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## Planned Unit Development

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# Comments

## PLANNED UNIT DEVELOPMENT

### I. INTRODUCTION

Too often those who seek to develop new and imaginative solutions to legal problems are confronted with the attitude that conventional ideas and legal theory should not be departed from too quickly. This reluctance is not uncommon in the area of planning, zoning, and land-use controls.<sup>1</sup> The most serious criticism of conventional zoning laws is that they concentrate on an individual lot-by-lot basis and require strict compliance with pre-set regulations, which creates diseconomies in large-scale development and tends to destroy creativity and flexibility.<sup>2</sup> The fact that our zoning laws require all lots in an entire zoning district to be devoted to a single use (such as single family dwellings) without permitting supporting commercial and service facilities, has also been regarded by some critics as a serious flaw in our zoning laws.<sup>3</sup>

The efforts of those seeking imaginative, flexible, and creative results from planning, zoning, and land-use controls have recently been concentrated on planned unit development (PUD). The basic purpose of PUD is to do away with the inflexible dimensional standards and use regulations of conventional zoning and planning laws, and thereby to encourage creative large-scale development in a way which can best utilize the land for the collective benefit of the residents. Individual PUD's most frequently involve the use of density zoning, rather than the conventional technique of minimum lot sizes.<sup>4</sup> Under density zoning, by varying lot sizes and using buildings such as apartments and condominiums along with the customary single- and multi-family types, the developer is allowed to "cluster" his development, as long as the prescribed overall density of dwelling units per acre is maintained. This enables the developer to create more "common open space." The emphasis in some PUD's is on mixing different building types or land uses. The basic philosophy of PUD is to substitute flexibility, creativity, and variety for the inflexibility and lack of variety which conventional zoning often imposes on the developer.

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1. See Mandelker, *Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki*, 114 U. PA. L. REV. 98 (1965).

2. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 108 (1968); J. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 48 (1962); Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965).

3. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 229 (4th ed. 1961).

4. For a discussion of other inducements often offered for large-scale developments, see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 2, at 111.

## II. VALIDITY OF PUD

## A. Statutes

## 1. Model Planning Enabling Act

Recognition of the need for planning and zoning legislation and regulations which are capable of allowing flexibility and creativity in residential developments is not of recent origin. Section 12 of the Model Planning Enabling Act of 1925<sup>5</sup> set forth a proposal to allow the legislative body to authorize the planning board to make any reasonable changes upon approving subdivision plats, when the owner of the land submits a plan designating the lots on which apartment houses and local shops are to be built and indicating the maximum density of population and the minimum yard requirements per lot. Section 12 also limited the average population density and the total land area covered by buildings in the entire subdivision to that permitted in the original zoning district.<sup>6</sup> The planning board was not to approve the developer's proposal unless the use of adjoining land was "reasonably safeguarded" and the plan was "consistent with the public welfare."<sup>7</sup> Upon the approval of the planning board following a public hearing with proper notice, the changes were to become part of the municipality's zoning regulations.<sup>8</sup> Section 12 was adopted in the New York City General City,<sup>9</sup> Village,<sup>10</sup> and Town<sup>11</sup> Laws, and in New Jersey<sup>12</sup> and Indiana.<sup>13</sup>

## 2. Standard City Planning Enabling Act

One proponent of PUD, Professor Jan Krasnowiecki of the University of Pennsylvania, believes Sections 14 and 15 of the Standard City Planning Enabling Act of 1928<sup>14</sup> are sufficient to allow PUD's to be established through the planning commission alone.<sup>15</sup> Section 15 allowed the planning board to:

agree with the applicant upon use, height, area or bulk requirements or restrictions governing buildings and premises within the subdivision provided such requirements or restrictions do not authorize the violation of the then effective zoning ordinance of the municipality.<sup>16</sup>

Section 14 allowed the planning board to adopt subdivision regulations for the proper arrangement of streets . . . for adequate and convenient open spaces, for traffic, utilities, access of fire-fighting ap-

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5. E. BASSETT, *Laws of Planning Unbuilt Areas*, in NEIGHBORHOOD AND COMMUNITY PLANNING, REGIONAL SURVEY Vol. VII, 272-73 (1929).

6. *Ibid.*

7. *Ibid.*

8. *Ibid.*

9. N.Y. GEN. CITY LAW §§ 26-38 (1968).

10. N.Y. VILLAGE LAW §§ 179e-179g (1966).

11. N.Y. TOWN LAW §§ 270-282 (1965).

12. N.J. STAT. ANN. § 40:55-19 (1940), *as amended*, N.J. STAT. ANN. § 40:55-54 (1967).

13. IND. ANN. STAT. § 53-4756 (7) (1964).

14. U.S. DEPT. OF COMMERCE STANDARD CITY PLANNING ENABLING ACT OF 1928 (1928). (hereinafter SCPEA).

15. KRASNOWIECKI, *supra* note 2, at 84; URBAN LAND INSTITUTE, TECH. BULL. NO. 52, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT 13 (1965).

