

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

CALIFORNIA'S EXPERIENCE

Daniel J. Curtin, Jr.*

I. INTRODUCTION

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

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

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

Mr. Curtin served as chair of the State and Local Government Law Section of the American Bar Association, 2001-2002. He was past chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly NIMLO). He is past vice-chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as president of the City Attorneys' Department of the League of California Cities, as a member of the board of directors of the league, and as regional vice-president of the International Municipal Lawyers Association.

1. See Dwight H. Merriam, *Nonplussed about Nonpareil: Wal-Mart as a Land Use Phenomenon*, 27 No. 11 ZONING & PLAN. L. REP., 1(2004).

2. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 22 Cal. Rptr. 3d 203 (Cal. Ct. App. 2004).

their respective retail shopping centers located 3.6 miles apart in the City of Bakersfield, California.³ Pursuant to state law, an Environmental Impact Report (EIR) was prepared for each project.⁴ On February 12, 2003, the Bakersfield City Council certified both EIRs and, after a public hearing, approved both projects.⁵ In March 2003, the Bakersfield Citizens for Local Control (BCLC) filed two CEQA actions challenging the sufficiency of the EIRs. While the suit was pending, construction began at both sites. The trial court decertified the EIRs, but left the project approvals intact.⁶ Both BCLC and C&C partially appealed the judgment to the appellate court.

In ruling against the City, the Court of Appeals reversed and remanded.⁷ Before rendering its opinion, the court said “it [was] necessary to explicitly reject certain philosophical and sociological beliefs that some of the parties had vigorously expressed.”⁸ For the record, the court stated that “[it did] not endorse BCLC’s elitist premise that so-called ‘big box’ retailers are undesirable in a community and are inherently inferior to smaller merchants, nor did it affirm its view that Wal-Mart, Inc. [was] a destructive force that threatened the viability of local communities.”⁹ The court said, “Wal-Mart [was] not a named party in these actions and . . . rebuff[ed] BCLC’s transparent attempt to demonize [the] corporation.”¹⁰ The court “[did] not know whether Wal-Mart’s entry into a geographic region or expansion of operations within a region [was] desirable for local communities. Similarly, [it] did not know whether Wal-Mart was a ‘good’ or a ‘bad’ employer.”¹¹ The court offered “no comment on Wal-Mart’s alleged miserly compensation and benefit package because BCLC did not link the asserted low wages and absence of affordable health insurance coverage to direct or indirect adverse environmental consequences.”¹² The court said, “[it] would not dignify with extended comment C&C’s complaint that BCLC [was] just a ‘front’ for a grocery worker’s union whose disgruntled members [felt] threatened by nonunionized Wal-Mart’s entry into the grocery business.”¹³

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

3. *Id.* at 211.

4. *Id.*; see also California Public Resources Code (CEQA) §§ 21000-21177 (West 2005).

5. *Id.* at 211.

6. *Id.*

7. *Id.* at 212.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

and had strictly adhered to the accepted principle that the judicial system ha[d] a narrow role in land use battles that were fought through CEQA actions.”¹⁴ The court said that “[t]he only role in reviewing an EIR was to ensure that the public and responsible officials were adequately informed of the environmental consequences of their decisions before they [were] made.”¹⁵

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

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

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

14. *Id.*

15. *Id.* (quoting *Berkeley Keep Jets Over The Bay Com. v. Board of Port Comm’rs.*, 111 Cal. Rptr. 2d 598 (Cal. Ct. App. 2001)).

16. *See Families Unafraid to Uphold Rural El Dorado County v. El Dorado*, 74 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998); *see infra* at 11 (discussion under “Use of General Plan”).

17. Press Release, Vermont Forum on Sprawl, VFOS Releases Big Box Retail Store Poll and Statement on National Trust Designation of Vermont as an Endangered Historic Place (May 24, 2004), available at <http://www.vtsprawl.org/News/pressrelease/VFOS-Poll%2BStatement-WalMart.pdf>.

