IN THE SUPREME COURT OF NEW MEXICO

No. 29,791

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner- Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE

Respondent – Respondent.

Consolidated with:

No. 29,799

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE

Respondent-Respondent.

BRIEF *AMICUS CURIAE*
OF THE AMERICAN PLANNING ASSOCIATION AND THE
NEW MEXICO CHAPTER OF THE AMERICAN PLANNING ASSOCIATION
IN SUPPORT OF
THE CITY OF ALBUQUERQUE
Second Judicial District Court, County of Bernalillo
Susan M. Conway, District Judge
No. 95-006031

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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 well-being of people today as well as future generations by developing sustainable and healthy communities and environments.

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 20 divisions devoted to specialized planning interests. The APA represents more than 41,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The New Mexico Chapter of the American Planning Association (NM-APA) represents over 300 planners in this state. Members of APA and NM-APA are involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

As an advocate for good planning, the APA files *amicus curiae* briefs in cases of importance to the planning profession. A few of the cases in which the 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), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725

(1997), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Kelo v. City of New London*, 545 U.S. 469 (2005), *Rapanos v. United States*, 126 S.Ct. 2208 (2006), and *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

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 the APA. In recent years, several policy guides have been adopted that highlight the APA's concerns about the issues involved in the present case, including a Policy Guide on Takings (1995), a Policy Guide on Planning for Sustainability (April 2000), and a Policy Guide on Smart Growth (April 2002). Each of these may be found at http://www.planning.org/policyguides/.

The APA believes the City of Albuquerque was justified in revising the Uptown Sector Plan ("95USP") because the previous version of the sector plan failed to implement the policies set forth in the adopted comprehensive plan.[1] Once the City recognized a disconnect existed between its development standards and the policies spelled out in the City/County Plan, the City had a responsibility to make revisions to the 95USP in order to effectively implement the policies in the City/County Plan. To ignore the disconnect would have been contrary to the public's interest and contrary to good planning.[2]

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[1] Albuquerque/Bernalillo County Comprehensive Plan (as amended 2003) [hereinafter City/County Plan].

[2] See eg., *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006) (holding that property owner was entitled to writ of mandamus directing city to reconcile conflict between comprehensive plan and zoning ordinance.)

The APA and NM-APA urge this Court to affirm the decision of the New Mexico Court of Appeals below and provide a resounding affirmation of the important role of planning and the comprehensive plan to the future of our communities.

SUMMARY OF ARGUMENT

This appeal highlights the unresolved tension between private property rights versus the public's interest in how and where the community will grow -- a debate ongoing across the nation. Albuquerque Commons Partnership (ACP), in effect, wants the zoning to trump the plan so it can build a big-box retail shopping center. The City says, in effect, "wait a moment – that's not what the community's plan envisions for the area – an activity node with mixed uses encouraging pedestrians and transit use. There is a disconnect between our plan and the zoning." City leaders, to their credit, recognized this disconnect and took steps to amend the zoning and development standards in order to implement the adopted plan.

The APA submits this brief *amicus curiae* to explain the evolution of planning in New Mexico and to describe the important role and function of the comprehensive plan to address the challenges of the future. The APA urges the New Mexico Supreme Court to join the growing number of states around the country that recognize comprehensive plans as the foundation for growth and development decisions. The approach to planning in those states has evolved from considering the comprehensive plan as an advisory document which merely guides decision-making and may or may not be followed, to

viewing the plan as the "constitution" of the community — a document which provides the legal basis for land use regulations and development decisions.[3]

New Mexico law already requires such consistency.[4] However, appellate court treatment of this statute has been inconsistent. This case offers the opportunity for clarity of the role of the comprehensive plan in New Mexico land use law. The consistency doctrine is the glue which connects the adopted comprehensive plan – to the land use regulations (zoning) – and to the incremental (day-to-day) development decisions.[5] At a minimum, upholding the decision of the Court of Appeals below will affirm the importance of the City's comprehensive plan and its reasonable implementation through a logical planning and regulatory framework. Ideally, this Court will provide much-

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[3] *See, e.g.*, Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 375 (1955). Professor Haar described the various views of the comprehensive plan by local governments, planners, and courts and argued that,

> [i]f the plan is regarded not as the vest-pocket tool of the planning commission, but as a broad statement to be adopted by the most representative municipal body—the local legislature—then the plan becomes a law through such adoption. . . . It thus has the cardinal characteristic of a constitution. *Id.* at 24.

Based on annual reports to the American Bar Association, Ed Sullivan has found that the comprehensive plan is gradually gaining more credence, through state legislation and court decisions, as the standard by which land use regulations and actions are judged. The migration away from the Unitary view—which does not require, and does not attach significance to, plans—to the Planning Factor and Planning Mandate views is pronounced over the recent past. Moreover, the increasing focus on the amendment and interpretations given plans call attention to their significance in land use regulation. The trend is definitely towards the requirements of a planning process that results in discrete, enforceable policies that may be examined and changed as circumstances require. *See* Edward J. Sullivan, *Recent Developments in Land Use, Planning, and Zoning Law: The Evolving Role of the Comprehensive Plan, Hot Topics in Land Use Law*, 1999 A.B.A. SEC. ST. & LOCAL GOV'T L.; Edward J. Sullivan, *The Rise of Reason in Planning Law: Professor Mandelker and the Relationship of the Comprehensive Plan in Land Use*, 3 J. LAW & POLICY 323 (2000); Edward J. Sullivan, *Comprehensive Planning and Smart Growth*, *in* TRENDS IN LAND USE LAW FROM A TO Z (Patricia E. Salkin ed., 2001); Edward J. Sullivan & Matthew J. Michel, Ramapo *Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75 (2003) [hereinafter Ramapo *Plus Thirty*]; Edward J. Sullivan, *Comprehensive Planning*, 36 URB. LAW. 541 (2004); Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 38 URB. LAW. 685 (2006).