16. SCPEA, *supra* note 14, at § 15.

paratus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots.<sup>17</sup>

The rationale behind Professor Krasnowiecki's theory is that Section 15 contemplates that the "then effective zoning ordinance" will leave latitude on the use, height, area, or bulk requirements and restrictions. Otherwise, it would have been futile to grant the planning board power to agree with applicants on such matters.<sup>18</sup> Further, Section 14, providing that the planning board is to adopt subdivision regulations concerning the minimum width and area of lots, reinforces this theory.<sup>19</sup>

### 3. Missouri

Missouri has no enabling legislation specifically authorizing PUD as do several states.<sup>20</sup> Neither Section 12 of the Model Planning Enabling Act nor Sections 14 or 15 of the Standard City Planning Enabling Act are incorporated into the provisions of Chapter 89 of the Missouri statutes.<sup>21</sup> But Missouri's general enabling legislation does authorize the legislative body of all municipalities to regulate "the location and use of buildings, structures and land for trade, industry, residence or other purposes,"<sup>22</sup> and to adopt regulations "for adequate open spaces for traffic, recreation, light and air. . . ."<sup>23</sup> Thus, Missouri's enabling legislation seems broad enough to authorize PUD's,<sup>24</sup> although it is not clear what procedure is required.<sup>25</sup>

### B. Cases

#### 1. Unconstitutional Delegation of Legislative Authority

In 1961, the New York Town Law Section 281 discussed *supra* was challenged as unconstitutional on the theory that it lacked sufficient standards to support a delegation of power to an administrative agency.<sup>26</sup> The New York court upheld the provision on the ground that the requirements of reasonableness of the change, average population density maintenance, adjoining lands being safeguarded, and consistency with the public welfare constituted sufficient standards.<sup>27</sup> However, the court went on to consider

17. SCPEA, *supra* note 14, at § 14.

18. KRASNOWIECKI, *supra* note 2, at 84; URBAN LAND INSTITUTE, *supra* note 15, at 13.

19. *Ibid.*

20. ARK. STAT. § 19-2829 (b) (Supp. 1963); CONN. GEN. STAT. ANN. §§ 8-2, 8-25 (1960); IND. ANN. STAT. §§ 53-1001, 53-1055 (1964); KY. REV. STAT. ANN. § 100.203 (1) (e) (Supp. 1968); N.J. STAT. ANN. § 40:55-54 (1967); N.Y. TOWN LAW §§ 270-282 (1965).

21. C. 89, RSMo 1959.

22. § 89.020, RSMo 1959.

23. § 89.410 (1), RSMo 1967 Supp.

24. *But cf.* J. DILLON, MUNICIPAL CORPORATIONS § 55 (1st ed. 1872) (for the proposition that a city possesses only those powers expressly granted or necessarily implied from express powers). See *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 628, 10 S.W. 197, 199 (1888); *City of Springfield v. Mecum*, 320 S.W.2d 742, 747 (Spr. Mo. App. 1959); *State v. Steinbach*, 274 S.W.2d 588, 590 (St. L. Mo. App. 1955).

25. See discussion *infra*, pt. III, B, of this comment.

26. *Hiscox v. Levine*, 216 N.Y.S.2d 801 (1961).

27. *Id.* at 805.

the planning board's action in that case, which involved changing the zoning regulations for sixty-three out of one hundred acres. The court stated that the planning board's actions under Section 281's authorization of "reasonable changes" were administrative, not legislative, and concluded that the board had encroached on the legislative authority to effect zoning changes. It was held that the planning board was not endowed with power to amend the zoning ordinance by rezoning large tracts of land.<sup>28</sup> The court did not specify what it considered to be "large tracts," but since proposed PUD's are generally subdivisions of considerable size, the value of the New York law in supporting PUD's is severely reduced.<sup>29</sup> The basis for the holding (that the power to amend zoning regulations does not include the power to change the zoning district of the land) does little to clarify the extent of that holding. This case involved changing zoning regulations in a one-acre residence zoning district to those in use in a one-half acre district, which was construed to be a change in the zoning district. But what about the typical PUD case, where changes within a single district involve the use of regulations common to several types of zoning districts? Until this is clarified, Section 281 offers little help to PUD.

The situation in Kentucky provides a typical example of the background for the adoption of enabling legislation authorizing PUD's. Prior to 1966, Kentucky had statutes which embodied both Sections 14<sup>30</sup> and 15<sup>31</sup> of the Standard City Planning Enabling Act of 1928.<sup>32</sup> As discussed earlier,<sup>33</sup> the existence of both provisions lends considerable support to attempts to achieve PUD's solely through the planning commission. This approach was tried in Kentucky.<sup>34</sup> A 1964 city ordinance authorized the planning commission to grant permits for PUD's. Following a hearing, a developer who was denied a permit for a PUD appealed on constitutional grounds, alleging that there was a grant of arbitrary power to the planning commission.<sup>35</sup> The circuit court upheld the constitutionality of the ordinance, found that the planning commission had not acted arbitrarily, and dismissed the action.<sup>36</sup> The Kentucky Court of Appeals denied standing to the developer to challenge the constitutionality of the ordinance, since the relief the developer sought (*i.e.*, the right to establish a PUD) would be unavailable if the zoning ordinance were held unconstitutional.<sup>37</sup> In 1966, Kentucky adopted enabling legislation authorizing PUD zoning regulations.<sup>38</sup> The statutes also provide that zoning regulations, changes, and amendments are to be prepared and recommended to the legislative body

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28. *Id.* at 806.

29. For a later New York decision reaffirming the philosophy that the courts will not allow administrative bodies to reclassify the zoning of large areas, see *Von Gerichten v. Schermerhorn*, 268 N.Y.S.2d 589, 591 (1966).

30. KY. REV. STAT. ANN. § 100.087 (1963).

31. KY. REV. STAT. ANN. § 100.088 (1963).

32. SCPEA *supra* note 14.

33. See text accompanying notes 15-19 *supra*.

34. *Mann v. City of Fort Thomas*, 437 S.W.2d 209 (Ky. Ct. App. 1969).