18. *Id.*

19. *Id.* (quoting Executive Director Beth Humstone, Vermont Forum on Sprawl).

20. *In re Wal-Mart Stores, Inc.*, 702 A.2d 397 (Vt. 1997).

21. *Id.* at 401.

requiring Wal-Mart to provide secondary-growth studies;²² (2) the term “growth,” within the meaning of impact of growth criterion includes economic as well as population growth;²³ (3) the board was not bound by the Agency of Transportation’s (AOT) determination of acceptable traffic flow levels;²⁴ and (4) “the board could properly require Wal-Mart to produce additional evidence demonstrating its plan to reduce or eliminate the burden” on regional education services.²⁵ Therefore, the court rejected Wal-Mart’s application for the permit.

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

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

II. POLICE POWER

A. In General

The legal basis for all land use regulation is the police power of the city³⁰ to protect the public health, safety, and welfare of its residents.³¹ A land use regulation lies within the police power if it is reasonably related to

22. *Id.* at 402.

23. *Id.* at 404.

24. *Id.*

25. *Id.* at 405.

26. Paul Shigley, *Big Box Regulations Sweep the State: Proposed Wal-Mart Supercenters are at Center of Debate*, CAL. PLAN. & DEV. REP., Vol. 19, No. 1 (Jan. 24, 2004).

27. *Id.*

28. *Id.*; see also *Historic Wal-Mart Controversy*, 27 State & Local Law News, No. 4 (Section of State and Local Government Law, Summer 2004).

29. *Id.*

30. When the word “city” is used, it also means “county;” “city council” also means “county board of supervisors.”

31. See *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

the public welfare.³²

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

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

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

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

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

B. California³⁷

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

32. See *Associated Home Builders, Inc. v. City of Livermore*, 135 Cal. Rptr. 41, 51 (Cal. Ct. App. 1976).

33. *Berman*, 348 U.S. 26, 33.

34. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

35. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

36. *Id.* at 9.

37. See generally DANIEL J. CURTIN, JR. & CECILY T. TALBERT, *CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW* (25th ed. 2005).

enact legislation under the police power.”³⁸ The police power, even though established by common law, is set forth in the California Constitution, which confers on cities the power to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.”³⁹

The California Supreme Court has stated:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation omitted]. Apart from this limitation, the ‘police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.’⁴⁰

Land use regulations are a manifestation of the local police powers conferred by the California Constitution, not an exercise of authority delegated by statute.⁴¹ For example, state zoning laws pertaining to the adoption of local zoning regulations are not intended as specific grants of authority, but as minimum standards to be observed in local zoning practices. Likewise, the California Supreme Court has held that: “a city’s or county’s power to control its own land use decisions derives from [its] inherent police power, not from the delegation of authority by the state.”⁴²

In exercising its police power, a city must act within all applicable statutory provisions so there will be no “conflict with general laws.”⁴³ The city’s actions must also meet constitutional principles of due process: they must be reasonable, nondiscriminatory, and not arbitrary or capricious.⁴⁴

The police power is an elastic power. It allows cities to tailor regulations to suit the interests and needs of a “modern, enlightened and progressive community,” even as those interests and needs change.⁴⁵ A full range of interests can support a city’s exercise of its police power. The California Supreme Court has held that aesthetic reasons alone can justify

38. *Metromedia, Inc. v. City of San Diego*, 164 Cal. Rptr. 510, 516 (Cal. Ct. App. 1980).

39. CAL. CONST. art. XI, § 7.

40. *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 705 P.2d 876, 882 (Cal. 1985) (quoting *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976)).

41. *See Scrutton v. County of Sacramento*, 79 Cal. Rptr. 872, 876 (Cal. Ct. App. 1969); *see, e.g., Candid Enters.*, 705 P.2d 876 (upholding a school facility’s impact fee imposed by a county without statutory authorization); *Birkenfeld*, 550 P.2d 1001 (upholding city’s rent control initiative despite lack of express statutory authority).