[4] N.M. STAT. § 3-19-9(A) (1978).

[5] Robert Lincoln, AICP, *Implementing the Consistency Doctrine, in Modernizing State Planning Statutes – The Growing Smart*[SM] *Working Papers*, Vol. 1, pp.89-104, American Planning Association, PAS 462/463 (March 1996).

needed clarity regarding the role of the comprehensive plan in the land use and development review process.

I. The Evolution of Land Use Planning and Plans

The current statutory planning and land use framework in New Mexico originated from two landmark pieces of legislation drafted by an advisory committee appointed by (then) Secretary of Commerce, Herbert Hoover: the first was the Standard State Zoning Enabling Act in 1926 (SZEA), followed two years later by the Standard City Planning Enabling Act in 1928 (SCPEA).[6] Hoover was motivated to draft model enabling legislation because he wanted to provide a uniform national framework for zoning and planning that could survive a challenge on state and federal constitutional grounds.[7] Although the validity of zoning had been upheld in a number of state courts, when the committee began drafting, the U.S. Supreme Court had not yet decided *Village of Euclid v. Ambler Realty Co.*[8] These model acts were designed to provide states with the tools to give local government full control over planning and zoning while balancing the need to preserve property rights with the need to protect cities against slums, blight, congestion, and loss of amenities.[9] By 1930, 35 states had adopted legislation based on the SZEA.[10] Today, nearly all 50 states have adopted portions or all of the SZEA.

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[6] For a brief description of the early planning enabling acts see, Stuart Meck, FAICP, *Model Planning and Zoning Enabling Legislation: A Short History*, pp. 1-17, contained in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART [SM] WORKING PAPERS, Volume One, American Planning Association, PAS 462/463 (March 1996); Edward J. Sullivan & Carrie A. Richter, *Out of the Chaos: Towards a National System of Land Use Procedures*, 34 URB. LAW. 449 (2002).

[7] Meck at p. 2

[8] 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). In this case, the Supreme Court upheld local government zoning efforts as furthering its efforts to protect the health, safety and welfare.

[9] For a discussion of the interaction and differences of opinion among members of the advisory committee in the formulation of the acts, see, R. Knack, S. Meck, and I. Stollman, "The Real Story Behind

The country was a very different place in the 1920s, facing very different challenges than today. There was no interstate highway system facilitating sprawling development into the countryside. Land use was a local and primarily urban issue. There seemed to be unlimited resources – both land and water. And there were far fewer people – approximately 360,350 New Mexicans in 1920 as compared to nearly 2 million in 2005.[11]

Today our communities are struggling with the regional impacts of growth and development and a whole new set of challenges – bumper to bumper commutes, over-crowded schools, park development which trails growth by nearly 10 years, a more than $700 million dollar backlog of infrastructure deficiency projects in Albuquerque,[12] deteriorating air quality and global warming concerns, limited water and land use resources, as well as accommodating the needs of an ever-growing population.

The SZEA, drafted more than eighty years ago, was prohibitive rather than prescriptive — the legislation was intended to discourage undesirable development and separate potential nuisances from residential neighborhoods rather than encourage long-term planning.[13] The New Mexico State Legislature adopted many of the provisions of the SCPEA and SZEA, beginning with delegating the power to zone to municipalities in

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the Standard Planning and Zoning Acts of the 1920s," *Land Use Law and Zoning Digest* 48, No. 2 (February 1996): 3-9.

10 N. Krause, Division of Building and Housing, U.S. Bureau of Standards, U.S. Department of Commerce, *Zoning Progress in the United States: Zoning Legislation in the United States* (Washington, D.C.: The Division, April 1930), 2.

11 U.S. Census Bureau, Decennial Census for New Mexico, prepared by the Bureau of Business and Economic Research, University of New Mexico (March 2007).

12 Planned Growth Strategy, Part 2, p.8, http://www.cabq.gov/council/pgs.html (accessed April 25, 2007).

13 DANIEL MANDELKER, LAND USE LAW 108 (4th ed. 1997).

1927. Laws of 1927, Chapter 2.[14] Authority to prepare and adopt a comprehensive plan followed.[15]

Unfortunately, the disconnect between planning and zoning occurred right from the beginning. Albuquerque adopted its zoning code in 1959, several years before it adopted its first plan comprised of several elements, referred to as the City Master Plan, between 1964 and 1972.[16] The Albuquerque/Bernalillo County Comprehensive Plan followed in 1975. This topsy-turvy relationship between zoning and planning elevated the community's zoning ordinance over its adopted plan, with the unintended consequence that the relevance and usefulness of the community's plan became questionable at best. Perhaps it also explains why some property owners believe, in error, that they have an entitlement to a particular zoning, regardless of what the community's plan may say.

City leaders acknowledged this serious disconnect in 2002 with the adoption of the Planned Growth Strategy, which noted:

> One cause of the inconsistency between Comprehensive Plan policies and the outcomes of development is that the policies were not translated into changes in the structure of law, regulations, procedures, and financial charges. The more detailed operations of government, in the context of a somewhat ambiguous set of policy statements, finally determine what is built, where it is built, and cost sharing between the developer, property

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[14] N.M. LAWS 1927, ch. 27, §§1-10 (1927). *See also* MANDELKER, supra note 13.

[15] Today, every county in New Mexico has adopted a comprehensive plan or is in the process of adopting one; and every large municipality in the state has adopted a comprehensive plan as well Of the 102 incorporated municipalities in New Mexico, the following have not adopted a comprehensive plan - Red River Taos Ski Valley, Maxwell, Springer, Cimarron, Grenville, Roy, Mosquero, Wagon Mound, Pecos, Encino, Willard, Logan, Floyd, Dora, Causey, Dexter, Virden (Conversation with Ken Hughes, Local Government Division, DFA, April 25, 2007).