35. *Id.* at 210.

36. *Id.* at 210.

37. *Id.* at 211.

38. KY. REV. STAT. ANN. § 100.203 (1) (e) (Supp. 1968).

by the planning commission, and that a majority vote of the members of the legislative body is necessary to override any action of the planning commission.<sup>39</sup>

This same attack could be levelled at the city council which enacted an ordinance delegating to itself the discretionary power to approve PUD applications, since the council would be acting administratively.<sup>40</sup> In a New Jersey case,<sup>41</sup> a local ordinance which attempted to permit a great variety of uses was deemed to be the "antithesis of zoning," and was held to be *ultra vires* and void.<sup>42</sup> The ordinance provided for normal agricultural and residence uses, for numerous specified "Special Uses"<sup>43</sup> where "investigation has shown that such structures and uses will be beneficial to the general development,"<sup>44</sup> and "light industrial uses and other similar facilities having no adverse effect on surrounding property and deemed desirable to the general economic well-being of the Township"<sup>45</sup> are present. The court decided that such provisions, even though the ordinance did specify the numerous types of permitted uses, were "hardly adequate to channel local administrative discretion."<sup>46</sup> A recent New York case reached a similar result.<sup>47</sup> There, the village board of trustees established a planned residential district which had no main permitted uses, but listed twelve uses permitted upon issuance of special permits by the board of appeals. This was held to be zoning not in accordance with a comprehensive plan, and the ordinance was held invalid because the delegation of legislative power to an administrative body was without sufficient standards.<sup>48</sup>

Missouri has not taken as harsh a view of the delegation of legislative authority as have the New York and New Jersey courts. In the *Guffey* case,<sup>49</sup> the Missouri Supreme Court was concerned with the administrative power of the city council to authorize additional uses by granting a special permit after a public hearing. The standards set forth in the ordinance were: (a) application for permit submitted to council is referred to planning commission; (b) report is given by planning commission to council with respect to the effect of the proposed use upon the character of the neighborhood, traffic conditions, public utility facilities, and other matters of general welfare; (c) city council holds public hearing; and (d) council determines whether granting of the permit will promote health, safety, morals, and general welfare of the people, in accordance with a comprehensive zoning plan.<sup>50</sup> The court stated these standards were sufficiently definite and held the ordinance constitutional.<sup>51</sup> The *Guffey* case is of

39. KY. REV. STAT. ANN. §§ 100.207, .211, .321 (1968 Supp.).

40. See *State v. Guffey*, 306 S.W.2d 552 (Mo. En Banc 1957).

41. *Rockhill v. Chesterfield Township*, 23 N.J. 117, 128 A.2d 473 (1957).

42. *Id.* at 127, 128 A.2d at 479.

43. *Id.* at 121-22, 128 A.2d at 475-76.

44. *Id.* at 120, 128 A.2d at 475.

45. *Id.* at 122, 128 A.2d at 476.

46. *Id.* at 127, 128 A.2d at 479.

47. *Marshall v. Village of Wappingers Falls*, 279 N.Y.S.2d 654 (1967).

48. *Ibid.*

49. *State v. Guffey*, 306 S.W.2d 552 (Mo. En Banc 1957).

50. *Id.* at 557.

51. *Id.* at 558; see *State ex rel. Rebenau v. Beckemeier*, 436 S.W.2d 52 (St. L. Mo. App. 1968) (holding constitutional a delegation of legislative authority to a zoning board of adjustment).

particular interest because the standards upheld there as constitutional are very similar to the procedures which would be used with PUD's in Missouri.

## 2. Not in Accordance with a Comprehensive Plan

One of the most encouraging decisions for advocates of PUD's is the Pennsylvania case of *Cheney v. Village 2 at New Hope, Inc.*,<sup>52</sup> which analyzes and offers solutions helping to alleviate the legal problems facing PUD's.<sup>53</sup> In this case, the Borough of New Hope's council enacted an ordinance creating a PUD district and another ordinance rezoning a tract of land to PUD. Pursuant to the first ordinance, a developer submitted plans for a PUD on that tract of land to the planning commission, which issued building permits. Neighboring property owners appealed to the board of adjustment, which upheld the ordinances and the permits. The neighbors appealed to the Court of Common Pleas, which invalidated the ordinances as failing to conform to a comprehensive plan and as vesting too much discretion in the planning commission.<sup>54</sup> This decision was reversed by the Pennsylvania Supreme Court, which first held that a comprehensive plan is not "forever binding" and may be changed by new zoning ordinances if passed "with some demonstration of sensitivity to the community as a whole, and [to] the impact that the new ordinance will have on this community."<sup>55</sup> Thus the court abandoned its old test,<sup>56</sup> which required a comprehensive plan in final form prior to enactment of the zoning ordinance in question. The court added that the fact that the change was made at the request of a particular landowner did not invalidate the change.<sup>57</sup> As to the contention that the ordinances vested greater authority and discretion in the planning commission than permitted by Pennsylvania's zoning enabling legislation, the court held that the enabling act contained nothing which would prohibit the council from creating a PUD zoning district with many permissible uses.<sup>58</sup>

52. 429 Pa. 626, 241 A.2d 81 (1968).

53. *But see* Note, 7 DUQUESNE L. REV. 153, 163 (1968).

54. *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 631, 241 A.2d 81, 83-84 (1968).

55. *Id.* at 632, 241 A.2d at 84.