42. *DeVita v. County of Napa*, 889 P.2d 1019, 1030-31 (Cal. 1995).

43. CAL. CONST. art. XI, § 7, *supra* note 39.

44. *See, e.g., G & D Holland Constr. Co. v. City of Marysville*, 91 Cal. Rptr. 227, 229-30 (Cal. Ct. App. 1970).

45. *Rancho La Costa v. County of San Diego*, 168 Cal. Rptr. 491, 494 (Cal. Ct. App. 1980).

the exercise of the police power.⁴⁶

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

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

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

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

46. See *Metromedia, Inc. v. City of San Diego*, 164 Cal. Rptr. 510, 514-15 (Cal. Ct. App. 1980) (upholding, in part, a city's total ban of offsite advertising signs); *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996) (upholding the city's public art fee ordinance).

47. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984).

48. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).

49. See, e.g., *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1022 (Cal. 1976) (holding that regulations implementing local rent control laws are valid); *Griffin Dev. Co. v. City of Oxnard*, 703 P.2d 339, 340-42 (Cal. 1985) (holding that regulations relating to condominium conversions are proper).

50. *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382 (Cal. Dist. Ct. App. 1991).

51. *Id.* at 383.

52. *Id.* at 387.

neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.⁵³

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

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

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

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

53. *Id.* at 388.

54. *Id.* at 388-89 [internal citations omitted].

55. *Novi v. City of Pacifica*, 215 Cal. Rptr. 439 (Cal. Ct. App. 1985).

56. *Id.*

57. *Id.*

58. *Id.* at 440.

59. *Id.* at 441 (quoting *People v. Gates*, 116 Cal. Rptr. 172, 176 (Cal. Ct. App. 1974)).

The Court then proceeded to apply this California rule to the Pacifica city council's anti-monotony ordinance:

Here, subdivision (g) of section 9-4.3204 requires 'variety in the design of the structure and grounds to avoid monotony in the external appearance.' The legislative intent is obvious: The Pacifica city council wishes to avoid 'ticky-tacky' development of the sort described by songwriter Malvina Reynolds in the song, 'Little Boxes.' No further objective criteria are required, just as none are required under the general welfare ordinance. Subdivision (g) is sufficiently specific under the California rule permitting local legislative bodies to adopt ordinances delegating broad discretionary power to administrative bodies.⁶⁰

Similarly, another appellate court, relying on *Novi*, held that a view protection ordinance was not unconstitutionally vague, and that such an ordinance supported denial of a building permit.⁶¹

In *Guinnane v. San Francisco Planning Commission*, the Court provided support for a city's concerns regarding neighborhood aesthetics.⁶² Guinnane sought "a building permit to construct a four-story, 6,000 square-foot house with five bedrooms, five baths, and parking for two cars."⁶³ The planning commission rejected Guinnane's application during design review because the proposed building was too massive and thus "not in character" with the neighborhood.⁶⁴ The board of permit appeals also denied the permit.⁶⁵

The court upheld the city's action. It stated that the planning commission and the appeals board had the authority to exercise discretion in deciding whether to issue the permit.⁶⁶ The court noted that such a review is not limited to "a determination [of] whether the applicant has complied with [the city's] zoning ordinances and building codes."⁶⁷ The San Francisco Planning Code specifically directed the commission to

60. *Id.*

61. See *Ross v. City of Rolling Hills Estates*, 238 Cal. Rptr. 561, 564 (Cal. Ct. App. 1987); see also *Briggs v. City of Rolling Hills Estates*, 47 Cal. Rptr. 2d 29, 31 (Cal. Ct. App. 1995) (a "neighborhood compatibility" ordinance requiring that designs "respect the existing privacy of surrounding properties" was not void for vagueness); *Echevarrieta v. City of Rancho Palos Verdes*, 103 Cal. Rptr. 2d 165, 173-74 (Cal. Ct. App. 2001) (an ordinance that prohibited residents from significantly impairing a view by permitting foliage to grow to heights in excess of certain limitations was not unconstitutionally vague).