[16] Planned Growth Strategy, Part 2, p. 11. http://www.cabq.gov/council/pgs.html (accessed April 25, 2007)

> owners, and the general public. While it was intended that modification be made to regulations, charges, etc., these actions were not taken. ...[17]

With the adoption of the 95USP, the City has taken an important step in rectifying this disconnect.

Unfortunately, through the years, zoning and planning have been conflated in New Mexico jurisprudence as well as in the development paradigm in many communities. Rather than assuming a proactive, systemwide approach to growth and development, the reality in New Mexico is that such decisions have been reactive and piecemeal, placing city leaders in a defensive position. The consequences of this reactive approach are well-known to anyone reading the local papers or watching the local news on television, and probably accounts for the finding that only 26% of Albuquerque city residents agreed with the statement in the 1999 Citizen Satisfaction Survey that "Albuquerque is well planned."[18] Another consequence of this reactive approach is that it implicitly lodges its trust in private development to meet public goals.

The frustration with the "business-as-usual" approach to development decisions led participants in a Shared Vision Town Hall to support an active role for local government in managing future growth.[19]

> "People .. wanted a different, more intentional approach to growth that is not reactive or piecemeal but instead follows carefully considered principles that are developed with a high degree of community involvement. The community needs to be more proactive, with development part of a bigger plan."[20]

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17 Planned Growth Strategy, Part 2, p. 11. http://www.cabq.gov/council/pgs.html (accessed April 25, 2007).

18 Planned Growth Strategy, Part 2, p. 4.

19 Planned Growth Strategy, Part 2, p.12.

20 *Id.*

In other words, Albuquerqeans want their community plan given supremacy; and the land use regulations and development decisions should be subordinate and consistent with the adopted plan.

II. New Mexico's "Unitary Approach" – Not for the 21st Century

A. Intent and Implementation: The Comprehensive Plan and the Uptown Sector Plan in Albuquerque

Planning involves the creation of long-term, forward-looking public policy which does not prevent growth but directs it in a coherent, carefully delineated fashion. Good planning should anticipate and mitigate the detrimental impacts of growth and development as well as provide greater predictability to the development process. As Professor Haar recognized more than fifty years ago, "in the press of day-to-day determinations in the field of land use, it is vital that there be some concrete unifying factor providing scope and perspective. Hence the need for city planning and the master plan . . . ."[21] This is precisely the need that the New Mexico state legislature addressed when it originally enacted the planning enabling legislation:

> The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development.[22]

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[21] Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155 (1955).

[22] N.M. STAT. § 3-19-9(A) (1978). In the context of county planning, the mandate is almost identical:

> Such planning shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the county which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development. *Id.* § 4-57-2(A).

The Albuquerque/Bernalillo County Comprehensive Plan (City/County Plan) quotes this language above,[23] and the 95USP looks to the City/County Plan for its legal and foundational authority.[24] This unbroken chain between the New Mexico planning enabling legislation, the City/County Plan and the 95USP provides the critical linkage necessary to ensure that current development decisions will result in "a coordinated, adjusted and harmonious development of the municipality."

Because the 95USP is derived directly from the state planning enabling act, it must logically be viewed as law. The City Council understood as much, stating in the 95USP that "[t]he Land Use Section of the plan is adopted as a constituent part of the City Zoning Code, and has the force of law."[25]

B. The Uptown Sector Plan: No Mere Zoning Ordinance Amendment

Zoning, by contrast, is the construction firm to the comprehensive plan's architect. The Oregon Supreme Court stated this principle in *Fasano v. Board of County Commissioners of Washington County:*

> "The purpose of the zoning ordinances, both under our statute and the general law of land use regulation, is to 'carry out' or implement the comprehensive plan. . . . The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles."[26]

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[23] City/County Plan, *supra* note 1. *See also* ALBUQUERQUE , N.M., CODE OF ORDINANCES § 14-13-1-1(A) (2006) [hereinafter ALBUQUERQUE CODE] ("The City has authority to adopt a comprehensive 'master' plan as granted under Chapter 3, Article 19, NMSA 1978 . . . .").

[24] 95USP, at 6 ("The Sector Development Plan elements and strategies were developed in accordance with the dictates of the Comprehensive Plan . . . .").

[25] *Id.* at 3.

[26] 507 P.2d 23, 27 (Or. 1973) (citing 1 ANDERSON, AMERICAN LAW OF ZONING, § 1.12 (1968)).

Zoning regulations alone are directionless. They do not elucidate long-term goals or evoke policy considerations. Professor Haar noted "zoning without planning lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve."[27]

The 95USP, as discussed, traces its very short lineage directly to, and is dependent upon, the state planning enabling legislation and the City/County Plan. It was, in fact, a disconnect between the plan and zoning regulations that the City Council was seeking to remedy when it enacted ordinances establishing its Planned Growth Strategy.[28] The Council deplored the fact that "[t]here are inconsistencies between adopted community plans and the structure of development regulations . . . that result in an undesirable gap between conditions and our best aspirations for the community."[29] It further noted that "[r]ecognized *comprehensive* community-building principles have not been and *should be incorporated* into the routine planning, standards, and functioning of City departments . . . ."[30]

This effort to ensure that the City's zoning regulations remain in close orbit around the City/County Plan is evident in the resolution adopting the 95USP.[31] Even more tellingly, the 95USP itself directly incorporates twelve long-term policy objectives[32] with the overall goal of "provid[ing] a framework and basis for the Sector

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27 Haar, *supra* note 21, at 1154.

28 ALBUQUERQUE § 14-13-1-1.

29 *Id.* § 14-13-1-1(K).

