**IN THE COURT OF APPEALS**
**OF THE STATE OF NEW MEXICO**

ALBUQUERQUE COMMONS
PARTNERSHIP,

Petitioner-Appellee,

v.

CITY COUNCIL OF THE
CITY OF ALBUQUERQUE,

Respondent-Appellant.

Case No. 24,026
Consolidated with
Case 24,027 and 24,042

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# BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

On Appeal from the Second Judicial District Court
County of Bernalillo
Susan M. Conway, District Judge

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## INTEREST OF THE *AMICUS CURIAE*

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning - including physical, economic and social planning - at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests, including the City Planning and Management Division, the Economic Development Division, the New Urbanism Division, and the Urban Design and Preservation Division. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and rural planning issues. These members are involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

The APA and its professional institute, the American Institute of Certified Planners, advance the art and science of planning to meet the needs of people and society more effectively. As an advocate for good planning, the APA regularly files amicus briefs in cases of importance to the planning profession and the public interest. A few of the cases in which APA has participated as *amicus curiae* include: *Agins v. Tiburon*, 447 U.S. 255 (1980), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503

U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata*, 38 P.3d 59 (Colo. 2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

As the need arises, the APA develops policies that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In recent years, several policy guides have been adopted that highlight APA's concerns about the issues involved in the present case, including a Policy Guide on Planning for Sustainability (April 2000), and a Policy Guide on Smart Growth (April 2002). Each of these are can be found at http://www.planning.org/policyguides/ .

One of the questions presented in this appeal is: what is the proper role of the planning process and the comprehensive plan, as opposed to the development review and approval process? The APA submits this brief *amicus curiae* to explain the important role and function of a comprehensive plan, the planning process, and the interplay between the plan and zoning regulations. The APA urges this 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.

## SUMMARY OF PROCEEDINGS

*Amicus Curiae* American Planning Association hereby adopts as its own the "Summary of Proceedings" as set forth in the brief in chief of the Respondent-Appellant City Council of the City of Albuquerque.

## ARGUMENT

### I. The Role of Planning and the Comprehensive Plan Continues to Evolve

New Mexico has a long and rich planning tradition dating back to the Anasazis and Pueblo Indians who first established communities for long-term occupation based on design principles of sustainability.[1] The first Europeans who arrived in the mid-to-late 1500s brought with them the Spanish medieval practices related to land and water use which became codified in the Law of the Indies.[2] These land use codes provided the framework for settlement planning which was ecologically-based. In 1789, the Plan de Pitic established instructions for the design of town master plans, the allocation of lands for residential and agricultural uses and the distribution of water rights. The land tenure patterns that resulted from these early community development strategies can still be seen today in many parts of New Mexico.[3]

The statutory framework for current planning and land use/development practices in New Mexico can be traced directly to the Standard City Planning and Zoning Enabling Acts (SCPEA and SZEA) drafted by the U.S. Department of Commerce in the 1920s.[4] These acts regarded planning and zoning as matters of purely local and urban concern. They were intended to

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1 Jose A. Rivera, *Acequia Culture: Water, Land & Community in the Southwest*, University of New Mexico Press, Albuquerque, 1998.

2 *Id.*, p.28-29.

3 Stanley Crawford, *A Garlic Testament - Seasons on a Small New Mexico Farm*, HarperCollins Publishers, New York, 1992; and Stanley Crawford, *Mayordomo - Chronicle of an Acequia in Northern New Mexico*, Doubleday, New York, 1998.

4 For a brief description of the early planning enabling acts see, Edward J. Sullivan and Carrie A. Richter, *Out of the Chaos: Towards a National System of Land Use Procedures*, THE URBAN LAWYER, Vol. 34, No. 2 (Spring 2002) 449.

provide a clear delegation of the state's police power authority to local government to engage in the regulation of land use and development, as well as preserve private property rights and protect cities against slums, blight, congestion and loss of amenities. The focus in the 1920s was the avoidance of nuisances by separating incompatible types of development from each other.

The New Mexico State Legislature adopted many of the provisions of the SCPEA and SZEA, beginning with delegating to municipalities the power to zone in 1927 (N.M. Laws 1927, ch. 27 §§1-10). It was another twenty years before the Legislature authorized municipalities to create municipal planning commissions (N.M. Laws 1947, ch. 204, §§1-20). Perhaps the disconnect between land use regulatory powers and planning powers can be traced back to this period in the state's history, but over the years there have been incremental steps to connect plans and the regulatory tools used to implement those plans. (See, APA *amicus curiae* brief at 4).

In 1962, William Doebele, a Harvard University planning professor, completed an extensive study of New Mexico's planning statutes for the State Planning Office (created in 1959 within the Department of Finance and Administration).[5] Professor Doebele[6] concluded that:

> "[t]he problems of urban planning and land-use controls of the 1960's unquestionably demand reconsideration of the legal context in which society strikes the balance between private right and public interest. New technologies, increasing urban pressures, shifting demands in the American living pattern, and the need to conserve natural resources have all contributed to making the enabling

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[5] William A. Doebele, Jr., *Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico*, NATURAL RESOURCES JOURNAL 2 (1962): 321

[6] Professor Doebele's task forty years ago was to draft a model enabling statute for New Mexico which would "strengthen the role of local discretion and responsibility, while at the same time underlining the critical relationship between long-range planning and the implementation process." *Id*., at p. 353-354.

legislation of an earlier generation obsolete."[7]

There have been amendments to New Mexico's planning statutory framework over the years, and many additional planning powers enacted[8], but the basic delegation of authority remains the same – to enact regulations which "are to be in accordance with a comprehensive plan."[9] Why do communities plan today? In addition to the ubiquitous public health, safety and welfare concerns, communities engage in planning processes and prepare planning documents (such as the Albuquerque/Bernalillo County Comprehensive Plan adopted in 1975) in order to prepare for the future, accommodate the present, anticipate change, maximize community strengths, minimize community weaknesses, respond to a legislative charge, secure a sense of

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[7] *Id.*, at p. 352-353.