56. *See* *Eves v. Zoning Bd. of Adjust. of Lower Gwynedd Twp.*, 401 Pa. 211, 164 A.2d 7 (1960).

57. *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 635, 241 A.2d 81, 85 (1968).

58. PA. STAT. ANN. tit. 53, § 48201 (1966) provides:

For the purpose of promoting health, safety, morals or the general welfare, councils of boroughs are hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, their construction, alteration, extension, repair, maintenance and all facilities and services in or about such buildings and structures and percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes, and also to establish and maintain building lines and set back building lines upon any or all streets;

PA. STAT. ANN. tit. 53, § 46601 (1966) provides:

For the purpose of assuring sites suitable for building purposes and human habitation and to provide for the harmonious development of boroughs, for the coordination of existing streets with proposed streets,

Comparison of these Pennsylvania statutes with Missouri's enabling legislation indicates that the only Pennsylvania provisions favorable to PUD's which are not found in Missouri's are the section 46601 provisions that the borough may adopt by ordinance subdivision regulations including design standards, plan requirements, and plan processing procedures.<sup>59</sup> The Pennsylvania court examined the enabling legislation for planning commissions<sup>60</sup> dealing with the approval of plans and plots of land, and concluded that the legislation does not prohibit the planning commission from approving PUD plans.<sup>61</sup> At this point, the court concluded that the task of approving a particular PUD should rest with a single municipal body. Persuaded by Professor Krasnowiecki's arguments,<sup>62</sup> the court stated that the advantages of flexibility would be lost if an ordinance were passed which was so detailed and specific that nothing was left for any administrator.<sup>63</sup> Since zoning boards of adjustment are typically concerned with problems on a lot-by-lot approach, the court agreed with Professor Krasnowiecki that such a body is not competent to handle such large-scale planning and was not intended to do so.<sup>64</sup> Therefore, the court concluded that the planning

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parks or other features of the official street plan of the borough, for insuring adequate open spaces for traffic, recreation, light and air, and for proper distribution of population, thereby creating conditions favorable to the health, safety, morals and general welfare of the citizens, any borough is hereby empowered to adopt, by ordinance, land subdivision regulations. Such regulations may include definitions, design standards, plan requirements, plan processing procedures, improvement and construction requirements, and conditions of acceptance of public improvements by the boroughs.

59. See statutes quoted note 58 *supra*.

60. PA. STAT. ANN. tit. 53, § 46155 (1966) provides:

All plans, plots, or replots of land laid out in building lots, and the streets or other portions of the same, intended to be dedicated to public use, or for the use of purchasers or owners of lots fronting thereon or adjacent thereto, and located within the borough limits, shall be submitted to the borough planning commission, and approved by it, before they shall be recorded. It shall be unlawful to receive or record any such plan in any public office, unless the same shall bear thereon, by endorsement or otherwise, the approval of the borough planning commission. The disapproval of any such plan by the borough planning commission shall be deemed a refusal of the proposed dedication shown thereon. The approval of the commission shall be deemed an acceptance of the proposed dedication, but shall not impose any duty upon the borough concerning the maintenance or improvement of any such dedicated parts, until the proper authorities of the borough shall have made actual appropriations of the same by entry, use, or improvement. No sewer, water, or gas main or pipe, or other improvement, shall be voted or made, within the borough, for the use of any such purchasers or owners, nor shall any permit for connection with, or other use of, any such improvement existing, or for any other reason made, be given to any such purchasers or owners, until such plan is so approved.

61. *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 638, 241 A.2d 81, 87 (1968).

62. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 71 (1965).

63. *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 639, 241 A.2d 81, 87 (1968).

64. *Id.* at 640, 241 A.2d at 88.



commission was the appropriate body to approve PUD's.<sup>65</sup> Recognizing that the planning commission is not empowered to rezone land, the court stated that the power to approve more than one type of building within a PUD did not amount to rezoning, since the ordinance permitted such a situation.<sup>66</sup> Were it not for the dissimilarities between the statutory powers given to a planning commission in Pennsylvania and in Missouri, *Cheney* would be of greater significance. The Pennsylvania legislation<sup>67</sup> provides that plans and plats be submitted to the planning commission for approval, and, upon such approval, they may be recorded and acted upon. But Missouri provides that a plat may not be filed or recorded until after the commission makes a report and recommendation to the city council, and the council has "approved the plat as provided by law."<sup>68</sup>

### 3. Challenging PUD in Missouri

Challenges to the validity of PUD's in Missouri will most likely have to be by declaratory judgment or injunction. Missouri's only statutory language refers to "any person aggrieved,"<sup>69</sup> and offers such person standing to appeal to and from the board of zoning adjustment, an administrative body, by the use of statutory certiorari proceedings authorized in the enabling legislation. Such appeals relate solely to administrative decisions made either by an "administrative officer" or by the board of adjustment itself. It is particularly important to distinguish administrative and legislative actions and the methods of challenging such actions in Missouri since the Missouri statutes contemplate the planning commission's making recommendations as to subdivision regulations to the council<sup>70</sup> or to the county court,<sup>71</sup> and then requiring the approval of that legislative body before such regulations go into effect. The significance of this distinction is that a statutory certiorari proceeding<sup>72</sup> is available for the review of administrative actions, whereas there are no statutory provisions concerning the review of legislative action. It is clear in Missouri that the statutory certiorari proceeding<sup>73</sup> is not the appropriate method of testing the validity of a purely legislative act such as a zoning ordinance.<sup>74</sup> The most common methods of attacking legislative rezoning, which is essentially what is involved in

65. *Id.* at 641, 241 A.2d at 88.