30 *Id.* § 14-13-1-1(M) (emphasis added).

31 Council Bill R-244, 11th Council, § 1 (1995) ("The Uptown Sector Plan as amended . . . is hereby adopted as a land use control pursuant to the Albuquerque/Bernalillo County Comprehensive Plan . . . .").

32 95USP, at 7–10.

Plan and its specific recommendations to guide Uptown's evolution into an urban center and special place as directed by the [City/County] Plan."[33] Finally, even those "specific recommendations" rely heavily on widely-accepted planning standards such as floor-area (FAR) ratios,[34] which are a means of guaranteeing an efficient use of space and permitting mixed-use development.

It is clear that the City is attempting to do what many municipalities across the country have done when they have come to the realization that zoning without planning is a recipe for disaster. The City has looked to the state's planning enabling statute for guidance, developed a comprehensive plan for development city- and county-wide, implemented the goals from that plan in a sector plan that is smaller in scale but no less reliant on long-term planning objectives, and, finally, amended its zoning ordinances to conform to both the City/County Plan and the 95USP.[35]

III. The New Mexico Approach to Planning: Solo into the Sunset?

A. New Mexico's "Unitary" approach

Despite the widespread and long-standing recognition that planning and zoning are separate concepts and that zoning regulations exist to further planning goals, there is a persistent tendency of some courts, including those New Mexico courts, to conflate the two. This is due to "the traditional role the comprehensive plan has played as merely part

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33 *Id.* at 7.

34 *See, e.g.*, 95USP, at 13.

35 A recent decision by the Fifth Judicial District Court in Santa Fe throw Albuquerque's actions in the instant case into sharp relief. In *Esquibel v. City of Santa Fe*, the elements of the General Plan at issue were "couched in terms of recommendations . . . ." No. D-0101-CV-2005-2376, at 16 (Mar. 17, 2007). By contrast, the 95USP is mandatory. *Supra*, note 32 and accompanying text (the plan "has the force of law"). Also, the challenged approval of the big box development in *Esquibel* was correctly viewed by the Court as a quasi-judicial action, as it was an application of the resolutions adopting the General Plan to a specific property. *Id.* at 19. In the instant case, the City's actions were legislative.

of a scheme of zoning under New Mexico law"[36]—what has been termed the "Unitary" approach to planning.[37]

The Unitary approach, which has changed little since its conception when the original zoning enabling acts were passed almost a century ago, views the comprehensive plan as being "either the zoning map or some coherent growth principle existing either within or outside the land use regulations themselves."[38] In other words, the comprehensive plan is not necessarily distinct from the zoning regulations and the two could even be found to be contained within the same document. This method of dealing with land use issues had its origins, its heyday, and its period of usefulness in a bygone, era where fewer people and a limited number of property uses made separating residential from industrial, for example, a simple task.[39] "The modern trend," the Court of Appeals below pointed out, "clearly is towards greater flexibility and discretionary review of proposed individual uses"—in other words, increased population growth, an

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[36] Edward J. Sullivan & Nicholas Cropp, *Legislative v. Quasi-Judicial—Deference or Defense?*, 27 ZONING & PLAN. L. REP. 5 (2004) [hereinafter *Deference or Defense*].

[37] Ramapo *Plus Thirty*, *supra* note 3, at 78. *See also Deference or Defense*, *supra* note 36, at 7 (citing New Mexico planning jurisprudence as an example of the Unitary approach in a discussion of the appeal to the Court of Appeals in the instant case).

[38] Ramapo *Plus Thirty*, *supra* note 3, at 78 (quoting Edward J. Sullivan & Lawrence Kressell, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. LAW. ANN. 33 (1975)). The other two main approaches have been called the Planning Factor approach, in which courts look to the comprehensive plan for guidance but do not treat it as binding authority, and the Planning Mandate approach, under which the comprehensive plan is "required as a precondition to and must be consistent with all subsequent land use regulation." *Id.*

[39] The land use systems of the day were characterized by what is known as Euclidean zoning, so-named because of the landmark U.S. Supreme Court case establishing the validity of the exercise of police power by municipalities enforcing their zoning ordinances, *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926)). Euclidean zoning involved "separating incompatible land uses through the establishment of fixed legislative rules that would be largely self-administering." 1 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:5, at 1-21 (2005) [hereinafter RATHKOPF].

exponential increase in use categories coupled with mixing of uses within development, and a better understanding of the need to conserve natural resources.[40]

The effect of the Unitary approach is to eliminate long-term policy considerations from the planning process. The courts will typically apply judge-created mechanisms to prevent what appear to be "bad" land use decisions, such as "spot zoning," "the appearance of fairness in land use decisions," or the "change or mistake" rule.[41]

The APA believes this Court can move New Mexico beyond the Unitary approach, just as the states discussed below have.

B. Examples of jurisdictions that have moved beyond the Unitary approach

1. Ramapo, New York

The approach of elevating the comprehensive plan above zoning regulations received its first judicial imprimatur thirty-five years ago in the landmark decision of *Golden v. Planning Board of the Town of Ramapo*.[42] There, the New York Court of Appeals upheld the comprehensive plan adopted by the town of Ramapo, raising "land use planning above mere regulations to a separate and independent factor by which to measure and evaluate land use regulations."[43] The court recognized as "largely

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40 149 P.3d at 81 (quoting RATHKOPF, *supra* note 39, at 1-24).