[8] Some of the planning and development statutes enacted over the years include: the Land Subdivision Act (§ 47-6-1 NMSA 1978), Annexation (§ 3-7-1 NMSA 1978), Regional Planning Act (§ 3-56-1 NMSA 1978); Planning Commission (§ 4-57-1 NMSA 1978); Planning District Act (§ 4-58-1 NMSA 1978); Urban Development Law (§ 3-46-1 NMSA 1978); Community Development Law (§ 3-60-1 NMSA 1978); Metropolitan Redevelopment Code (§ 3-60A-1 NMSA 1978); Business Improvement District Act (§ 3-63-1 NMSA 1978); Economic Advancement District Act (§ 6-19-1 NMSA 1978); New Mexico Finance Authority (§ 6-21-1 NMSA 1978); Enterprise Zone Act (§ 5-9-1 NMSA 1978); Main Street Act (§ 3-60A-1 NMSA 1978); Improvement Districts (§3-33-1 NMSA 1978); Development Fees Act (§ 5-8-1 NMSA 1978); Local Economic Development Act (§ 5-10-1 NMSA 1978); Land Use Easements (§ 47-12-1 NMSA 1978); Cultural Properties Preservation Easement Act (§ 47-12A-1 NMSA 1978); Scenic Highway Zoning (§ 67-13-1 NMSA 1978); Border Development Act (§ 58-12-1 NMSA 1978); Greenbelt Law (§ 7-36-20 NMSA 1978); Municipal Airport Zoning Law (§ 3-39-16 NMSA 1978); Traditional Historic Community (§ 3-21-1(D) NMSA 1978); Forest Reserve Act (§ 6-11-3 NMSA 1978); Eminent Domain Law (§ 3-18-10 NMSA 1978); Municipal Housing Law (§ 3-45-1 NMSA 1978).

[9] § 3-21-5 NMSA 1978.

community coordination, deal with a scarce resource, and build a sense of community.[10] The City of Albuquerque and Bernalillo County adopted their joint Comprehensive Plan to "establish a publicly endorsed, basic vision for the area's future and provide a policy foundation upon which to build more detailed plans for the development and expansion of public facilities and places, to coordinate growth and development with public services, and to guide decisions in a way that balances economic and environmental goals."[11]

The goals and aspirations of the community, as expressed in its comprehensive plan and other planning documents, are implemented or take shape by the development and planning tools that the community selects. The City of Albuquerque has a number of such tools, such as zoning and subdivision regulations. The City is currently preparing to use a new tool – development impact fees – to implement its planning documents and goals for the community.[12] Notably, the New Mexico Legislature requires that impact fees be tied to a planning process and a planning document called a capital improvements plan.[13] Most recently, the New Mexico Legislature linked county subdivision regulations to the comprehensive plan when it amended §47-6-9.1(c)

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[10] Lora A. Lucero, Esq., *Sustainable Communities Act, A Proposal for Reforming New Mexico's Planning and Land Use Laws*, August 2000 [available at 1000 Friends of New Mexico].

[11] http://www.cabq.gov/planning/pages/longrange/complan.html (Last accessed on 12/20/03). Many of the city's planning documents are available at http://www.cabq.gov/planning/publications/index.html#compplan

[12] Albuquerque Tribune reported on the new advisory committee established to recommend rules on development impact fees. http://www.abqtrib.com/archives/news03/101103_news_council.shtml (Last accessed on 12/20/03)

[13] §5-8-1 to 5-8-42 NMSA 1978

in 2003 to clarify that more stringent local subdivision regulations are permissible when tied to the comprehensive plan's goals, objectives and policies.[14]

Although Alfred Bettman, often considered the force behind the creation of the comprehensive plan, envisioned planning and implementation integrated in the adopted plan,[15] not all state courts have given the comprehensive plan priority over zoning. New Mexico is a prime example of a state that typically employs the so-called "Unitary" approach to development and thus to the comprehensive plan.[16] The "Unitary" approach prioritizes zoning above planning. In such cases, the courts will typically look for spot zoning, the appearance of fairness in land use decisions, or changes in physical circumstances under the "Unitary" approach. The New Mexico approach is exemplified by the decision of the Supreme Court of New Mexico in *Miller v. City of Albuquerque*[17], where Justice Montoya affirmed the constitutional and procedural validity of zoning *per se*, but went on to state that any attempt to re-zone will only be permissible in the instances of mistake or substantial change in the character of the

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[14] N.M. Laws 2003, ch. 322, § 1

[15] See, Douglas W. Kmiec, ZONING AND PLANNING DESKBOOK, §15.01.

[16] See, Edward J. Sullivan and Matthew J. Michel, *Ramapo plus Thirty: The Changing Role of the Plan in Land Use Regulation*, THE URBAN LAWYER, Vol. 35, No. 1 (Winter 2003) 75, 92:

> "New Mexico typifies states with the SCPEA model planning legislation still largely intact and courts applying a Unitary approach when interpreting any legal significance in a comprehensive plan where one exists for a local government."

[17] 89 N.M. 503; 554 P.2d 665 (1996).

neighborhood.[18] *Miller* represents the classic example of the quasi-judicial, as opposed to legislative, approach to development by proceeding on a case-by-case zoning-oriented basis to determine whether a particular development should be authorized or not, and treating the zoning ordinances themselves as a statement of comprehensive planning goals and looking for error through incongruity with the overall zoning scheme. New Mexico has pursued this approach to zoning ordinances, as was made clear in *Bogan v. Sandoval County Planning and Zoning Comm'n*[19] where Chief Justice Mizner said:

> "[NMSA, Section 3-21-5(A)] neither defines "comprehensive plan" nor does it require that such a plan be formally adopted prior to the passage of the ordinance. The New Mexico courts have stated that a comprehensive plan may be found within the ordinance itself where a comprehensive plan has not been enacted and that the plan need not be in the form of a document ...[t]he district court concluded that the ordinance was valid because the County has a comprehensive plan in substance if not in form at the time the ordinance was enacted. We agree." [890 P.2d 395, 404 (1994)].