62. *Guinnane v. S.F. Planning Comm'n*, 257 Cal. Rptr. 742 (Cal. Dist. Ct. App. 1989).

63. *Id.* at 743.

64. *Id.*

65. *Id.* at 744.

66. *Id.* at 747.

67. *Id.*

“protect the character and stability of residential. . . areas. . . .”⁶⁸ Such concern for neighborhood aesthetics has long been justified as a legitimate governmental objective. Sufficient evidence existed in this case to uphold the commission’s finding that the proposed house would increase traffic, cause parking problems, and have a negative effect on the neighborhood.⁶⁹

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

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

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

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

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

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

68. *Id.* at 745.

69. *Id.* at 748.

70. *Saad v. City of Berkeley*, 30 Cal. Rptr. 2d 95, 101 (Cal. Dist. Ct. App. 1994); *Harris v. City of Costa Mesa*, 31 Cal. Rptr. 2d 1, 6 (Cal. Dist. Ct. App. 1994) (denial of a use permit for second residential unit on one lot based on incompatibility with the neighborhood was proper).

71. *See Kucera v. Lizza*, 69 Cal. Rptr. 3d 582 (Cal. Dist. Ct. App. 1997).

72. *Id.* at 589.

73. *Consolidated Rock Prods. Co. v. City of Los Angeles*, 370 P. 2d 342, 346 (1962).

74. *See Remmenga v. California Coastal Comm’n*, 209 Cal. Rptr. 628, 632 (Cal. Ct. App. 1985); *Santa Monica Beach Ltd. v. Superior Court*, 968 P.2d 993, 999 (Cal. 1999) (where the California Supreme Court advocated a hands-off policy for reviewing local legislative acts).

75. *Assoc’d. Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 483 (Cal. 1976).

processing land use applications in their jurisdictions to deal with all types of situations. Cities must properly exercise their police power, without infringing upon the Fifth Amendment, Equal Protection, or the Due Process clauses of the United States Constitution. These situations include the issue of whether big box development is appropriate in a city's jurisdiction. In implementing its police power, a city is further guided by the use of the general plan—as discussed in the next section.

III. USE OF THE GENERAL PLAN⁷⁶

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

A. California

The general plan has been declared by the California Supreme Court as the single most important document; the “constitution for all future development.”⁷⁷ Since the general plan is the “constitution for all future development,” any decision of a city affecting land use, development, and public works projects must be consistent with the general plan.⁷⁸ Under Government Code Section 65860(a), for example, a zoning ordinance is consistent with such plans only if: the city has officially adopted such a plan; and the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general uses, and programs specified in such a plan.⁷⁹

In *Leshar Communications Inc. v. City of Walnut Creek*, the California Supreme Court struck down a growth management initiative that conflicted with the City of Walnut Creek's general plan.⁸⁰ *Leshar* thus marked the first occasion where the court squarely addressed the general plan's position

76. CAL. GOV'T CODE § 65860 (2005). The term “general plan” sometimes is labeled “master plan” or “comprehensive plan.” Today, the term “general plan” is being more commonly used. In California, land use regulations and all approvals must be consistent with the general plan.

77. *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990); see CURTIN & TALBERT, *supra* note 36, ch. 2 (For a general discussion of General Plan Law and its effect in California).

78. *Citizens of Goleta Valley v. Board of Supervisors of the County of Santa Barbara*, 801 P.2d 1161, 1171 (Cal. 1990).