41 *See, e.g.*, RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 104 (1966). This level of judicial involvement in zoning decisions, according to Babcock, had created very early on a "pervading frustration" among judges who feel compelled to clear up the "mess of local zoning administration":

> In those jurisdictions where the final local zoning decisions are "legislative," that is, are made by the city council, the courts are torn between their traditional reluctance to explore the motives of legislators and their suspicion that, as one appellate judge put it, "there's a lot of hanky-panky that we suspect but cannot find in the record." *Id.*

42 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

43 Ramapo *Plus Thirty*, *supra* note 3, at 79.

antiquated"[44] the view that the public's interest in controlled growth is satisfied by the mere enactment of zoning regulations.[45]

Furthermore, the court stated, the town's comprehensive plan, which imposed time restrictions to ensure that public infrastructure kept pace with development, was due considerable deference and that "[i]mplicit 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."[46]

It should not be assumed that the judicial and legislative environment in New York in the late 1960s was particularly fertile ground for the rise of the comprehensive plan. The Unitary approach so familiar to New Mexico courts today was typical in that state prior to *Ramapo*. The New York Court of Appeals, followed in the years since by numerous jurisdictions, many of which have cited *Ramapo* with approval,[47] recognized

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44 285 N.E.2d at 299.

45 The Court of Appeals noted how growth has impacted land use planning where it stated:

> Experience, over the last quarter century, . . . with greater technological integration and drastic shifts in population distribution has pointed up serious defects and community autonomy in land use controls has come under increasing attack . . . because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation. *Id.*

46 *Id.* at 301.

47 At least seventeen states' highest courts have cited *Ramapo* with approval (including the following: (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 Comm'n*, 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 Comm'n v. Rosenberg*, 269 Md. 520; 307 A.2d

that the Unitary approach is a throwback to an era for which the pressures of modern towns and cities were unthinkable.

2. Oregon

Oregon today is widely known as a pioneer in long-term planning, but it was not always thus. To a certain degree, it took a courageous decision by the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*[48] to send the signal to local and regional governments across the state that a new day was dawning and that comprehensive plans could, indeed, be viewed as law. That decision struck down a rezoning action by the county as inconsistent with the comprehensive plan because the evidence before the board of commissioners was insufficient to justify a departure from that plan.[49]

Importantly for this appeal, the *Fasano* Court explicitly disapproved the "change or mistake" rule that was applied by the District Court in the instant case (relying on *Miller v. City of Albuquerque*[50]) and questioned by the New Mexico Court of Appeals.[51]

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)), as have the following federal courts: The 1st Circuit Court of Appeals (*Steel Hill Dev., Inc. v. Sanbornton*, 469 F.2d 956, 962 (1st Cir. 1972)), the 4th Circuit U.S. District Court (*Smoke Rise, Inc. v. Wash. Suburban Sanitary Comm'n*, 400 F. Supp. 1369, 1384 (D. Md. 1975)), the 6th Circuit U.S. District Court (*Schenck v. City of Hudson Village*, 937 F. Supp. 679, 691 (N.D. Ohio 1996)), and the 9th Circuit Court of Appeals (*Construction Indus. Ass'n v. Petaluma*, 522 F.2d 897, 904 (9th Cir. 1975)).

[48] 507 P.2d 23 (Or. 1973).

[49] *Id.* at 30.

[50] 554 P.2d 665, 667 (N.M. 1976).

Instead, the Oregon Supreme Court recognized, "[t]he important issues . . . are compliance with the statutory directive and consideration of the proposed change in light of the comprehensive plan."[52]

3. Montana

Montana proves that even when a state is saddled with 1920s-era planning enabling legislation, like New Mexico, the courts may nevertheless decide that the comprehensive plan is due considerable deference in deciding land use issues.

Montana's statutes feature the "in accordance with" language adopted from the SZEA.[53] Under the New Mexico approach, the Montana courts would have kept the state firmly in the Unitary land use camp, giving very little weight, if any, to municipal or county comprehensive plans. But in 1981 the Montana Supreme Court adopted a standard that boosted considerably the role of the comprehensive plan. In *Little v. Board of County Commissioners*,[54] the county

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[51] *Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, 149 P.3d 67 (N.M. Ct. App. 2006). As the Court put it:

> [W]e are concerned that the rule itself is the minority position and that it is often criticized. The rule has been described as a "clear example of a legal doctrine based upon a misunderstanding of the nature of the planning process." . . . The "change or mistake" rule has been almost exclusively a Maryland doctrine, with few exports to other states, and has "occasionally turned up in other states with less experience in zoning litigation." . . . Further, this rule has been criticized as giving the original zoning a greater presumption of correctness than the amendment and has thereby prevented the zoning authority from making zone changes, no matter how reasonable and desirable they may be.

Id. at 90 (internal citations omitted).

[52] 507 P.2d at 29.

[53] MONT. CODE ANN. § 76-2-304(1) (2005) ("Zoning regulations must be: (a) . . . made in accordance with a growth policy . . . ."). While that provision pertains to municipalities, the language covering county plans is nearly identical. MONT. CODE ANN. § 76-2-203(1). *See also supra* notes 6–7 and accompanying text (discussing the "in accordance with a comprehensive plan" language of the SZEA).

[54] 631 P.2d 1282 (Mont. 1981).

made what the Court recognized as a clearly illegal spot zoning decision to allow the construction of a shopping center on previously un-zoned land.[55] When the county attempted to rezone the tract as commercial property, despite a recommendation in the comprehensive plan that the tract be zoned residential, the neighbors sued to prevent the rezoning and to enjoin the city from issuing a building permit.

The Court, after surveying planning treatises and hornbooks and a number of cases from other jurisdictions, including *Fasano*, decided that the "in accordance with" language did, in fact, "place great weight on the comprehensive plan as a guide in zoning."[56] The county argued that the plan was merely advisory, but the Court determined that "substantial compliance" with the comprehensive plan was required.[57] This "substantial compliance" standard is still good law in Montana and was applied in a case as recently as 2006.[58]

Importantly for the instant case, although the statutory language establishing the legal status of the comprehensive plan in Montana was and is no more forceful than that of the current New Mexico planning enabling statute,[59] the

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55 *Id.* at 1290.