Even when there *is* a comprehensive plan, New Mexico courts have held the plan to be merely a statement of aspirational principles, without legislative force. Most recently in *West Bluff Neighborhood Association v. City of Albuquerque*[20], Chief Justice Bossom, delivering the opinion of the Court, reaffirmed the weak interpretation afforded the "in accordance with the comprehensive plan" requirement in New Mexico law:

> "We understand the 'in accordance with the [comprehensive plan]' language of [NMSA] Section 3-21-5(A) to require that land use planning regulations and decisions be guided by a city master plan and generally be consistent with a city master plan. However, we do not infer from that one phrase that the legislature

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[18] *Id*, 554 P.2d 665, 667 - 668.

[19] 119 N.M. 334; 890 P.2d 395 (Ct. App.1994)

[20] 132 N.M. 433; 50 P.3d 182 (Ct. App. 2002)

> intended master plans to be strictly adhered to in the same manner as a statute, ordinance, or agency regulation." [50 P.3d 182, 187 (N.M. Ct. App. 2002)].

It is possible for the City to bind itself by ordinance to strict adherence to the master plan. *Atlixco Coalition v. County of Bernalillo*, 1999-NMCA-088, ¶¶ 17-22, 127 N.M. 549, 984 P.2d 796. Short of that, City officials are not free to ignore the master plan but must utilize it as a policy guide in the land use decision-making process. *West Bluff*, 2002-NMCA-075, ¶ 33. Taken together, *Miller*, *Bogan* and *West Bluff* are the *locus classicus* of the "Unitary" approach to development, zoning and the comprehensive plan, where judicial decision-making trumps legislative action; where zoning is so much more significant than planning that plans can be inferred in zoning ordinances even when such plans do not actually exist; and where plans do exist they can effectively be disregarded as mere aspirational, unenforceable goals. Such an approach has been roundly criticized for being too short-term in scope. As has been explained:

> "Community planning leads to the creation of land use goals that become the basis for and drive zoning and other types of land use regulations. However, the history of planning and land use regulation put zoning ahead of planning. With no driving vision for land use, land use regulation was incoherent and unprincipled in its development, leaving communities without the power to direct their own urbanization activities."[21]

The prioritization of zoning above planning has been referred to as an historical error, with the alternative (and it is submitted, better) view being one where long-term planning drives short-term zoning.[22] Planning goals, as set out in a comprehensive plan, represent a separate interpretative standard legislatively promulgated and thus ensure full public participation, subject

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[21] Sullivan and Michel, *Id* at 81.

[22] Sullivan and Michel, *Id* at 76.

to review based on a deferential standard that is easily satisfied given the presumption of validity of legislative acts.[23] Under such a system, planning assumes a new and significant role as a "...series of statements and precepts, representing community choice and decisions as to the space needs."[24]

Prioritizing the comprehensive plan in this way is precisely what was done in the classic "plan as law" case of *Golden v. Planning Board of the Town of Ramapo*.[25] Justice Scileppi, giving the majority opinion of the New York Court of Appeals, said of the due process entitlements of those parties opposing the application of the comprehensive plan:

> "...The power to zone under current law is vested in local municipalities ... [w]hat does become more apparent ... is that though the issues are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the rights of others "in search of a [more] comfortable place to live" ...(quoting *Concord Twp. Appeal*, 439 Pa. 466, 474)."[26]

Justice Scileppi further explained that:

> "The evolution of more sophisticated efforts to contend with the increasing complexities of urban and suburban growth has been met by a corresponding reluctance upon the part of the judiciary to substitute its judgment as to the plan's over-all effectiveness for the considered deliberations of its progenitors; see *e.g.*, *National Land & Inv. Co. v. Easttown Typ. Bd. Of Adj.*, 419 Pa. 504, 521. Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning, and thus well within the legislative prerogative, not lightly to be impeded (*Rogers v. Village of Tarrytown*, 302 N.Y.

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[23] See generally, Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

[24] Haar, *Id* at 1174-1175.

[25] 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). *See also*, *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973).

[26] 285 N.E.2d 291, 300 (1972).

115, 121; *Matter of Wulfsohn v. Burden*, 241 N.Y. 288, 296-297.)"[27]

Finally, in upholding the status of the comprehensive plan as a legally binding document, Justice Scileppi summarized his reasons for affording the comprehensive plan such a high degree of importance in the overall planning/zoning scheme of the Township of Ramapo:

> "Considered as a whole, [the *Ramapo* scheme] represents both in its inception and implementation a reasonable attempt to provide for the sequential, orderly development of land in conjunction with the needs of the community, as well as individual parcels of land, while simultaneously obviating the blighted aftermath which the initial failure to provide needed facilities so often brings."[28]

Furthermore, it is perfectly possible to judicially overlay such a system into a "Unitary" system. In fact, overlaying the "plan as law" system into the New Mexico "Unitary" approach is *precisely* what was done in *Ramapo*, as the current New Mexico approach was typical in new York prior to the *Ramapo* decision. This approach has been upheld by the Supreme Court of New York[29], and has received extensive academic support[30] and judicial recognition. *Ramapo*

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[27] 285 N.E.2d 291, 303 (1972).

[28] 285 N.E.2d 291, 303 (1972).

[29] E.g. *Continental Bldg. Co. v. Town of N. Salem*, 211 A.2d 88, 91; 625 N.Y.S.2d 700, 703 (N.Y. App. Div. 3d Dep't 1995); *Cellular Tel. Co. v. Village of Tarrytown*, 209 A..2d 57, 66; 624 N.Y.S. 2d 170, 175 (N.Y. App. Div. 2d Dep't 1995); *Gernatt Asphalt Prods. v. Town of Dardinia*, 208 A.D. 2d 139, 152; 622 N.Y. S. 2d 395; 133 Oil & Gas Rep. 310 (N.Y. App. Div. 1st Dep't 1995).

