concerns about the Wal-Mart “big box” into perspective. Stacey Mitchell from the New Rules Project\(^7\) shared some of these statistics with an audience in Great Britain last year.\(^8\) Wal-Mart is ranked as the 33\(^{rd}\) largest economy in the world and was China’s fifth largest trading partner. Its revenues have nearly doubled in the past six years ($137 billion in 1998 -- $260 billion in 2004). It only started selling groceries in the late 1980s and now ranks as America’s top grocer. While the company closes down “obsolete” stores in the U.S. (there are 350 empty Wal-Mart stores today), it’s building new super-centers (averaging 200,000 square feet) everywhere, including Brazil, China, Canada, Mexico and India. For purposes of this discussion, perhaps the most startling statistic in Ms. Mitchell’s speech is the amount of retail store space per person in the U.S. --- 38 square feet per person --- twice the amount

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we had just fifteen years ago! Compare this to seven square feet of retail space per person in Great Britain.9

“Big box” development applications rarely sail through the review process easily these days. Whether it’s the gargantuan size and design issues, the sea of parking and traffic issues, the economic impacts on existing small businesses or the issue of employee wages and health care benefits, many local governments are struggling to find the appropriate response. As more and more communities embrace TOD (transit-oriented development) and pedestrian-friendly design, the standard “big box” formula is meeting its match.

This paper describes what happened when the two -- TOD and “big box” -- met head-on in Albuquerque, New Mexico. As can be expected, they both ended up in court. Although the conclusion to the story has not yet been written, there may be lessons to be learned to handle the challenge successfully.

CONFLICTING VISIONS

The property is a vacant 28-acre parcel located on the northeast corner of Louisiana Blvd. and Indian School Rd in northeast Albuquerque. The area is commonly known as Uptown, in contrast to Downtown, approximately 6.5 miles away. Near the property are two regional shopping centers, Winrock Center and Coronado Center, and approximately 1.9 million square feet of office space, nearly a quarter of the total office space in Albuquerque. The City’s new Rapid Ride transit system terminates in Uptown.

The City’s Comprehensive Plan10 designates Uptown as an urban center – an area containing the highest densities and the tallest and most massive structures. An urban

9 Id. at p. 5
center is suppose to concentrate a wide range of community activities and intense land uses for greater efficiency, stability, image, and diversity and for a positive effect on the urban form, environmental quality, and the transportation network.\textsuperscript{11} The goal of an urban center is “to create specially designed concentrations of high-density mixed land use and social/economic activities which reduce urban sprawl, auto travel needs, and service costs, and which enhance the urban experience.”\textsuperscript{12} The Uptown Sector Plan, prepared in 1981, repeatedly referred to pedestrian-friendly landscaping, open spaces, and building orientation, but did not mandate development densities or limit the amount of retail use in a development and did not impose structured parking requirements.

In June 1994, a developer submitted an application for a 28-acre low-density “big box” retail shopping center on this property. The application included a request to amend both the zoning and the Uptown Sector Plan. The neighbors went ballistic and the developer withdrew his application on August 31, 1994.

In mid-September, the city council passed a memorial requesting a public review and revision of the 1981 sector plan because it wanted to fulfill the vision of the comprehensive plan for an urban center and realized that the sector plan needed significant revision to accomplish that vision. However, two weeks later, the developer submitted a second application for the property, this time for development of a smaller, 17.9-acre low-density “big box” project. This application did not require a zoning amendment.