56 *Id.* Although the Montana statute currently says that zoning ordinances must be in accordance with "a growth policy" or "master plan," *see supra* note 53, the language at the time "specifically state[d] that zoning shall be conducted 'in accordance with a comprehensive development plan.'" *Id.*

57 *Id.* at 1291.

58 *North 93 Neighbors, Inc. v. Bd. of County Comm'rs*, 137 P.3d 557 (Mont. 2006).

59 Montana: "[T]he [planning] board shall be guided by and give consideration to the general policy and pattern of development set out in the master plan . . . ." MONT. CODE ANN. § 76-1-605 (1963). New Mexico: "The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality . . . ." N.M. STAT. § 3-19-9(A) (1978).

Little Court looked at the totality of the statutes pertaining to the comprehensive plan and understood that the plan is

> of paramount importance. In fact, the unmistakable message of these statutes is that if no comprehensive plan (master plan) has been adopted . . . . and if no jurisdictional area has been created after the adoption of the master plan . . . , the counties are without authority to zone except on an interim basis.[60]

As the phrase "substantial compliance" indicates, however, the Montana Court stopped shy of viewing the plan as law. The Court was reluctant to take that next step, however logical it would have been, reasoning that requiring "strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities."[61] It felt that this standard would allow the plan to remain largely static while permitting local authorities and courts the discretion to decide whether a development action constituted an "acceptable deviation" from the plan.[62]

A quarter-century later, it is now clear to most planners and local government officials that amendments to comprehensive plans—although ideally infrequent—are inevitable, given the rapid pace of change and the pressures of explosive growth in many parts of the country. With this in mind, the "substantial compliance" standard is manifestly inferior to the "plan as law" approach, but it nevertheless provides a useful alternative to the Unitary approach and one that this Court could consider adopting without fear of outstripping the statutory underpinnings of the comprehensive plan in New Mexico.

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60 631 P.2d at 1291.

61 *Id.* at 1293.

62 *Id.*

4. New Mexico Contrasted

While the New Mexico statutes also require that zoning regulations "be in accordance with a comprehensive plan,"[63] because the phrase "comprehensive plan" itself is not defined, courts such as the Court of Appeals in *Bogan v. Sandoval County Planning and Zoning Commission*[64] have decided that, where a comprehensive plan does not exist, one "could be implied into existence simply by looking at zoning ordinances."[65] Furthermore, where a comprehensive plan *does* exist separate from the zoning regulations, as is the case with the City/County Plan, the Court of Appeals in *West Bluff Neighborhood Association v. City of Albuquerque*,[66] for example, has held that the plan does not merit strict adherence.[67] The plan, it must be assumed, "is considered merely a statement of aspirational principles that need not be followed"[68]—this despite a requirement later in that same statute that the adoption of zoning regulations be preceded by "reasonable consideration" of the very goals any comprehensive plan is designed to address.[69]

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63 N.M. STAT. § 3-21-5(A).

64 890 P.2d 395 (N.M. Ct. App. 1994).

65 *Deference or Defense*, *supra* note 36, at 6.

66 50 P.3d 182 (N.M. Ct. App. 2002).

67 *Id.* at 187 ("[W]e do not infer from [the "in accordance with a comprehensive plan"] phrase that the legislature intended master plans to be strictly adhered to in the same manner as a statute, ordinance, or agency regulation.").

68 *Deference or Defense*, *supra* note 36, at 6.

69 N.M. STAT. § 3-21-5(B) ("The zoning authority in adopting regulations and restrictions shall give reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and to conserving the value of buildings and land and encouraging the most appropriate use of land throughout its jurisdiction.").

Contrast these decisions with those of the Courts in *Fasano* and *Little*, for example. The Oregon Supreme Court realized that its state legislature fully intended for comprehensive plans to be treated as law, and the Montana Supreme Court established a standard based on the idea that the plan deserves great deference, even if not necessarily binding authority. Both understood that the very wording of a phrase such as "in accordance with a comprehensive plan" indicates that the zoning regulations should look to the plan for their validity. In New Mexico, however, judicial treatment of planning legislation remains mired in the past, with most of the state's courts willing to "perpetuate the interpretive improvisation that typifies the Unitary approach."[70]

C. The Unitary Approach's Unwelcome Progeny

1. Deference Based on Parcel Size

The Unitary approach leads to a number of problems. First, some courts have felt compelled to focus on parcel size to determine whether a development action is legislative or quasi-judicial in nature. This is an important decision, as it bears on how much deference a local government is due in such a situation. But the New Mexico Court of Appeals in *Davis*, for example, reduced the analysis to a case-by-case and highly unpredictable comparison of lot acreage.[71] To a large extent, however, the *Davis* court was simply reflecting the prevailing view in New Mexico of the comprehensive plan as, at best, one element of the zoning scheme. Under such an interpretation, the categorization of a land use action as legislative or quasi-judicial depends on the size of the property affected. If it is a single small lot, presumably that qualifies as a quasi-

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70 Ramapo *Plus Thirty*, *supra* note 3, at 93.

71 648 P.2d at 779.

judicial action which will be closely scrutinized. If an entire city block will be impacted, perhaps a court would consider the action legislative and defer to the local government. But where is the line drawn between those extremes?