66. *Ibid.*

67. See statute quoted note 60 *supra*.

68. § 89.400, RSMo 1967 Supp; *but cf.* §§ 89.420, .440, RSMo 1967 Supp. (which cast some doubt on the meaning of § 89.400).

69. §§ 89.100, .110, 64.120 (1), .120 (3), .281 (1), .281 (4), RSMo 1959; §§ 64.660 (1), .660 (2), RSMo 1967 Supp.

70. § 89.410 (1), RSMo 1967 Supp.

71. §§ 64.060, .241, .580, RSMo 1959.

72. §§ 89.100, .110, 64.120 (1), .120 (3), .281 (1), .281 (4), RSMo 1959; §§ 64.660 (1), .660 (2), RSMo 1967 Supp.

73. §§ 89.100, .110, 64.120 (1), .120 (3), .281 (1), .281 (4), RSMo 1959; §§ 64.660 (1), .660 (2), RSMo 1967 Supp.

74. *State v. City of Raytown*, 289 S.W.2d 153 (K.C. Mo. App. 1956).

changes to PUD, are the use of a declaratory judgment<sup>75</sup> or an injunction.<sup>76</sup>

The Missouri courts have used similar interpretations of who has standing to complain of legislative action as they have with the statutory category "any person aggrieved."<sup>77</sup> The statutes provide that if enumerated percentages of certain categories of neighbors protest changes in or amendments to zoning regulations, a greater vote of the appropriate legislative body will be required to approve the change.<sup>78</sup> Thus it seems that a primary concern of the legislature was to provide protection for the neighboring property owner, and this concern has been recognized in cases challenging council action.<sup>79</sup> Several cases have also indicated that the neighboring property owner is a sufficiently aggrieved person within the statutory definition.<sup>80</sup> Because of the neighboring property owner's standing to complain, Missouri may find developers reluctant to attempt innovations such as PUD's which do not conform to conventional practices. The only way to alleviate this problem is to adopt enabling statutes specifically authorizing PUD.

A challenger might argue that a rezoning for PUD or the issuance of a PUD permit is violative of the Missouri constitutional provision restricting the right to take private property for private use.<sup>81</sup> The challenger's theory would be that the establishment of a PUD might decrease the value of his private residential property for the benefit of a private individual, the developer. But Missouri has held that rezoning is an exercise of the state's police power to serve the public interest and welfare, and the constitution is not violated even though some private person might incidentally make a profit.<sup>82</sup>

A further argument in challenging a PUD could be that there must be a showing of changed conditions in order to rezone. One decision regarding changes in zoning held that it is not always a prerequisite to zoning changes to show a change in conditions.<sup>83</sup> The analogy can be made to justify changes in zoning desired to enable a "better" development through establishing a PUD district, even though there are no changed physical conditions.

### III. PROCEDURES FOR PUD

#### A. *Ideal Procedure*

Proponents of PUD emphasize the desirability of procedures for the approval of PUD's which are relatively uncomplicated and which involve

75. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963); *Urnstein v. Village of Town and Country*, 368 S.W.2d 390 (Mo. 1963); *Porporis v. City of Warson Woods*, 352 S.W.2d 605 (Mo. 1962).

76. *City of Moline Acres v. Heidbreder*, 367 S.W.2d 568 (Mo. 1963); *Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374 (Mo. 1954).

77. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963).

78. §§ 89.060, 64.140, .271 (3), .670, RSMo 1959.

79. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963).

80. *Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374, 377 (Mo. 1954); *State v. Lewis*, 395 S.W.2d 522, 524 (St. L. Mo. App. 1965).

81. Mo. CONST. art. I, § 28.

82. *Strandberg v. Kansas City*, 415 S.W.2d 737, 748 (Mo. En Banc 1967).

83. *Miller v. Kansas City*, 358 S.W.2d 100, 105 (K.C. Mo. App. 1962) (a "stagnated" area resulting from unwise strip zoning).

only a single agency.<sup>84</sup> Section 12 of the model act<sup>85</sup> allowed the legislative body to delegate to the planning commission the power to approve PUD's, and established general standards for the commission to follow. Sections 14 and 15 of the Standard City Planning Enabling Act have been thought to enable PUD's established entirely through the planning commission.<sup>86</sup>

## B. Missouri Procedures

### 1. Cities

As discussed earlier, such provisions as Section 12 of the model act and Sections 14 and 15 of the Standard City Planning Enabling Act have not been incorporated into the provisions of Chapter 89 of the Missouri statutes.<sup>87</sup> Section 89.020 clearly entrusts the local legislative body with the power to regulate and restrict the use, height, area, and bulk of buildings and premises,<sup>88</sup> and section 89.030 authorizes the local legislative body to divide the municipality into zoning districts.<sup>89</sup> Section 89.050 invests in the local legislative body the power to provide for the manner in which zoning and zoning regulations are to be originally established, enforced, and amended, requiring only the holding of a public hearing upon fifteen days' notice.<sup>90</sup> These provisions seem to enable the local legislative body to delegate to the planning commission the authority to handle and decide all applications for PUD's. However, section 89.060, also dealing with amendments to the regulations, provides that upon the protest of a certain proportion of landowners, an amendment will fail unless it receives a three-fourth's vote of the members of the city legislative body.<sup>91</sup> This seems to indicate that the provisions in section 89.050 dealing with the adopting of amendments after a hearing refer to the local legislative body, and this provision

84. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 79 (1965).