[30] E.g. for a detailed explanation of the *Ramapo* plan and its significance, see John R. Nolan, *Golden and its Emanations: The Surprising Origins of Smart Growth*, 35 THE URBAN LAWYER 15 (2003) and Daniel J. Curtin, Jr., *Ramapo's Impact on the Comprehensive Plan*, 35 THE URBAN LAWYER 1 (2003). For a recent declaration of the importance of *Ramapo* in the whole make-up of the State of New York's Smart Growth Initiatives, see Professor Patricia E. Salkin, *Sorting Out New York's Smart Growth Initiatives: More Proposals and More Recommendations*, 8 ALB. L. ENVTL. OUTLOOK 1, 4 (2002). *Ramapo* has been hailed as pioneering "…orderly growth…" in New York and elsewhere: see

has been cited with approval in the highest courts of at least 17 states[31], several of which are

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Professor Steven J. Eagle, *The 1997 Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345, 370 (1998). There are numerous other articles hailing *Ramapo* as a landmark decision: see for example, Daniel R. Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976); Edward J. Sullivan and Lawrence Kressel, *Twenty Years After – Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. LAW ANN. 33 (1975), and Sullivan and Michel, *Id.*

[31] Examples of citations of *Ramapo* in various state courts are as follows: (1) Arizona Court of Appeals: *Bella Vista Ranches v. Sierra Vista*, 126 Ariz. 142; 613 P.2d 302, 304 (Ariz. Ct. App. 1980); (2) Supreme Court of California: *Associated Home Builders, Inc. v. Livermore*, 18 Cal. 3d 582; 135 Cal. Rptr. 41, 62; 557 P.2d 473, 494; 7 Envtl. L. Rep. 20155, 92 A.L.R.3d 1038 (1976); (3) Connecticut Supreme Court: *Arnold Bernhard & Co. v. Planning & Zoning Com*., 194 Conn. 152; 479 A.2d 801, 806 (1984); (4) Florida District Court of Appeals: *Dade County v. Yumbo*, S. A. 348 So. 2d 392, 395 (Fla. Dist. Ct. App. 3d Dist. 1977); (5) Idaho Supreme Court: *Dawson Enters. v. Blaine County*, 98 Idaho 506; 567 P.2d 1257, 1274 (Idaho 1977); (6) Illinois Appellate Court: *La Salle Nat'l Bank v. County of Lake*, 27 Ill. App. 3d 10; 325 N.E.2d 105, 114 (Ill. App. Ct. 2d Dist. 1975); (7) Maine Supreme Judicial Court: *Tisei v. Ogunquit*, 491 A.2d 564, 569; (Me. 1985); (8) Maryland Court of Appeals: *Maryland--National Capital Park & Planning Com. v. Rosenberg*, 269 Md. 520; 307 A.2d 704, 705 (1973); (9) Massachusetts Supreme Judicial Court: *Sturges v. Chilmark*, 380 Mass. 246; 402 N.E.2d 1346, 1351 (1980); (10) Michigan Supreme Court: *Ed Zaagman, Inc. v. Kentwood*, 406 Mich. 137; 277 N.W.2d 475, 505 (1979); (11) Montana Supreme Court: *State ex rel. Diehl Co. v. Helena*, 181 Mont. 306; 593 P.2d 458, 461 (Mont. 1979); (12) New Hampshire Supreme Court: *Beck v. Raymond*, 118 N.H. 793; 394 A.2d 847, 849 (1978); (13) New Jersey Supreme Court: *Oakwood at Madison, Inc. v. Madison*, 72 N.J. 481; 371 A.2d 1192, 1245 (1977); (14) North Dakota Supreme Court: *Minch v. Fargo*, 332 N.W.2d 71, 74 (N.D. 1983); (15) Ohio Supreme Court: *Forest City Enter. v. Eastlake*, 41 Ohio St. 2d 187; 70 Ohio Op. 2d 384, 324 N.E.2d 740, 749 (1975); (16) Pennsylvania Supreme Court: *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182; 382 A.2d 105, 115 (1977); (17) South Carolina Court of Appeals: *Bear Enters. v. County of Greenville*, 319 S.C. 137, 141; 459 S.E.2d 883, 886 (S.C. Ct. App. 1995).

"Unitary" states[32]; and in the 1st Circuit Court of Appeals[33], 4th Circuit U.S. District Court[34], 6th Circuit U.S. District Court[35], and 9th Circuit Court of Appeals[36], not to mention the dismissal of the petitioner's appeal by the United States Supreme Court in the case itself.[37]

Approaching a separate comprehensive plan as a legally binding document ensures fairness both to the significant public interest in the planning process, and to development interests.[38] Municipalities can pursue legitimate long-term objectives while providing clarity in a community's prospects for expansion and growth. The interests of neighbors, the general public, property owners and businesses alike are protected. And the "plan as law" approach is just as effective a safeguard against arbitrary governmental approaches to development[39] as it is against

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[32] Arizona, Connecticut, Michigan and Ohio all employ the Unitary approach to a varying degree. See Sullivan and Michel, *Id* at 90.

[33] *Steel Hill Dev., Inc. v. Sanbornton*, 469 F.2d 956, 962; 4 ENV'T REP. CAS. (BNA) 1746; 3 ENVTL. L. REP. 20018 (1st Cir. N.H. 1972).

[34] *Smoke Rise, Inc. v. Washington Suburban Sanitary Com*., 400 F. Supp. 1369, 1384; 8 ENV'T REP. CAS. (BNA) 1350; 6 ENVTL. L. REP. 20389 (D. Md. 1975).

[35] *Schenck v. City of Hudson Village*, 937 F. Supp. 679, 691 (N.D. Ohio 1996).

[36] *Construction Industry Asso. v. Petaluma*, 522 F.2d 897, 904; 8 ENV'T REP. CAS. (BNA) 1001, 5 ENVTL. L. REP. 20519 (9th Cir. Cal. 1975).

[37] 409 U.S. 1003 (1972).

[38] E.g. the *Bogan* case (supra) demonstrates how developers can be harmed by the Unitary approach just as easily as communities, due to the lack of clarity in the development and planning process**.**

[39] E.g. in *Ramapo* Justice Scileppi for the Court of Appeals said that the judiciary still played an important role in the planning process, in that their function was "…defining the metes and bounds beyond which local regulations may not venture, regardless of their professedly beneficial purpose." (285 N.E.2d 291, 301 (1972)).

development which harms the critical objectives of the community.