A more useful analysis would be based on the *nature* of the decision, not the size of the parcel affected.[72] This approach was explained by the Florida Supreme Court as follows: "[L]egislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy."[73] The result is a system that gives deference to local government decisions based on a comprehensive plan and that closely scrutinizes a rezoning of a single property, for example (regardless of its size). As has been demonstrated in Florida, Oregon, and elsewhere, "[p]roblems of scale vanish when the conceptual distinction between planning and zoning is categorically made."[74]

This analysis was applied by the Court of Appeals below, in part to respond to ACP's argument that it was essentially only ACP's property that was affected by the City's development action. Aside from the fact that the appearance of a disparate impact was due to the simple reality that ACP's property was "vacant and yet to be developed,"[75] the Court wrote,

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[72] The 95USP imposes regulations on an area identified as the Inner Core, the area inside Loop Road and an outside area where floor-to-area ratio density regulations differ. In *Meyer v. City of Portland*, the Oregon Court of Appeals found a change in the regulations impacting over 600 acres of property was deemed quasi-judicial and not entitled to judicial deference. 678 P.2d 741 (Or. App. 1984), *review denied*, 679 P.2d 1367 (Or. 1984). Size cannot be the determining factor for evaluating whether an action is legislative.

[73] *Bd. of County Comm'rs of Brevard County, Florida v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) (emphasis in original). See also the discussion of *Fasano infra.*

[74] *Deference or Defense*, *supra* note 36, at 8.

[75] 149 P.3d at 78.

> [T]he fact that the vacant property remaining to be developed here belongs to a limited number of parties does not mean that the zoning action was necessarily quasi-judicial in nature. "'[T]he central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached.'"[76]

The nature of the decision here is that different areas of downtown Albuquerque are viewed differently under the plan, but landowners within a certain zone are all treated the same. In the words of the Court of Appeals, ACP's redevelopment and "any redevelopment that occurs within the core must abide by these restrictions."[77] By the same token, of course, landowners in areas of the City which are zoned differently will receive different treatment under the plan. Equal protection principles only call for similarly situated individuals to be treated similarly.

Furthermore, the Court explained, "a legislative decision may appear adjudicatory when parties focus on the effect of the particular decision on individual rights. However, policy decisions generally begin with the consideration and balancing of individual rights."[78] Those rights having been fully and publicly considered in the process of drafting and adopting the comprehensive plan, any effects on an individual landowner's rights will be incidental to the overall impact. The City's revision of the Uptown Sector Plan, therefore, remains firmly in the legislative category and entitled to deference.

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[76] *Id.* (quoting in part from *Jafay v. Bd. of County Comm'rs*, 848 P.2d 892, 898 (Colo. 1993)).

[77] *Id.* (emphasis added).

[78] *Id.* (citing *KOB-TV, L.L.C. v. City of Albuquerque*, 111 P.3d 708, 716 (N.M. App. Ct. 2005) (internal quotation marks and citation omitted).

2. Unfortunate—and Unnecessary—Judicial Constructs

The second major problem that arises from a conflation of zoning and planning is the plethora of difficult-to-apply judicial rules such as those dealing with "change or mistake" and whether a development action was a "map amendment" or a "text amendment." The problems attendant on the change or mistake rule will be discussed below.[79] The "text or map amendment" question consumed a substantial amount of the Court of Appeals' discussion in the instant case, and added considerable complexity to its analysis of the issues.[80] Although the Court correctly held that the development action here was a plan amendment and was thus due deference as a legislative action,[81] it could have come to the same conclusion much sooner and with more clarity by holding that the City's action deserved deference because it was carried out in accordance with a comprehensive plan, the 95USP.

This Court should take this opportunity to sweep away the cobwebs of judicial complexity created by an outdated view of the relationship between planning and zoning.

D. "Change or Mistake"

The New Mexico courts' continued reliance on the "change or mistake" rule is worthy of separate discussion. As the Court of Appeals below correctly noted, the rule "was a Maryland invention and has been almost exclusively a Maryland doctrine,"[82] is

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79 *Infra*, Part II.D.

80 149 P.3d at 79–82. Similarly, the Court of Appeals could have eliminated its analysis of the "reasonableness exception" had it looked to see if the 95USP implements the Comprehensive Plan.

81 *Id.* at 81.

82 149 P.3d at 90 (citing 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 33:1, at 838 (rev. ed. 2003).

followed by a minority of states, and is a "clear example of a legal doctrine based upon a misunderstanding of the nature of the planning process."[83] Furthermore, those few states that adopted the rule apparently misunderstood its application to comprehensive plans by the Maryland courts themselves. In 1974, the Maryland Court of Special Appeals wrote that "[t]he Court of Appeals and this Court have consistently held that the 'change or mistake' rule is not controlling in cases involving comprehensive rezoning."[84] The rule, according to the Court, is only applicable to "piecemeal rezoning cases;" a comprehensive plan, by contrast, "is entitled to the same presumption that it is correct as is an original zoning."[85]

The rule was originally adopted by New Mexico thirty years ago in *Miller v. City of Albuquerque*[86] and, despite the misgivings of courts such as the Court of Appeals in the instant case, persists to this day. However, there is clear indication that the rule was never meant to apply to comprehensive plans in New Mexico, any more than it does in Maryland. The *Miller* Court cited to McQuillin for support of the rule, but that treatise only discussed it in the context of amendments to zoning ordinances, not comprehensive plans.[87] Indeed, the Court itself drew the same distinction.[88] The "change or mistake"

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83 149 P.3d at 90 (quoting WILLIAMS, *supra* note 82, at 837).

84 *Coppolino v. County Bd. of Appeals of Baltimore County*, 328 A.2d 55, 61 (Md. App. 1974).

85 *Id.* (quoting *McBee v. Baltimore County*, 157 A.2d 258, 260 (Md. 1960)).

86 554 P.2d at 668.

87 8 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS, § 25.67b, at 178 (3rd Ed. 1965).