This is where the conflicting TOD and “big box” met. While the city planners were conducting studies, holding public hearings and preparing revisions to the Uptown

\textsuperscript{11} Id. at 15.
\textsuperscript{12} Id. at 69.
Sector Plan, the developer was proceeding with his own plans. The city wanted a vibrant urban center in Uptown to support its plans for transit and to reduce air pollution. City planners recommended a minimum FAR of .7 and a maximum FAR of 1.5. An FAR of .7 requires that the leasable floor space be at least 70 percent of the site’s total square footage. A high FAR requires building up with very little parking space. Therefore, development would have to be predominantly office or other high-density use, with only specialty retail and commercial on the ground floor. Most parking would be located in parking garages.\textsuperscript{13}

\textbf{TOD Vision for Uptown}

\textsuperscript{13} The facts are excerpted from the opinion of the New Mexico Court of Appeals, Albuquerque Commons Partnership v. City Council of the City of Albuquerque, ___ P.3d. ___ (December 9, 2005).
The planners recommended that a transportation management organization be created in the Uptown area to assist employers to implement strategies to reduce single-occupant car trips in the area. There were also recommendations to make the area more pedestrian-friendly.

Enhance the Urban Experience

- Pedestrian oriented
- Less driving
- Save time
- Don’t fight traffic
- Save money
- Safer
- Healthy
- Socialize
The “Big Box” Vision

The developer, on the other hand, wanted to build another plain vanilla shopping center with a “big box” retail center and a sea of parking.

The developer proceeded along with his application and the review process, as the city was moving along with updating the sector plan. His application was originally scheduled for a public hearing before the planning commission in November 1994, but he agreed to a deferral to January so he could revise the site plan to address staff comments. In January 1995, the planning commission discussed whether the application should be deferred again pending completion of the sector plan amendments. The commissioners deferred the application until February 9 when it heard the city council was considering a
moratorium in the Uptown area. The city council passed a four-month moratorium on February 6, so the planning commission deferred the developer’s application to June.

That spring there were many public hearings about the proposed amendments to the Uptown Sector Plan and the regulations. The developer attended those hearings and was vocal and vehement in his objections, claiming the TOD regulations effected a downzoning of the property. Although the planning commission recommended against the proposed amendments (5-3), the city council adopted the TOD amendments (7-0) in June. The next month, the planning commission voted to defer indefinitely the developer’s application because the “big box” development did not comply with the revised TOD Uptown Sector Plan and regulations.

“BIG BOX” MEETS TOD IN THE COURTROOM

The developer asked the district court to review the city’s adoption of the TOD amendments to the Uptown Sector Plan. He included claims for damages for a taking and violation of his civil rights. The court decided the amended plan could not be applied to the developer’s application and remanded it back to the city. Following more public hearings on the “big box” application, both the planning commission and city council rejected it because the “big box” proposal did not create the type of urban place envisioned in the comprehensive plan. The developer went back to district court, which again ruled in his favor. The district court ordered the city to approve the “big box” development.14

The developer’s takings and due process claims were not forgotten. A jury trial was conducted in February 2003. The developer argued that the revised Uptown Sector

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14 The city filed a petition for writ of certiorari of the administrative decision with the court of appeals. The petition was denied as premature.
Plan with the new TOD regulations effected a downzoning of his property and shouldn’t have been applied to him. The jury was instructed that the developer’s property had been downzoned and that he should have been entitled to a quasi-judicial hearing before the property was downzoned. At the closing argument, the developer’s attorney played the CD from the soundtrack of “Chicago” – inferring that the city’s argument was a “razzle dazzle” attempt to pull the wool over the jury’s eyes. The jury found in favor of the developer and awarded him damages in the amount of $8,349,095. Now, the court of appeals would consider the “big box” controversy.

A strong case needed to be made for the importance of the plan. The City of Albuquerque retained Dwight Merriam (Robinson & Cole) and the American Planning Association asked Ed Sullivan and Carrie Richter (Garvey, Schubert & Barer) for assistance in preparing an amicus curiae brief.\footnote{http://www.planning.org/amicusbriefs/pdf/ABQCommons.pdf} The APA urged the court to follow the example of other states around the country which have moved away from “the comprehensive plan as merely an advisory document” to “the comprehensive plan as law” approach. On December 9, 2005, nearly two years after the briefs were filed the New Mexico Court of Appeals issued its opinion – reversing the District Court – in favor of the City and its plan.