## II. *West Bluff* Revisited

In *West Bluff Neighborhood Association v. City of Albuquerque,*[40] the New Mexico Court of Appeals upheld an important element of the "Unitary" approach to planning and zoning; namely, that the comprehensive plan does not carry the same force as a statute, ordinance, or agency regulation.[41] The Court of Appeals based this determination on two factors. First, the Court in *West Bluff* adopted the reasoning in *Dugger v. City of Santa Fe*,[42] where the court placed significance on the fact that comprehensive plans are typically adopted by resolution rather than by way of ordinance.[43] Second, when considering the "in accordance with the comprehensive plan" language of NMSA § 3-21-5(A), the Court in *West Bluff* determined that the New Mexico Legislature did not intend that comprehensive (or "master") plans be strictly followed. The Court referenced academic opinion as authority for this proposition: specifically Stuart Meck's article, *Evolving Voices in Land Use Law*,[44] saying that the article demonstrated that:

> "…despite the widespread adoption of the "in accordance with" model statutory language, states vary widely in their approaches to land use planning, with many

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40 50 P.3d 182 (N.M. Ct. App. 2002)

41 *Id* at 187.

42 114 N.M. 47, 834 P.2d 424 (N.M. Ct. App. 1992). The Court of Appeals did acknowledge, however, that the *Dugger* distinction between resolutions and ordinances is substantially less significant following *West Old Town Neighborhood Association v. City of Albuquerque* 927 P.2d 529.

43 There the New Mexico Court of Appeals said that, "In New Mexico, a resolution does not carry the weight of law, as do ordinances for municipalities." (834 P.2d 424, 432 (1992).

44 3 WASH U.J.L. & POL'Y 295, 297-306 (2000).

states treating comprehensive land use plans as advisory and others revising their legislation to clarify the relationship between zoning and planning."[45]

These two factors led the Court to conclude that "…the master plan sets goals and community objectives that should [merely] guide decision makers as they apply the plan to a proposed development…" and that the Legislature's apparent intent to afford the plan only this weak weight should not be interfered with judicially.[46] With due respect to Chief Justice Bossom, these justifications for the "Unitary" approach are weak and should be revisited.

### A. Comprehensive Plans Passed by Resolution Should Be Given The Weight of Law

In *West Bluff* the Court determined that the comprehensive plan was not supposed to have the force of law, in part because "…city planning documents are typically adopted by resolution."[47] As the learned Chief Justice himself acknowledged in *West Bluff*, the bright line distinction between ordinances and resolutions in *Dugger* is now suspect following the analysis in *West Old Town Neighborhood Association v. City of Albuquerque*.[48]

MCQUILLIN identifies situations where a legislative act may be *evidenced* by resolution, and is thus denominated, but is *in fact* an ordinance;[49] it is submitted that such a situation arises

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45 *West Bluff*, 50 P.3d 182, 188 (2002).

46 "What the legislature has elected not to do [i.e. grant greater force to the plan than that of a mere advisory document], we cannot change by judicial fiat."50 P.3d 182, 188.

47 *West Bluff*, 50 P.3d 182,187 (2002).

48 122 N.M. 495; 927 P.2d 529 (Ct.App. 1996).

49 MCQUILLIN, *Id* at § 15.06: "The general rule is that where a charter commits the decision of a matter to the council or legislative body alone, and is silent as to the mode of its exercise, the decision may be evidenced by resolution. The rule

in the case of New Mexico comprehensive plans.

MCQUILLIN identifies several factors which point to a comprehensive plan being an ordinance rather than a mere "resolution" strictly understood. A comprehensive plan is not merely a "statement of opinion or mind or policy…for a temporary purpose…"[50] Rather, a comprehensive plan is "..a municipal act which applies generally and prescribes a new plan or policy"[51], and may also appropriately be characterized as an act intended to regulate the affairs of the municipality, and thus an ordinance.[52] A comprehensive plan has a specific set of requirements prescribed by New Mexico statute,[53] and doubtless affects the people of the relevant

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unquestionably is applied to the performance of a ministerial act or administrative business, of a municipality, and it has been held to be applicable even where the action is taken to be legislative or where the action taken in denominated a resolution but is in fact an ordinance enacted in the same form and manner as other ordinances." (emphasis added).

50 MCQUILLIN, *Id* § 15.02.

51 MCQUILLIN, *Id* § 15.02.

52 MCQUILLIN, *Id* § 15.08: "…It is an ordinance still if it is anything intended to regulate any of the affairs of the municipality, and if it is in substance and effect an ordinance."

53 NMSA § 3-19-9 states that the planning commission "shall" undertake several tasks in preparing the master plan, including "…careful and comprehensive surveys and studies of existing conditions and probable future growth of the municipality and its environs…" and must be drafted so as to "…best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development." MCQUILLIN, *Id* at § 15.02 states that "[r]esolutions, as distinguished from ordinances, need not be, in the absence of some express requirement, in any set or particular form." A comprehensive plan, it is submitted, is not general enough to be a resolution in the weak sense, given the specific requirements of the New Mexico legislature.

community in a material fashion.[54] Thus, it can easily be characterized as an ordinance, properly understood, under general principles of municipal law.

Furthermore, courts have focused on the generalized requirements of NMSA § 3-19-9(A), which states that "[t]he plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality…," as indicating that the Legislature did not intend the plan to have any legal effect. This was the approach taken in *Dugger*[55] and approved in *West Bluff*.[56] But this concentration on the words "general" and "guiding" ignores four factors. First, it ignores the word "accomplishing" in NMSA § 3-19-9(A). The master plan is designed to achieve results, not merely posit unascertainable goals. The plain wording of legislation has to mean something, the word "accomplishing" cannot simply be ignored. Second, it ignores the fact that the master plan does have specific legal effect. NMSA § 3-19-11, relating to the legal status of the master plan, states unambiguously:

> "After a master plan or any part thereof has been approved and within the area of the master plan or any part thereof so approved, the approval of the planning commission is necessary to construct, authorize, accept, widen, narrow, remove, extend, relocate, vacate, abandon, acquire or change the use of any:
>
> (1) park, street or other public way, ground, place or space;

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[54] MCQUILLIN, *Id* at § 15.02: "…[A]ll legislation creating liability of affecting in any important or material manner the people of the municipality should be enacted by ordinances."