85. BASSETT, *supra* note 5.

86. See text accompanying note 15 *supra*.

87. See text accompanying note 21 *supra*.

88. § 89.020, RSMo 1959 provides:

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

89. § 89.030, RSMo 1959.

90. § 89.050, RSMo 1959 provides:

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality.

91. § 89.060, RSMo 1959.

has been so construed.<sup>92</sup> Furthermore, the Missouri courts have insisted that amendments to zoning ordinances require the same careful consideration as that given to the original ordinance.<sup>93</sup> Thus, it seems probable that the Missouri statutes will not permit delegating authority to approve PUD's to the planning commission.

In areas not previously zoned, authorization of PUD's will involve several difficulties. With zoning of original districts, which has been defined as the establishment of zoning districts in areas not previously zoned,<sup>94</sup> section 89.070 delineates the manner in which the local legislative body may avail itself of its power to establish zoning districts and regulations.<sup>95</sup> This section requires the legislative body to appoint a "Zoning Commission" (or appoint an existing planning commission as the zoning commission) to hold public hearings.<sup>96</sup> Then, to insure "double protection," a second set of public hearings is to be held by the legislative body.<sup>97</sup> Thus it would appear that any attempt to create a PUD in an area which has not been previously zoned would not only require consideration by both the local legislative body and the zoning (or planning) commission, but would also require two sets of public hearings. However, from a practical standpoint, the entire framework of PUD's involves working with rezoning rather than original zoning, since original zoning would only authorize the establishment of PUD's. With the extensiveness of today's zoning, even original authorization most likely will come through rezoning. Subsequent to authorization, applications for PUD permits would be submitted by developers.

In 1963, the legislature enacted sections dealing with planning for all Missouri municipalities.<sup>98</sup> After authorizing the appointment of a planning commission,<sup>99</sup> the statute authorizes the planning commission to "make *and adopt* a city plan for the physical development of the municipality."<sup>100</sup> That section further authorizes the planning commission to:

*prepare* a zoning plan for the regulation of the height, area, bulk, location and use of private, nonprofit and public structures and premises, and of population density, *but* the adoption, enforcement and administration of the zoning plan shall conform to the provisions of sections 89.010 to 89.250.<sup>101</sup>

Without the proviso, it would appear that this section would offer a means by which PUD's in original zoning could be handled entirely through the

92. *Strandberg v. Kansas City*, 415 S.W.2d 737, 742 (Mo. En Banc 1967); *Murrell v. Wolff*, 408 S.W.2d 842, 848 (Mo. 1966).

93. *City of Monett v. Buchanan*, 411 S.W.2d 108 (Mo. 1967); *Taylor v. Schlemmer*, 353 Mo. 687, 183 S.W.2d 913 (1944); *Miller v. Kansas City*, 358 S.W.2d 100 (K.C. Mo. App. 1962); *Allega v. Assoc. Theatres*, 295 S.W.2d 849 (K.C. Mo. App. 1956).

94. *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966).

95. § 89.070, RSMo 1959.

96. *Ibid.*

97. *Murrell v. Wolff*, 408 S.W.2d 842, 847 (Mo. 1966).

98. Mo. Laws 1963, at 146, § 1.

99. § 89.310, RSMo 1967 Supp.

100. § 89.340, RSMo 1967 Supp. (emphasis added).

101. *Ibid.* (emphasis added).

planning commission since the commission is authorized to prepare a plan regulating height, area, bulk, and use. But the proviso requires compliance with section 89.070, which provides for both local legislative and administrative adoption and hearings.<sup>102</sup> Furthermore, it is apparent from the statutory language that the legislature meant to distinguish between the city plan and the zoning plan, because it authorized the planning commission to "make and adopt"<sup>103</sup> the city plan, but only to "prepare" a zoning plan.<sup>104</sup>

Finally, section 89.410 presents the most serious obstacles to attempts in Missouri to create PUD's entirely through the planning commission.<sup>105</sup> This section provides that "the planning commission shall recommend and the council may by ordinance adopt regulations governing the subdivision of land within its jurisdiction."<sup>106</sup> The city council is also required to hold a duly advertised public hearing before adoption or amendment of its subdivision regulations.<sup>107</sup>

Although section 89.340 allows the planning commission to prepare a zoning plan regulating height, area, bulk, and use,<sup>108</sup> it is interesting to note that the provisions of section 89.410, detailing the types of subdivision regulations that the planning commission may recommend, are silent as to regulations governing the above elements.<sup>109</sup> Yet, at the same time, that section states that the regulations may include those "for adequate open spaces,"<sup>110</sup> which could be construed as recognizing the need to use PUD in order to best achieve such open spaces.

A problem which might discourage a developer from promoting a PUD would arise if the developer were forced to secure the approval of more agencies or to endure more public hearings than would be required for a standard type development. With a standard development, the number of hearings would depend upon whether the proposed zoning was original zoning or rezoning.<sup>111</sup> With original zoning, there will be two sets of public hearings.<sup>112</sup> With rezoning, only one set of hearings is required.<sup>113</sup>

If the standard development involves creating a subdivision, then a developer must comply with subdivision regulations as well as zoning regulations. Section 89.410 contemplates that the planning commission recommend regulations governing the subdivision of land and that the council adopt those regulations by ordinance.<sup>114</sup> The statute provides that the council must hold a public hearing before adopting the subdivision

102. See § 89.070, RSMo 1959.

103. See § 89.360, RSMo 1967 Supp., for the procedure to be followed by the planning commission in adopting the city plan.

104. § 89.340, RSMo 1967 Supp.