79. CAL. GOV'T CODE § 65860 (West 2005).

80. *Leshar*, 802 P.2d at 319.

in the planning hierarchy, and especially its interplay with the initiative process.⁸¹

Leshner arose from a challenge to Measure H, a traffic-based growth management initiative adopted by Walnut Creek voters in 1985. The trial court had determined that Measure H was not a general plan amendment, but rather a zoning ordinance or other land use regulation.⁸² As a mere regulation, Measure H was required to be consistent with the city's general plan.⁸³ Because it was not consistent, the trial court declared it invalid.⁸⁴ This holding was overturned on appeal.⁸⁵ The Court of Appeals agreed that Measure H was inconsistent with the city's general plan, but interpreted it as a general plan amendment in order to give the greatest possible protection to the initiative process.⁸⁶ The California Supreme Court rejected this interpretation and struck down the initiative, thereby upholding the trial court's decision.⁸⁷

The California Supreme Court began its decision by emphasizing that all laws are subject to the same constitutional and statutory limitations and rules of construction, whether enacted by the local legislative body or the electorate.⁸⁸ Focusing on the absence of any ballot materials that labeled Measure H a general plan amendment, as well as the detailed scope and self-executing nature of its text (resembling a zoning ordinance), the court ruled that Measure H was a land use regulation subordinate to the city's general plan and therefore invalid under the consistency doctrine.⁸⁹ "The tail does not wag the dog," pronounced the court.⁹⁰

Therefore, under *Leshner*, any subordinate land use action—such as a zoning ordinance, tentative map, or development agreement—that is not consistent with a city's current and legally adequate general plan is "invalid at the time it is passed."⁹¹ The court's only task is to "determine the existence of the conflict."⁹² Further, it does not matter how the conflict arises. If a conflict is present, under state law, the action is void.⁹³

81. *Id.* at 317.

82. *Id.* at 320.

83. *Id.* at 319.

84. *Id.* at 320.

85. *Id.*

86. *Id.*

87. *Id.* at 326.

88. *Id.* at 322 (quoting *Legislature v. Deukmejian*, 669 P.2d 17 (Cal.1983)).

89. *Id.*

90. *Id.*

91. *Id.* at 324.

92. *Id.* at 325.

93. *Id.*

In *City of Irvine v. Irvine Citizens Against Overdevelopment*,⁹⁴ the Court of Appeal held that a land use regulation “is consistent with [a] city’s general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment.” The Court of Appeals has also held that “[a] city’s findings that [a land use regulation] is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.”⁹⁵

B. Other States

Nearly all states require that zoning, and at times other related land use actions, take place “in accordance with” some sort of comprehensive or master plan.⁹⁶ The states vary, however, in the use of the general plan as a significant or decisive factor in evaluating land use regulations or decisions; although over time there has been a slow and incremental increase nationwide in the quasi-constitutional status of the general plan.⁹⁷ As labeled by one of the nation’s leading commentators on the general plan, the states currently fall into three major categories in terms of the role of the comprehensive plan in the land use regulatory process.⁹⁸

The first category, the “unitary view,” probably reflects the majority of the states.⁹⁹ In this category, the general plan is accorded no special significance, meaning there is no requirement that local governments prepare a plan that is separate from the zoning regulation. Examples of states falling into this category with recent judicial decisions upholding the “unitary view” are Arkansas, Connecticut, Illinois, New York and Massachusetts.¹⁰⁰

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

94. *City of Irvine v. Irvine Citizens Against Overdevelopment*, 30 Cal. Rptr. 2d 797, 803 (Cal. Dist. Ct. App. 1994).

95. *A Local and Reg’l Monitor (ALARM) v. City of Los Angeles*, 20 Cal. Rptr. 2d 228, 239 (Cal. Dist. Ct. App. 1993) (citing, *No Oil, Inc. v. City of Los Angeles*, 242 Cal.Rptr. 37 (Cal. Dist. Ct. App. 1987)).

96. DAVID L. CALLIES, DANIEL J. CURTIN, JR. & JULIE A. TAPPENDORFF, *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES*, (Environmental Law Institute, 2003).

97. *Id.*

98. See Edward J. Sullivan, *Recent Development in Land Use, Planning, and Zoning Law: Comprehensive Planning*, 36 URB. LAW. 541 (2004); Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulations*, 35 URB. LAW. 75 (2003).