[55] 834 P.2d 424, 432 (1992): "The New Mexico legislature intended any master plan adopted by a municipality to be advisory in nature. Section 3-19-9(A) states expressly that the master plan 'shall be made with the *general purpose of guiding* and accomplishing a co-ordinated, adjusted and harmonious development of the municipality."

[56] 50 P.3d 182, 187 (2002).

(2) public building or structure; or
(3) utility, whether publicly or privately owned." (emphasis added).

In essence the master plan solidifies the status of those rights of way, buildings and utilities referred to in NMSA § 3-19-11(A). Thus it must have legal effect, and it is not merely aspirational in scope.

Third, the *West Bluff/Dugger* approach overemphasizes the general nature of the master plan. Such generality was present in the statute authorizing the creation of comprehensive plans in *Ramapo*;[57] the fact that the plan was general in scope was no bar to the plan having legal effect.

Fourth, the mere fact that a master plan is general in scope should not be conceptualized as barring its legal effect. Otherwise, it would falsely appear to be impossible to import broad, future-oriented principles into concrete form in any legislation; and clearly it is possible, for such a task is undertaken by legislatures around the United States on a regular basis.

Finally, it is conceptually flawed to characterize comprehensive plans as being less significant than ordinances, such as zoning or other ordinances, designed to protect the health, safety and well-being of inhabitants of a municipality. Comprehensive plans are on all fours with such ordinances in terms of their nature, scope, effect, and authority and should be treated

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[57] NY CLS Town § 272-a, authorizes the creation of comprehensive plans in the Town of Ramapo. Subsection (3) reads as follows:

3. Content of a town comprehensive plan. The town comprehensive plan may include the following topics at the level of detail adapted to the special requirements of the town:

(a) General statements of goals, objectives, principles, policies and standards upon which proposals for the immediate and long-range enhancement, growth and development of the town are based. (emphasis added).

similarly. This much is clear from the opinion of Justice Scileppi in *Ramapo*:

> "The power to restrict and regulate under [the applicable law] section 261[58] includes within its grant, by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course."

Clearly in *Ramapo*, Justice Scileppi took the view that the power to regulate a city's growth by means of a comprehensive plan is part and parcel of the city's overall scheme of public protection, including the ability to zone. In *Ramapo* the United States Supreme Court decision of *Euclid v. Amber Realty Co.*[59] was cited as authority for this proposition. Justice Sutherland for the Supreme Court said:

> "…[T]he village [of Euclid, Ohio], though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed

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[58] NY CLS Town § 261 provides, *inter alia*:

> "For the purposes of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city…"

[59] 272 U.S. 365 (1926).

lines."[60] (emphasis added).

Justice Sutherland went on to state that the trend was moving in favor of a broad power to permit municipalities to create certain forms of districts at its discretion,[61] and that such provisions should only be struck down by the courts as unconstitutional if they bore no substantial relation to the public health, safety, morals or general welfare powers from whence they sprung.[62]

*Ramapo* and *Euclid* are both authority for the proposition that the power to plan is as significant as the power to zone. Although planning must logically come first, the power to plan can be implied from a municipality's well accepted power to regulate the behavior of businesses and citizens to protect the public health, safety, morals and general welfare. To classify comprehensive plans as being less significant than ordinances is to fail to recognize the importance of any municipality's overall power to create a scheme to protect the public well-being. Comprehensive plans are, in fact, more fundamental to those schemes than zoning ordinances. New Mexico has specifically approved the use of zoning "to protect and promote the

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[60] 272 U.S. 365, 389 (1926).

[61] 272 U.S. 365, 390 (1926).

[62] Justice Sutherland said in *Euclid* at 272 U.S. 365, 395 (1926):

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated pertinent to the inquiry, at least, the reasons are 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: *Cusack Co. v. City of Chicago* 242 US 526; *Jacobson v. Massachusetts* 197 U.S. 11."

safety, health, morals and general welfare";[63] implicit in such approval is an approval of the significance of the comprehensive plan as an equivalent class of legislative action, as *Ramapo* and *Euclid* make clear. Moreover, both authorities advocate a deferential standard of review to the municipality in such cases, allowing the municipality, as representatives of the people, to make its own decisions about its long term future, providing such decisions are not wholly arbitrary.

Thus, the first of the arguments identified by the Court in West Bluff to justify its assertion that the comprehensive plan is a mere guide without legal effect, suffers from the flaws identified above.

### B. ___The "In Accordance" Language Should Afford Comprehensive Plans the Force of Law

Petitioners in *West Bluff* argued that the "in accordance with a comprehensive plan" language of NMSA § 3-21-5(A) "…incorporates the comprehensive plan by reference, giving it a legal stature on par with zoning ordinances, regulations, and other such restrictions that do have force of law."[64] The Court rejected this argument, referring to Stuart Meck's article[65] as authority for the proposition that the legislative intent of the "in accordance with the comprehensive plan" language was to require merely that decisions be "guided" by a city master plan. With due respect to Chief Justice Bosson, the Meck article is scant authority for the proposition that the Legislature of New Mexico, by the use of the "in accordance with a comprehensive plan"

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[63] *City of Santa Fe v. Gamble-Skogmo, Inc.* 389 P.2d 13, 17 (1964).

[64] 50 P.3d 182, 187 (2002).

[65] *Evolving Voices in Land Use Law*, 3 WASH U.J.L. & POL'Y 295, 297-306 (2000).

language, did not intend the comprehensive plan to have legal effect. First, the article was prepared as part of a *festschrift* in honor of Professor Daniel R. Mandelker, who has been an avid proponent of the plan-as-law approach[66] and a commentator on the expansive importance of *Ramapo*.[67] Second, Meck's article charts the progress of the SZEA and the Standard City Planning Enabling Act (SCPEA)[68], the source of the "in accordance with a comprehensive plan" language. Though Meck does concede that the Model legislation's wording is unclear and that states have been varied in the application and interpretation of that wording,[69] Meck's analysis of the legislative history and backdrop to the Model legislation makes it absolutely clear that the intent of the legislators creating the SZEA was to prioritize long-term planning above zoning. Meck notes that when the third draft of the SZEA was circulated for review by external planners,

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[66] See generally, Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Law*, 74 MICH. L. REV 900 (1976).