What did the Court of Appeals conclude from this case spanning more than a decade? When the city amended its Uptown Sector Plan to beef up the TOD provisions, it was supporting the “urban center” envisioned in the comprehensive plan and the amendment was a legislative action, not quasi-judicial. The court noted the difference:

\begin{quote}
[A] legislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the
\end{quote}
other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.\footnote{Albuquerque Commons Partnership v. City Council of the City of Albuquerque, \_\_ P.3d \_ (N.M. App., 2005)}

The Court of Appeals also found that “the record is clear that legitimate concerns about the development of the Uptown Sector formed a basis for the revision” and that the city wanted to strengthen the sector plan, quantitatively define the Comprehensive Plan’s policy objectives, and maintain the area as an urban center.\footnote{Id. at \_} Although the court did not go as far as the American Planning Association had urged and adopt the “plan as law” approach, it did move in the right direction and give a nod to the consistency doctrine – noting that the city’s policy decision to strengthen the TOD provisions in the Uptown Sector Plan “was entirely consistent with the City’s master plan, which designated Uptown as an urban center.”\footnote{Id. at \_} Furthermore, the court said the city would have had discretion to deny the “big box” development in any case because it was inconsistent with the Comprehensive Plan.\footnote{Id. at \_}

The last chapter hasn’t been written yet in the ACP v. Albuquerque litigation. In January, the developer filed a motion for reconsideration with the Court of Appeals. This case may still reach the state’s highest court. But clearly there are some lessons learned for successfully handling the big box challenge.
SUCCESSFULLY HANDLING THE BIG BOX CHALLENGE

The American Planning Association recently published a PAS Report, MEETING THE BIG BOX CHALLENGE: PLANNING, DESIGN, AND REGULATORY STRATEGIES, which provides a number of recommendations for addressing the big box challenge; as well as the December 2005 issue of Zoning Practice20 entitled REGULATORY STRATEGIES FOR BIG BOXES by Jennifer Evans-Cowley, AICP. They include:

- moratoria
- size limitations21
- formula business ordinance
- design (ie., building requirements, parking, signs, landscaping, storage, community amenities, pedestrian and bicycle access)
- traffic impact studies
- adaptive reuse for big boxes that have closed.

The important lesson learned from the experience in Albuquerque is that the community’s plan -- and the regulations used to implement the plan -- must be consistent with each other. It’s not enough to have good policies that espouse “pedestrian-friendly,” “transit-oriented,” and “urban center.” The policies must be supported with strong regulations that provide quantifiable, measurable standards (such as floor area ratio standards) and clear design requirements.

In the West Bluff case, the city’s planning documents arguably supported the neighbors’ position opposing the big-box shopping center, but the implementing regulations did not. Presented with this inconsistency, the court affirmed the city’s

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20 http://www.planning.org/zoningpractice/index.htm
21 See also, Denning, Brannon P. and Rachel M. Lary, Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine. The Urban Lawyer, Vol. 37, No. 4, pp. 907 – 955 (Fall 2005).
approval of the big box development and reaffirmed prior judicial decisions holding that the zoning regulations rule! The plan is advisory - not mandatory – in New Mexico.

In the Albuquerque Commons Partnership case, the city’s planning documents again supported the neighbors’ position opposing the big-box shopping center, while the implementing regulations did not. However, the city’s response was different. Rather than approve the big-box shopping center, the city leaders decided to take their plan seriously. The plan wasn’t merely an advisory document, but a document that expressed the community’s goals and desires for an urban center. Consistent regulations were needed to implement its provisions. The court acknowledged this need for consistency and again ruled in the city’s favor.

The next step for New Mexico is to update its planning statutory framework to ensure that the consistency doctrine is clearly articulated in state law, and the requirements for the comprehensive plan are spelled out and made an explicit requirement for local government planning and development review. There are many regulatory tools to address the land use challenges presented by big-box applications. Those tools need to be consistent with the adopted comprehensive plan so that the community’s vision for its future can be realized.