105. § 89.410, RSMo 1967 Supp.

106. *Ibid.*

107. *Ibid.*

108. § 89.340, RSMo 1967 Supp.

109. § 89.410, RSMo 1967 Supp.

110. *Ibid.*

111. See text accompanying notes 90-97 *supra*.

112. See text accompanying notes 94-97 *supra*.

113. See text accompanying note 90 *supra*.

114. § 89.410, RSMo 1967 Supp.

regulations,<sup>115</sup> but it is silent as to the necessity of public hearings by the planning commission. Therefore, it would appear that only one hearing would be required. A PUD, under this statutory scheme, would thrust no more burdensome procedures upon the developer than would a standard development. If the PUD required rezoning, the developer would face more burdensome procedures, since the standard development will usually not require rezoning. Ideally, a PUD would involve dealing with fewer bodies than would a standard development, which requires subdivision plat approval, all necessary rezoning, and compliance with the building and zoning code administration. This would be possible if the approval of PUD's could eventually be centered in the planning commission, with a perfunctory sort of legislative approval by the city council to satisfy statutory requirements. Such a possibility seems unlikely under current Missouri statutes.

An example of a Missouri city recently adopting a PUD ordinance allowing density but not use variations is Columbia.<sup>116</sup> The ordinance requires an applicant to submit a "preliminary development plan" to the planning and zoning commission which shall hold a public hearing.<sup>117</sup> After securing the commission's approval, the applicant must submit a "final development plan" to the commission for review and recommendation to the City Council.<sup>118</sup> Reading into this ordinance either section 89.410 (3) (if this were construed as a subdivision application) or section 89.050 (if this were construed as a rezoning application), the council must hold a public hearing after notice.<sup>119</sup> A developer would thus be confronted not only with numerous presentations before two separate bodies, but would be subject to at least two public hearings.

It is settled in Missouri that applications for rezoning and special permits may be referred by a city's legislative body to its zoning commission for study and for the making of recommendations to the legislative body.<sup>120</sup> But the provisions of sections 89.050 and 89.060 still require a public hearing before the local legislative body.<sup>121</sup> This allows a second chance at victory to neighbors and citizens who have, for example, lost one battle before the planning and zoning commission on the same matter. Furthermore, the Missouri Supreme Court has recognized that since the power to enact an original zoning or a rezoning ordinance is vested in the city council, the council is not bound to adopt the recommendations of the planning and zoning commission, especially if the council has heard the parties and is aware of the problems involved.<sup>122</sup> Therefore, it is again apparent that a developer may have to convince two bodies of the efficacy of his proposal

115. § 89.410 (3), RSMo 1967 Supp.

116. COLUMBIA, MO., REV. ORDINANCES § 19.141 (1969).

117. *Ibid.*

118. *Ibid.*

119. § 89.410 (3), RSMo 1967 Supp.

120. *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966).

121. *Id.* at 848.

122. *City of Monett v. Buchanan*, 411 S.W.2d 108, 114 (Mo. 1967); *but cf.* *RK Development Corp. v. City of Norwalk*, 156 Conn. 369, 242 A.2d 781 (1968) (when city council acts administratively in passing on a PUD application, council has no discretion but to approve it if the plan conforms to the regulations).

in addition to having to defend his proposals at two public hearings. Nevertheless, once the city council has acted on a proposal, either favorably or adversely, the developer can be fairly sure that the courts will not substitute their opinions for that of the council. The courts will not interfere if the question was "reasonably doubtful or fairly debatable,"<sup>123</sup> as long as the council's decision was not "clearly arbitrary and unreasonable. . . ."<sup>124</sup> The challenger of an ordinance has the burden of proving its unreasonableness.<sup>125</sup>

## 2. Counties

The provisions of Chapter 89 are not the only zoning enabling legislation which Missouri has. Chapter 64<sup>126</sup> has numerous provisions concerning county zoning, the contents of which differ substantially from the provisions of Chapter 89. Unlike section 89.410, the three statutory provisions governing subdivision regulations for class one,<sup>127</sup> noncharter class one,<sup>128</sup> class two, and class three<sup>129</sup> counties all provide that the county planning commission may prepare and adopt regulations governing, among other things, "minimum width and area of lots." Such provisions are the same as that found in Section 14 of the Standard City Planning Enabling Act<sup>130</sup> which offers a basis for PUD's handled by the planning commission. The above sections further provide that such regulations become effective only after the holding of a public hearing by the planning commission, adoption by the planning commission, and approval and adoption by the county court.<sup>131</sup> However, the statutory language to the effect that the county planning commission is to both prepare and adopt the regulations seems to indicate that the role of the county court is purely that of a "formal adoption." Thus it would appear permissible to effectuate a PUD in Missouri counties solely through the planning commission. It is certainly easier to justify PUD type subdivision regulations adopted by a county planning commission than by a city planning commission because of the above discussed difference in the statutory enabling language for counties as compared to cities. The argument can also be advanced that the legislature, by specifically including such a provision in the county statutes and not including it in the city statutes, intended that the city planning commissions were not to have such powers.

One Missouri county which has adopted PUD ordinances to establish a planning commission procedure for the approval of PUD permits is St. Louis County.<sup>132</sup> The county has provided that upon application of an

123. *Miller v. Kansas City*, 358 S.W.2d 100 (K.C. Mo. App. 1962).

124. *City of Monett v. Buchanan*, 411 S.W.2d 108 (Mo. 1967); *Miller v. Kansas City*, 358 S.W.2d 100 (K.C. Mo. App. 1962); *Allega v. Assoc. Theatres*, 295 S.W.2d 849 (K.C. Mo. App. 1956).