[67] E.g. see Edward J. Sullivan, *Evolving Voices in Land Use Law: A* Festschrift *in honor of Daniel R. Mandelker; The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation* 3 WASH U.J.L. & POL'Y 323, 338-339 (2000) (part of the same series of articles as that prepared for the *festschrift* by Stuart Meck):

"It was Mandelker who instinctively knew the significance of cases such as *Golden v. Planning Board of the Town of Ramapo*, in which a regulatory scheme based on well-considered and integrated, albeit imperfect, capital facilities and land use plans survived highly intensive statutory and constitutional challenges."

[68] U.S. Dept. of Commerce 1928.

[69] *Evolving Voices*, 3 WASH U.J.L. & POL'Y 295, 304 (2000):
"…[T]he "in accordance" language continued to cause problems in land use litigation. Many ordinances were developed without the formulation of any plan or study, much less one that was comprehensive, and the court continued to uphold them. Despite the ambiguity, the "in accordance" language is still found in the enabling legislation of many states."

one of those planners, Harland Bartholomew,[70] suggested the language be changed from "well-considered plan" to "comprehensive plan." Bartholomew went on to explain in detail the significance he attached to the phrase "comprehensive plan":

> "Without such a comprehensive city plan, the framers of the zoning plan must make numerous assumptions regarding the future of city in respect of all these matters but without the benefit of detailed information and study. Zoning is but one element of a comprehensive plan. It can neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan…" (emphasis added).[71]

Bartholomew's approach ties in neatly with the holistic approach to zoning and the comprehensive plan endorsed by cases such as *Ramapo* and *Euclid*, identified above. Meck says of Bartholomew's paper:

> "Bartholomew clearly was thinking of a study that not only looked at existing conditions but also at potential future ones as well…Bartholomew's paper supports the notion that the zoning plan was to be grounded in separate technical reports that documented its rationale with quantitative and qualitative analyses of community growth and current and future land use relationships, preferably taking into account the impact of proposals for future public improvements. In short, he was talking about a separate document that was a plan." (emphasis added).[72]

As far as the legislative history of the "in accordance with a comprehensive plan" language is concerned, Meck concludes that "[t]he historical backdrop suggests that the preparation of an independent plan or study should be a condition precedent to the adoption of a

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[70] Bartholomew is described by Meck as "a nationally-famed St. Louis planning consultant." (3 WASH. U.J. L. & POL'Y 295, 300). Bartholomew was clearly an influential figure in both the drafting of the SZEA Model legislation and the thinking behind it.

[71] Harland Bartholomew, *What is Comprehensive Zoning?* in Planning Problems of Town, City and Region: Papers and Discussions and the Twentieth National Conference on City Planning 47, 50 (1928).

[72] *Evolving Voices*, 3 WASH U.J.L. & POL'Y 295, 301 (2000).

zoning ordinance."[73] Though the *application* of the language has been confused, and though several states have mis-applied the language, this factor alone, contrary to what is asserted in *West Bluff*, cannot be authority for the proposition that the language should also be mis-applied in New Mexico.

The *intent* behind the language is, Meck asserts, reasonably clear. Thus, it is incorrect to assert, as was asserted in *West Bluff*,[74] that the intent of the New Mexico Legislature, in adopting language identical to the SZEA, was not to accord the plan any special weight equivalent to that of an ordinance. The comprehensive plan was intended to have such significance under the model legislation prepared by the Dept. of Commerce, which New Mexico has followed essentially word-for-word. This approach condemns the proposition that the comprehensive plan can be found in the zoning ordinances "in substance if not in form" as was asserted in *Bogan*.[75] The plan was intended to be a separate document. Thus, the second of the arguments promulgated by the Court in *West Bluff*, to justify its assertion that the comprehensive plan is a mere guide without legal effect, suffers from various flaws identified above.

The above authorities demonstrate that the approach taken in *West Bluff* is unconvincing, and that the comprehensive plan *can* properly be conceptualized as being equivalent in stature to other legislative acts promulgated by municipalities. Certain elements of the *West Bluff* decision are encouraging: in particular, that although the status of the plan in that case was only a weak advisory document, development clearly offensive to that particular plan could not be permitted

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[73] *Evolving Voices*, 3 WASH U.J.L. & POL'Y 295, 304 (2000).

[74] 50 P.3d 182, 187 (2002)

[75] 890 P.2d 395, 404 (1994).

given the specific language used to implement it;[76] moreover, the plan cannot be ignored completely in the decision-making process.[77] To the extent that *West Bluff* is an obstacle to ascribing *Ramapo*-style significance to the comprehensive plan, it is wrongly decided and should be revisited.

## III. New Mexico Should Join Other States in Moving Towards the "Plan as Law" Approach

Certain plans *have* been afforded legal status above and beyond mere guidance in New Mexico caselaw.[78] In *West Old Town Neighborhood Association v. City of Albuquerque,*[79] the New Mexico Court of Appeals considered the applicability of an existing Sector Plan to annex land that had not yet been zoned. The City argued that upon annexation, the City would be free to select an initial zoning regardless of the Sector Plan, arguing that the Sector Plan "…is merely advisory…".[80] The Court of Appeals rejected this argument. After discussing *Dugger* and McQUILLIN, and considering the extensive formalities required for the approval of a Sector Plan, the Court concluded that, "by the very language of the Albuquerque planning and zoning ordinances, the city has expressed the intention that sector development plans have the force of

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[76] 50 P.3d 182, 189.

[77] "…[W]e emphasize that City officials are not free to ignore the master plan, but must utilize the plan as a policy guide in the decision making process." 50 P.3d 182, 191.

[78] *City of Albuquerque v. Paradise Hills Special Zoning District Commission,* 99 N.M. 630, 661 P.2d 1329 (1983).