99. See Sullivan, *supra*, note 98, at 541.

100. See Sullivan & Michel, *supra* note 98, at 90 (for chart showing breakdown of states according to how their treatment of the General Plan).

significance to the general plan, if it exists, as a factor in evaluating land use regulations, but do not make it the exclusive factor. The weight to be given to the plan varies from state to state. Examples of states in this category are Missouri, Montana, New Jersey, and Vermont.

In Vermont, each city and county may develop a “municipal development plan” or “municipal plan.”¹⁰¹ The “municipal plan” includes (but is not limited to):

a statement of objectives, policies and programs of the municipality to guide the future growth and development of the land, public services and facilities; and to protect the environment; a land use plan, consisting of a map and statement of present and prospective land uses, indicating those areas proposed for forests, recreation, agriculture . . . residence, commerce, industry, public and semi-public uses and open spaces reserved for flood plain, wetland protection, or other conservation purposes; and setting forth the present and prospective location, amount, intensity and character of such land uses and the appropriate timing or sequence of land development activities in relation to the provisions of necessary community facilities and service; a transportation plan, consisting of a map and statement of present and prospective transportation and circulation facilities, transit routes, terminals, bicycle paths and trails, scenic roads, airports, railroads and port facilities, and other similar facilities or uses, with indications of priority of need. . . .¹⁰²

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

In California and the other states that treat the general plan as the constitution, the general plan is the most important legal planning tool for city and county officials to utilize in their efforts to regulate development. It is clearly the “constitution for all future development.”¹⁰³ The goals and policies of the general plan can be used not only in managing growth, regulating development, and imposing land use regulations, but also in evaluating big box retail development.

101. 24 VT. STAT. ANN. §§ 4381-4386 (2004).

102. *Id.* at § 4382.

103. *Lesher Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317, 317 (Cal. 1990); *see* CURTIN & TALBERT, *supra* note 37, at ch. 2.

C. Implementation

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

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

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

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

104. See *Associated Homebuilders etc., of the Greater East Bay, Inc. v. City of Walnut Creek*, 484 P.2d 606 (Cal. 1971).

105. See Governor’s Office of Planning and Research, STATE OF CALIFORNIA GENERAL PLAN GUIDELINES, ch. 1 “General Plan Basics” (2003), (hereinafter, *the Guidelines*) available at http://www.opr.ca.gov/planning/PDFs/General_Plan_Guidelines_2003.pdf (the author wrote and contributed to the Guidelines and has based a large part of this paper section on that writing).

106. *Id.* at 14.

107. *Id.* at 14-15.

abstract in nature.”¹⁰⁸ Examples of goals are: a diversified economic base for the city, an aesthetically pleasing community, and a safe community.

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

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

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

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

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

In Families Unafraid to Uphold Rural El Dorado County v. County of

108. *Id.* at 15.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 16.

113. *Id.*

El Dorado,¹¹⁴ the appellate court declared invalid the County Board of Supervisors' approval of a residential subdivision since it was not consistent with the county's general plan.¹¹⁵ The court said that the County's findings of consistency were not supported by substantial evidence. In this situation, the land use policy of the general plan was fundamental, mandatory, and unambiguous, and the project's inconsistency was clear. Likewise, a well-drafted general plan will mandate what commercial development is consistent with that city's overall goals and policies for development.

IV. CONCLUSION

The regulation of big box development properly lies in the hands of the legislative bodies of the cities and counties, with the able assistance of the planning commission and staff. The police power, which is the power to regulate for public health, safety, and welfare, is the basis for such regulation. The cases cited in this paper clearly show how broad that power is even to the extent that a city could deny a monstrous development, as in the power to block development in the City of Pacifica, California.¹¹⁶ Further, by addressing the issues in their general plans, cities, towns, and villages are able to refer to their general plans to guide them in either permitting or denying proposed big box developments.

114. *Families Unafraid to Uphold Rural El Dorado County v. County of El Dorado*, 74 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998).

115. *Id.*

116. *Novi v. City of Pacifica*, 215 Cal. Rptr. 439 (Cal. Ct. App. 1985).