125. *City of Moline Acres v. Heidbreder*, 367 S.W.2d 568 (Mo. 1963); *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. En Banc 1952).

126. C. 64, RSMo 1959.

127. § 64.060, RSMo 1959.

128. § 64.241, RSMo 1959.

129. § 64.580, RSMo 1959.

130. SCPEA, *supra* note 14, at § 14.

131. §§ 64.060, .241, .580, RSMo 1959.

132. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.183, § 1003.185, § 1003.187 (1965 Supp.), dealing respectively with density zoning, mixed building types, and mixed uses.

owner (or his representative) of property sought to be used for a PUD, and following a public hearing conducted by the planning commission, such commission may give "preliminary approval."<sup>133</sup> The county council then must approve the application, after which the matter is returned to the planning commission for its approval of a "final development plan" to be submitted by the applicant.<sup>134</sup> This procedure is almost totally in the hands of the planning commission, and only one public hearing is required. However, the approval of the county council is required, and such approval might not always be purely a formality.

### 3. Further Problems under Current Missouri Statutes

One problem which large-scale developers will encounter in Missouri relates to the bonding of subdivision improvements.<sup>135</sup> The statutes require street improvements and installation of utility facilities or the bonding thereof as a condition precedent to plat approval.<sup>136</sup> For the developer of a large area, the cost of bonding can be extremely high. Even though the project may be constructed in stages, cities may be reluctant to accept assurances of completion on a section-by-section basis because of their fear that the entire project might not be finished. Such an approach is not only more expensive for the developer, but could create difficulties if a developer made the necessary improvements in future sections (rather than bonding them), and then the growth of the project created the need to alter the planned development.<sup>137</sup> Flexibility would be hindered.

One aspect of the Missouri statute which is extremely helpful to the developer desirous of establishing a PUD is the provision authorizing tentative approval of a subdivision plat<sup>138</sup> by the city council.<sup>139</sup> This allows the developer to secure some approval of his plan before he is required to bond improvements. However, the statute makes it explicit that such tentative approval shall not be entered on the plat, and that completion or bonding must occur before final approval.<sup>140</sup> Some assurance should be given to the developer that future disputes over the plan or about the stage-by-stage construction of the project will not jeopardize the entire development. Missouri, like almost all states, provides no such assurance.<sup>141</sup>

133. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.183 (1), § 1003.185 (3), § 1003.187 (4) (1965 Supp.).

134. ST. LOUIS COUNTY, MO., REV. ORDINANCES § 1003.183 (1), § 1003.185 (3), § 1003.187 (4) (1965 Supp.).

135. For an excellent discussion of this problem generally, see Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 91-94 (1965).

136. §§ 64.060, .241, .580, RSMo 1959; § 89.410 (2), RSMo 1967 Supp.

137. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 93 (1965).

138. § 89.410 (2), RSMo 1967 Supp.

139. See, e.g., COLUMBIA, MO., REV. ORDINANCES § 19.141 (1969); ST. LOUIS COUNTY, MO., REV. ORDINANCES, § 1003.187 (1965 Supp.).

140. § 89.410, RSMo 1967 Supp.

141. For a discussion of such assurances, see Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 95-96 (1965).



## IV. CONCLUSION

Although of early origin,<sup>142</sup> PUD has been a relatively dormant creature with both local authorities and developers.<sup>143</sup> As Professor Krasnowiecki has pointed out, it is the duty of the lawyer to ascertain the legal aspects which tend to make PUD impractical or risky, and to analyze current zoning and subdivision control laws to ascertain what modifications need to be made.<sup>144</sup> Scholars in this area have drafted a Model State Enabling Act for Planned Unit Residential Development<sup>145</sup> and have proposed ordinances<sup>146</sup> which aid in solving many of the legal problems surrounding PUD.

PUD in Missouri has not been widely adopted but is growing in popularity. With no judicial tests and a lack of widespread use, the specific legal problems PUD may face in Missouri cannot be clearly delineated. However, statutory changes will be required to insure the success of PUD's in Missouri. PUD's should be specifically authorized by state enabling legislation.<sup>147</sup> Of greatest significance in Missouri is the necessity for such legislation to clearly authorize the centering of PUD approval within one agency, such as the planning commission, and to provide that such procedures are in lieu of other procedures for approvals required under Missouri's conventional zoning and subdivision statutes.<sup>148</sup> A complete review and analysis of conventional laws with a view toward such modifications making PUD workable in Missouri will surely be more advisable than an attempt to effectuate PUD's solely through existing laws, which may impede its full and widespread acceptance.

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142. See text accompanying notes 5-8 *supra*.

143. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 144 U. PA. L. REV. 47, 48 (1965).

144. *Id.* at 49.

145. Babcock, *An Introduction to the Model Enabling Act for Planned Residential Development*, 114 U. PA. L. REV. 136 (1965); URBAN LAND INSTITUTE, TECH. BULL. NO. 52, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT 65 (1965).

146. See, e.g., 4 R. ANDERSON, AMERICAN LAW OF ZONING § 26.61 (1968); URBAN LAND INSTITUTE, *supra* note 145, at 84.

147. See note 145 *supra*.

148. See, e.g., MODEL ENABLING ACT § 5 (f); Babcock, *An Introduction to the Model Enabling Act for Planned Residential Development*, 114 U. PA. L. REV. 136, 157; URBAN LAND INSTITUTE, *supra* note 145, at 77.