[79] 927 P.2d 529 (N.M. Ct. App. 1996).

[80] 927 P.2d 529, 532.

zoning,"[81] and that allowing the City to ignore the Sector Plan "…would ignore one of the purposes of zoning ordinances, which is to protect comprehensive planning and zoning in anticipation of annexation."[82]

The 1995 Plan in the present case is a Sector Plan, identical in form to the plan in *West Old Town*. Furthermore, at page 3 of the 1995 Plan at "Purpose and Intent of Plan", the City has made it clear that: "The Land Use Section of this plan is adopted as a constituent part of the City Zoning Code, and has the force of law." The 1988 Plan states at Policy G that "[e]xisting urban center locations shown on the comprehensive plan map, and their predominate uses in accordance with their unique roles and expected needs of the community, shall be developed in accordance with their respective sector plans [including the sector plan for the Uptown area])" (emphasis added). *West Old Town* makes it clear that Sector Plans, applying with full force of law, are "…comprehensive plans for [a given] area…".[83] Applying *West Old Town* and the other plan-as-law authorities identified above, the land use section of the 1995 Plan must be given full effect.

The process of adoption of the 1995 Sector Plan was extensive and involved several stages, including a memorial calling for a comprehensive review of the original 1981 Sector Plan

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81 927 P.2d 529, 534.

82 *Id.*

83 *West Old Town*, 927 P.2d 529, 536. See also, *Atlixco Coalition v. County of Bernalillo*, 127 N.M.549, 984 P.2d 796 (Ct. App.1999). The Groundwater Protection Policy and Action Plan (GPPAP), although adopted by resolution, had the force of law and was binding on the board of county commissioners because the GPPAP was explicitly incorporated into a subsequent ordinance.

in September 1994; a public workshop in November 1994 held in the Uptown area; a City Council meeting on January 18, 1995; a City Council Land Use Planning and Zoning Committee ("LUPZ") meeting on January 25, 1995; a City Council meeting authorizing a moratorium on development on February 6, 1995; public hearings on the 1995 Sector Plan on April 13, 1995 (City Environmental Planning Commission ("EPC")), May 5, 1995 (City Council Land Use Planning and Zoning Committee meeting), May 24, 1995 (joint EPC and LUPZ) and May 30, 1995 (LUPZ); and two full City Council meetings on June 5, and June 19, 1995. Representatives of Petitioner-Appellee ACP were present at all public hearings, and presented their arguments in opposition to the adoption of the 1995 Sector Plan. The adoption of the 1995 Sector Plan was clearly a legislative act, as opposed to a quasi-judicial decision. As such, ACP's participation was sufficient to satisfy its due process rights.

## IV. ACP Had No Entitlement to Approval of its Site Plan

ACP argued below that its revised site plan submitted in September 1994, prior to the adoption of the 1995 Sector Plan, contained uses that were allowable as a matter of right which the 1995 Plan could not abrogate. The argument implies that the city council had no discretion to deny ACP's revised site plan. This is clearly an incorrect interpretation of existing law.

ACP also argued that it relied on the existing zoning scheme and changed its position in reliance on that scheme, hinting that there was a vested right to the zoning which was prejudiced by the moratorium. Under similar facts ten years ago in Rio Arriba County, the New Mexico Court of Appeals clearly rejected such a notion in *Brazos*.[84] There, a moratorium was imposed

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[84] *Brazos Land Inc. v. Board of County Comr's of Rio Arriba County,* 848 P.2d 1095 (N.M. Ct. App. 1993).

on subdivision approvals four months after the petitioner submitted a preliminary subdivision plat for approval. The moratorium lasted for approximately seven months, during which time the board of county commissioners promulgated new subdivision regulations. The board then applied post-moratorium regulations to the subdivision plat. The petitioner argued that it had vested rights; alternatively, that its application had "pending status" per Art. IV § 34 of the New Mexico Constitution. The Court of Appeals ruled that Art. IV "pending status" was inapplicable, specifically because "...the only administrative action Brazos [the petitioner] took was to submit a preliminary plat application, which the Board has legal discretion to consider and approve or disapprove."[85] Furthermore, the petitioner in *Brazos* was found to have no vested rights -

> "In other jurisdictions, the determination of whether a new zoning ordinance will be applied retroactively is analyzed under a vested rights approach. There are two prongs that must be met for a vested right to exist. First, there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. Here, Brazos received no assurance to expect approval and no actual approval of the application. Nor was there any substantial reliance or change in position. Therefore, Brazos had no vested right and is subject to the Board's [new] regulations."

The situation in *Brazos* is directly analogous to the situation in the present case. ACP was given no assurances by the City that its second application in September 1994 would be approved. ACP worked with the City staff throughout the process, but this factor alone does not estop the City from denying ACP's application. The ruling in *Brazos*, subsequently affirmed in *Mandel v. City of Santa Fe*[86] and in *Santa Fe Trail Ranch v. Board of County Commissioners of*

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85 *Brazos*, 848 P.2d 1095, 1098.

86 894 P.2d 1041 (N.M. Ct. App.,1995)

*San Miguel County*[87] controls and defeats ACP's assertions of vested rights.

[87] 961 P.2d 785 (N.M. Ct. App., 1998)

## CONCLUSION

For all the above reasons, moving away from the "Unitary" approach should be endorsed. To the extent that *West Bluff*[88] opposes such an endorsement, it is wrongly decided. Reversing the determination of the Second Judicial District Court will help ensure that planning in New Mexico proceeds in a logical and rational fashion, connecting land use and development decisions to the goals and objectives expressed in the plans adopted by the community. The *Amicus Curiae* American Planning Association respectfully requests this Court to grant the appeals of the City of Albuquerque.

Respectfully submitted,

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[88] 50 P.3d 182 (N.M. Ct. App., 2002)

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 22nd day of December, 2003, I mailed a true copy of the **BRIEF *AMICUS CURIAE* OF THE AMERICAN PLANNING ASSOCIATION**, herein by placing a copy of same in a sealed envelope, postage prepaid, depositing same in the U.S. Mail, addressed as follows:

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