88 554 P.2d at 668 ("[W]e think it appropriate to set out the controlling principles regarding amendments to a zoning ordinance as contrasted to ordinances enacting comprehensive zoning.").

rule was not applied to comprehensive plans—if at all—until the Supreme Court's decision in *Davis v. City of Albuquerque.*[89]

In *Davis*, landowners challenged Albuquerque's adoption of a comprehensive plan, alleging it resulted in an illegal "downzoning" of their property. The Court appeared to hold that the change or mistake rule applies to comprehensive plans, thus contradicting *Miller.*[90] The Court's meaning in that decision, however, was far from clear since there are indications the Court believed that the plan was a sham and not at all comprehensive.[91] It has been argued, for example, that the Court was merely saying that "a municipality cannot avoid the ambit of the change or mistake rule by cloaking an amendatory zoning change in the *language* of comprehensive rezoning"—the claimed plan must actually exist.[92]

However the Court's decisions in *Miller* and *Davis* were intended, though, one thing is clear: judicial constructs such as the change or mistake rule and the confusion they have engendered would be completely unnecessary if this Court were to move New Mexico away from the Unitary approach and towards considering the plan as a factor or as law approach.

IV. The Plan and Property Rights

As a final note, a few words are warranted in support of the Court of Appeals' statement that its holding, far from preventing ACP from developing its property, meant

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89 648 P.2d 777, 779 (N.M. 1982).

90 *Id.* at 779 ("[W]e do not find that *Miller* limits the mistake or change rule to piecemeal rezoning . . . .").

91 *Deference or Defense, supra* note 36, at 7.

92 *Id.*

that ACP "must simply now abide by the density and parking restrictions" of the comprehensive plan.[93] Since ACP could redesign its proposed development to conform to the new standards in the plan, the denial was a valid exercise of the City's police power. As the *Miller* Court itself noted, "Any incidental economic loss involved in such a lawful exercise of the police power is merely the price of living in a modern enlightened and progressive community."[94] Of course, there are well-known limitations in place to prevent arbitrary trampling of property owners' rights. Courts will generally require that there be a demonstrated public need for a proposed zoning change and that changing the classification of the property at issue is the best means of meeting that need.[95] Indeed, as Professor Haar argued, the comprehensive plan actually provides the best protection of individual property rights:

> [T]here is danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare, and morals of the community. The more clarity and specificity required in articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it ultra vires if it is not in reality "in accordance with a comprehensive plan."[96]

On a related point, 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. The test for whether a right has vested

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93 149 P.3d at 78.

94 554 P.2d at 667 (internal quotation marks and citation omitted).

95 *See, e.g.*, *Fasano*, 507 P.2d at 28.

96 Haar, *supra* note 21, at 1158.

was explained by the New Mexico Court of Appeals in *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*[97] as requiring "approval by the regulatory body, and . . . a substantial change in position in reliance thereon."[98] ACP's argument is unavailing, however, because it was given no assurances by the City that its second application in September 1994 would be approved.

Unfortunately, while much progress has been made, appreciation for the importance of a long-term planning scheme which drives zoning decisions cannot be taken for granted and some jurisdictions, such as New Mexico, have ended up with a "matrix of conceptually confused case law . . . ."[99]

This Court, however, has the opportunity to steer New Mexico planning jurisprudence back towards the intent of the comprehensive plan statute and to move the state away from the Unitary approach. The APA asks this Court to accept the comprehensive plan as a factor or as law, eschew complicated rules such as "change or mistake," and allow the state's local governments to get on with the business of planning for the future.

V. Conclusion

In 1962, a Harvard University Planning Professor was commissioned by the New Mexico State Planning Office to review the existing planning enabling acts and make

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97 848 P.2d 1095 (N.M. Ct. App. 1993).

98 *Id.* at 1097.

99 *Deference or Defense*, *supra* note 36, at 9.

concerned the general (or comprehensive) plan and shifting the burden of proof.[101]

> In any litigation or dispute involving zoning or subdivision control, [he wrote] the adoption of the plan could be introduced as evidence supporting the reasonableness of the ordinance. When this occurred, the party seeking to invalidate the ordinance assumed a "correspondingly greater burden of proof of unreasonableness."[102] Doebele argued that, "[t]he more restrictive the community's regulations, the more need it has for a general plan which will buttress its ordinances in a court test. Thus, the shifting burden of proof offers a reasonable and self-adjusting method of relating the restriction of private property rights with a well-thought-out community policy as to why such restrictions are imperative for the public good.[103]

The underlying assumption behind Professor Doebele's recommendation was that the challenged land use regulation must be consistent with the adopted plan upon which it was based. Doebele's recommendations were never acted upon, but it illustrates that nearly 45 years ago, there was recognition of the importance of the adopted plan in the hierarchy of land use decisions. This Court should recognize the same and affirm the decision below.

Respectfully submitted,

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100 W.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.

101 *Id.*, discussed in Stuart Meck, FAICP, *Model Planning and Zoning Enabling Legislation: A Short History*, pp. 1-17, contained in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART SM WORKING PAPERS, Volume One, American Planning Association, PAS 462/463 (March 1996)

102 Doebele at 336. See also, W. Doebele, Jr., "Horse Sense about Zoning and the Master Plan," *Zoning Digest* 13 (1961): 209, 212-14.

103 Meck *supra.* 6.

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April 30, 2007

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30th day of April, 2007, I mailed a true copy of the **BRIEF *AMICUS CURIAE* OF THE AMERICAN PLANNING ASSOCIATION AND THE NEW MEXICO CHAPTER OF THE AMERCIAN PLANNING ASSOCIATION IN SUPPORT OF THE CITY OF ALBUQUERQUE,** 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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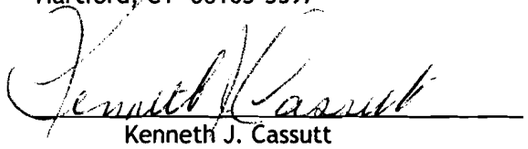

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